Eclan

European Criminal Law Academic Network

Newsletter

January – June 2019 Issue no. 21

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

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and

Proposal for a Regulation establishing the conditions for accessing other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) 2019/816 [ECRIS-TCN] – "the Proposal on police and Judicial Cooperation"

In September 2018, the Council and the European Parliament adopted two legislative acts, a Regulation establishing the European Travel Information and Authorisation System ('ETIAS') and an amendment of the Europol Regulation for the purpose of establishing ETIAS. ETIAS is an automated IT system created to identify any potential security or irregular migration risks associated with visa-exempt third country nationals travelling to the Schengen area. To assess those risks, such nationals have to file an online travel authorisation application before their departure date. According to the ETIAS Regulation, personal data in those applications will be compared with the data present in records, files or alerts registered in EU information systems or databases (the ETIAS Central System, Schengen Information System ('SIS'), the Visa Information System ('VIS'), the Entry/Exit System '(EES') or Eurodac), in Europol data or in the Interpol databases.

While the Regulation defines which group of data from the ETIAS application files can be used to consult the other systems, not all those data are collected or recorded in the same way in the other EU information systems and Europol data. In light of this, the ETIAS Regulation provides that "[t]he amendments to the legal acts establishing the EU information systems that are necessary for establishing their interoperability with ETIAS as well as the addition of corresponding provisions in this Regulation shall be the subject of a separate legal instrument".

To that end, on 7 January 2019, the Commission published two proposals in order to establish the interoperability of ETIAS and other information systems:

1. A Proposal for a Regulation establishing the conditions for accessing other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) 2019/816 [ECRIS-TCN] – "the Proposal on police and Judicial Cooperation"
2. A Proposal for a Regulation establishing the conditions for accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240 (the ETIAS Regulation) Regulation (EC) No 767/2008 (the VIS Regulation), Regulation (EU) 2017/2226 (the EES Regulation) and Regulation (EU)

2018/1861 (the SIS Regulation for border checks) – "the Proposal on Borders and Visa"

The first proposal amends the police component of the Schengen Information System and ECRIS-TCN, in order to connect the ETIAS central system to other EU information systems and Europol data and to specify the data to be exchanged with these EU information systems and with Europol data. The second proposal amends four information systems: ETIAS itself, the external borders element of the Schengen Information System, the EU Entry/Exit System and the Visa Information System.

In the European Parliament, both files have been assigned to the Committee for Civil Liberties, Justice and Home Affairs (LIBE), but the Committee has not published its reports yet. In the Council, discussions among the preparatory bodies have been taking place since January.

The European Data Protection Supervisor (EDPS) published its formal comments on the two proposals on 13 March 2019. As a first note, the EDPS stressed that the proposals seek to interconnect five information systems, three of which (ECRIS-TCN, EES and ETIAS) are not yet operational and therefore a fuller assessment of the fundamental rights implications will be possible once more information becomes available. Nonetheless, the EDPS highlighted that the interoperability of those systems will bring about a level of complexity that is bound to have implications both for the protection of personal data, but also for the governance and supervision of the five information systems in question. That said, the EDPS focused -among other things- on the interoperability with the ECRIS-TCN for the purposes of ETIAS, which is the purpose of the first proposal, and noted that the use of ECRIS-TCN for border management purposes would inevitably imply further processing of data stored in ECRIS-TCN for purposes different than those provided for by the ECRIS-TCN Regulation. The EDPS explained that the purpose of ECRIS-TCN is to enhance judicial cooperation in criminal matters by improving the exchange of information on criminal records in the EU. Therefore, using the data stored therein for border management purposes exceeds the purpose of the ECRIS-TCN and would be difficult to reconcile with the purpose limitation principle.

ON-GOING NEGOTIATIONS

Approximation of substantive criminal law

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 whistleblowers 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 whistleblowers 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. The European Parliament and the Council reached a provisional agreement on 15 March 2019 and the former officially adopted the text on 16 April 2019.

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 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 the removal of terrorist content via the introduction of a 'removal order', which can be issued as an administrative or judicial decision by a competent authority in a Member State. 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 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.

On 6 December 2018, the Council agreed on a general approach. However, on 7 December 2018, three Special Rapporteurs of the United Nations Human Rights Council expressed concerns about the proposal. As a result, the Parliament requested an opinion from the EU Fundamental Rights Agency (FRA) on the key fundamental rights implications of the proposal. The FRA published its opinion on 12 February 2019 and made several recommendations. Among other things, the Agency noted that the definition of terrorist content has to be modified, because as it stands it is too broad and would interfere with the freedom of expression and information. The Agency also suggested that the proposal should better protect journalistic, academic and artistic expression and that, with respect to removal orders, fundamental rights guarantees must be strengthened by increasing the involvement of the judiciary in the process. It also recommended amendments that would safeguard against a disproportionate impact on the freedom to conduct a business. To ensure that the right to an effective remedy can be exercised, the FRA found that content providers have to receive sufficient information, which is currently not ensured under the proposal.

The European Economic and Social Committee adopted its opinion in March 2019.

In the European Parliament, the proposal has been assigned to the LIBE Committee. The Committee on the Internal Market and Consumer Protection also gave an opinion – as did the Committee on Culture and Education. The LIBE Committee tabled its report for plenary on 9 April 2019 and on the 17th of the same month, the European Parliament adopted its position at first reading.

Electronic evidence in criminal matters

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

and

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

In 2015, in the 'European Agenda for a Security Union', the Commission highlighted the issue of access to electronic evidence and a year later, committed to propose solutions to address the problems of obtaining digital evidence in relation to criminal investigations. The Council, 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 - without the intervention of an authority of the Member State where their legal representative is located.

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 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 revealed several political issues. In May 2018, the Presidency invited the Justice and Home Affairs Council to discuss two key issues. 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 or real-time interception of data. The second was the adoption of the US CLOUD Act in March 2018 and its impact on e-evidence. The Act clarifies through an amendment of the Stored Communications Act of 1986 that US service providers are obliged to comply with US orders to disclose content data regardless of where such data is stored. It also enables the conclusion of executive agreements with foreign governments, on the basis of which US service providers would be able to deliver content data directly to these foreign governments, subject to conditions spelled out by the agreements. Given that, at an earlier meeting of the JHA Council (March 2018) the Ministers spoke in favour of a common EU approach towards the US, the Presidency invited them to confirm their wish to swiftly engage in negotiations with the US on the conclusion of an executive agreement between the EU and the US.

In June 2018 the Council debated the 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 evidence and real time interception and called on the Commission to continue the expert process and report at the October JHA 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.

The Council held a policy debate on the proposal on 4 October 2018, during which several delegations expressed concerns and proposed the introduction of an obligation to provide an opportunity for another Member State to get involved in the procedure via a notification to the judicial authorities of that Member State. This would enable an assessment of the legality of the order, and of any obstacles to its execution. Following the outcome of that assessment, the judicial authorities would be able to object to the execution of the order. Due to the centrality of this issue, the Ministers were invited to discuss whether the approach taken in the proposal (that orders could be addressed directly to service providers without the involvement of any other MS at the stage of the request) should be kept, or whether it should be modified by introducing a notification procedure. At the JHA Council meeting of 11-12 October, the presidency noted that Member States were willing to continue working towards a compromise over the inclusion of a notification procedure. In December 2018, the Council adopted its general approach on the proposal for a Regulation. In March 2019, the Council adopted its general approach on the proposal for a Directive.

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. On 2 April 2019, the rapporteur, Birgit Sippel, presented to the LIBE Committee a series of working documents, addressing various issues linked to the proposal for a Regulation (safeguards and remedies, enforcement of European Preservation Order, relation with third country law, etc.). No vote took place and the adoption of the Parliament's position was postponed to the next legislature.

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

On a related issue, after the Commission recommended on 5 February 2019 negotiating international rules for obtaining electronic evidence, the Council adopted on 6 June 2019 two decisions. The first one authorises the Commission to open negotiations with the United States of America with a view to concluding an agreement on cross-border access to electronic evidence for judicial cooperation in criminal matters. The second one authorises it to participate on behalf of the EU in negotiations of a Second Protocol to the Council of Europe Convention on Cybercrime.

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. The Committee of Legal Affairs and the LIBE Committee were also asked to give their opinions – and they both did so, on the 25th and the 11th of January 2019 respectively. The Budgetary Control Committee tabled its report for plenary on 22 March 2019 and the European Parliament adopted its position at first reading on 16 April 2019 and in June, the Council adopted its mandate for negotiations with the European Parliament.

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

ADOPTED TEXTS

Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 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.

After several discussions within the Council, the proposal was finally adopted by the European Parliament on 13 March 2019, and the Council on 9 April 2019. The text has been published in the Official Journal on 10 May 2019.

Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 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. The Council and the European Parliament reached a provisional agreement on 12 February 2019. The Parliament adopted the text on 17 April 2019 and the Council did so in June - with Germany, which has expressed several concerns about the agreed text, abstaining. The text was signed into law on 20 June 2019 and has been published in the Official Journal on 11 July 2019.

Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816

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. 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 in September 2018. The Parliament's LIBE Committee tabled its report on 19 October 2018.

After a series of trialogues, the Council and the European Parliament reached a provisional agreement in February 2019. The Permanent Representatives Committee confirmed the agreement on behalf of the Council on 13 February 2019. On the Parliament's side, the LIBE committee approved the provisional agreement on 19 February and, after a debate in Parliament on 27 March 2019, the latter adopted the text in April 2019. On 14 May, the Council formally adopted the text, which was published in the Official Journal of the European Union on 22 May 2019.

Directive (EU) 2019/884 of the European Parliament and of the Council of 17 April 2019 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

Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726

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, 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 and on 11 December 2018, a provisional agreement on a final compromise text was reached. The European Parliament adopted the text in March and the Council approved the Parliament's position on 9 April 2019. On 17 April it received the signature of the President of the European Parliament and of the Council and it was published in the Official Journal on 7 June 2019.

CASE LAW

JUDGMENTS

Case C-97/18, *ET*, Judgment of 10 January 2019 (First Chamber)

On 10 January 2019, the Court of Justice (First Chamber) delivered its judgment in case C-97/18, on the interpretation of Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders.

In particular, the judgment concerns Article 12(1) and (4) of the Framework Decision. Article 12(1) provides that the execution of the confiscation order shall be governed by the law of the executing State, while Article 12(4) forbids the executing Member State to impose measures as an alternative to the confiscation order, including measures limiting a person's freedom, unless the issuing State has given its consent.

ET was subject to a confiscation order for 800,000 € issued by a Belgian court in December 2012. The Netherlands was requested to execute the confiscation order. The Dutch Law on the Mutual Recognition and Enforcement of Financial Penalties and Confiscation Orders allows a Dutch court (District Court, Northern Region), upon request of the public prosecutor, to grant leave for the enforcement of a term of imprisonment for a maximum of three years, if the convicted person fails to comply with the judgment in which payment of a sum of money to the State for the purpose of recovering unlawfully obtained gains was imposed. This rule applies when the person is not insolvent.

This was the case of ET. More than €650,000 was outstanding and the public prosecutor suspected there to be invisible financial flows. The public prosecutor thus lodged an application before the District Court, Northern Region, seeking leave to enforce a term of imprisonment against ET. The Court referred two questions to the Court of Justice for a preliminary ruling.

First, the referring court asks whether Article 12(1) and (4) of Framework Decision 2006/783/JHA must be interpreted as precluding the application of a law of an executing Member State, such as the Dutch one, which, for the purpose of enforcing a confiscation order adopted in an issuing State, authorises a term of imprisonment to be imposed, if necessary. The Court replies in the negative. The

Court of Justice notes that, when a term of imprisonment has been imposed on the person who is subject to a confiscation order, the obligation to pay remains in place. That person may indeed be freed anytime from such an obligation by paying the debt. A term of imprisonment aims only to pressure the person who refuses to pay the amount owed even if he or she would be capable of doing so. Hence, it represents a means to execute a confiscation order issued in another Member State and is not an alternative to that order. It follows that the adoption of a term of imprisonment does not need the prior consent of the issuing State.

Second, the referring court wonders whether the fact that also the legislation of the issuing State allows having recourse to a term of imprisonment has a bearing on the application of such a measure in the executing State. The Court of Justice replies briefly in the negative. The principle upon which Framework Decision 2006/783/JHA builds – like any other instrument regulating the application of the principle of mutual recognition – is indeed that the execution of the confiscation order is governed by the law of the executing State. Therefore, it would adversely affect the objective pursued by Framework Decision 2006/783/JHA if the application of an execution measure in the executing Member State were governed by the national law of the issuing State or subject to the conditions provided for in that law.

Case C-310/16, *Peter Dzivev and others*, Judgement of 17 January 2019 (Fourth Chamber)

On 17 January 2019, the Court of Justice (Fourth Chamber) delivered its judgement in case C-310/16 on the interpretation of Article 325 TFEU and its impact on national rules concerning investigations of VAT fraud.

Mr Dzivev was under investigation for leading a criminal gang that 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 Convention on the protection of the European Communities' financial interests ('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.

Unlike its judgement in *Kolev*, the Court rules against the disapplication of national law in such circumstances. The reasoning of the Court develops through four main steps. First, the Court notes that matters connected to the gathering of evidence within criminal proceedings fall within the competence of the Member States. Second, it recalls a principle that it has often restated in recent case law (see, for instance, *Fransson, Taricco*), namely that according to which there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second. Hence, VAT-related issues fall within the field of application of EU law. Third, Article 325 TFEU requires Member States to counter fraud and any other illegal activities affecting the Union's financial interests through effective deterrent measures. Such measures shall be adopted by the national legislator. If necessary, they may also be of criminal nature, as is the case for serious cases of VAT evasion, for which the PIF Convention requires criminal sanctions.

However, and here comes the fourth and last step, the effective collection of the European Union's

resources does not dispense national courts from the necessary observance of the fundamental rights guaranteed by the Charter and of the general principles of EU law, given that criminal proceedings instigated for VAT offences amount to an implementation of EU law, within the meaning of Article 51(1) of the Charter. In the field of criminal law, those rights and principles shall be respected already during the stage of the preliminary investigation, from the moment when the person concerned becomes an accused. In the case of Mr Dzivev, the principle of legality and the rule of law come into consideration. They imply that the exercise of the power to impose penalties cannot take place outside the legal limits within which an administrative authority is authorised to act in accordance with the law of its Member State. Furthermore, as the issue under analysis concerns interception of telecommunications, the Court points out that such an interception amounts to an interference with the right to a private life, enshrined in Article 7 of the Charter. In accordance with Article 52 of the Charter, any interference with fundamental rights must abide by some criteria, including that of being provided by law. In that regard, the Court argues, it is common ground that the interception of telecommunications at issue in the proceedings against Mr Dzivev was authorised by a court which did not have the necessary jurisdiction. Hence, it must be regarded as not being in accordance with the law.

The Court thus concludes, agreeing with the view of the Advocate General, that Article 325(1) TFEU, as well as the other relevant provisions of the PIF Convention, interpreted in the light of the Charter of Fundamental Rights, do not preclude a national court from applying a national provision excluding, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction, in a situation in which that evidence alone is capable of proving that the offences in question were committed.

Case C-492/18 PPU, *TC*, Judgement of 12 February 2019 (First Chamber)

On 12 February 2019 the Court of Justice (First Chamber) delivered its judgment 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. However Dutch courts have developed diverging interpretations of the law. The Amsterdam District Court developed a case law declaring such provision incompatible with the EAW Framework Decision, especially in situations in which the final decision on the execution of an EAW, and thus on the surrender of the individual concerned, is delayed. For instance, the referring court (the District Court of Amsterdam) 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. In contrast the Amsterdam Court of Appeal considered this interpretation incorrect and proposed a different approach based on a balancing of interests, determining 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 preliminary reference brought before the Court of Justice aims at determining whether keeping a person in detention pending surrender in such a case is contrary to Article 6 of the EU Charter of Fundamental Rights, in particular the principle of legality enshrined therein.

In his Opinion, delivered on 6 November 2018, and analyzed in our previous newsletter, AG Szpunar considers that the national rule in question is incompatible with the EAW Framework Decision, thus validating the interpretation of the Dutch courts, but he also points out that the Charter precludes the introduction by means of case law of a limitation to the right of liberty.

In its judgment, the Court starts to reformulate the first question brought by the referring court as concerning in essence the interpretation of the EAW Framework Decision as precluding a national legislation laying down a general and unconditional obligation to release the person arrested pursuant to a EAW as soon as a period of 90 days from that person's arrest has elapsed, where there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures. The Court recalls in this regard situations in which delays in the decision to execute the EAW may arise, such as the need to ensure that there is no real risk for the person concerned to suffer inhuman or degrading treatment, or a breach of his fundamental right to a fair trial, or when proceedings are pending before the Court of Justice. Building on its previous case-law on the EAW Framework Decision, especially the case *Lanigan* (C-237/15 PPU), the Court stresses that the instrument does not provide for a general and unconditional obligation to release the requested person whenever the 90 days period expires. The requested person may thus remain in custody to prevent him/her from absconding and to ensure that the material conditions of his/her surrender are fulfilled. As a consequence, the national provision at stake (Article 24 (2) OLW) is incompatible with the EAW Framework Decision, and the interpretation of the national courts does not correct such incompatibility.

The Court then addresses the second question of the referring court, reformulated as concerning the compatibility with Article 6 of the Charter of a national case law allowing the requested person to be kept in detention on the basis of an interpretation of a national provision, namely Article 22(4) OLW. After recalling general considerations on the interpretation of the Charter and its relationship with the European Convention on Human Rights, and highlighting the serious interference caused by a prolonged detention with the person's right of liberty, the Court stresses the importance of upholding strict safeguards, namely the existence of a legal basis which justified that continued detention and which must meet the requirements of clarity, predictability and accessibility in order to avoid any risk of arbitrariness. The Court considers that EU law, namely the EAW framework decision and its interpretation through its judgments, meets such requirements, as it imposes clear and predictable rules on the duration of the detention of a requested person. However, for the Court of Justice, the divergent approaches of the national courts are problematic. As pinpointed by the judges, depending on the court concerned, the suspension of the 90-days period could have started either on 14 June 2018, or on 17 May 2018, thus resulting in different periods of continued detention. For the Court of Justice, such variation does not make it possible to determine with the clarity and predictability required the period for which a requested person, subject to an EAW, is to be kept in detention in the Netherlands. The Court thus concludes in declaring such national case law as contrary to Article 6 of the Charter.

Case C-8/19, *RH*, Order of 12 February 2019 (First Chamber)

On 12 February 2019, the Court delivered its order in Case C-8/19 PPU on the interpretation of Article 267 TFEU and Article 47 of the Charter regarding the possibility for a national court to request for a preliminary ruling to the Court. The second part of its order deals with the interpretation of Directive 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 (hereinafter 'the directive').

The present case concerns RH, who is suspected of having been part of a criminal gang organized in order to commit murders in Bulgaria. That offence is sanctioned under Bulgarian law and punishable with a custodial sentence of 3 to 10 years. On 22 October 2018, a pre-trial detention decision was made in respect of RH, the courts at first instance and on appeal holding that there were reasonable grounds for suspecting that RH committed the offence with which he was charged. On 20 December 2018, RH challenged this decision before the referring court seeking an order to be released. The latter court stated that the question of RH's release depended solely on the existence of reasonable grounds for suspecting that he committed the offence concerned. Following the most recent national case-law, the court must carry out a "prima facie" examination of whether the charge is made out in order to assess the legality of a pre-trial detention decision. The main difficulty for the referring court is to conduct this examination and formulate its decision so that RH is not presented as guilty (*Milev*, C-310/18 PPU).

The referring court mentions that the national legislation on pre-trial detention has already been subject of a recent preliminary ruling (*Milev*, C-310/18 PPU). In the wake of this decision, the new national case-law interprets the national relevant provision as meaning that a request for a preliminary ruling is impossible due to the obligation for the national court to adjudicate in a reasonable time. In those circumstances, the referring court asks two questions to the Court of justice and requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure, which the Court accepted.

First the referring court asks the Court of justice whether a national measure, as interpreted by the national case-law, which has the effect that a national court is required to adjudicate on the legality of a pre-trial detention decision without the possibility to request for a preliminary ruling to the Court of Justice or to wait for its reply, is contrary to EU law, and particularly to Article 267 TFEU and 47 of the Charter.

The reasoning of the Court is threefold. First, it recalls that the right of accused persons to have their case heard within a reasonable delay is guaranteed by article 6(1) of the ECHR and by the second paragraph of Article 47 of the Charter. The preliminary ruling procedure does not contravene these provisions as paragraph 4 of Article 267 TFEU requires the Court to act with the minimum of delay in a case pending before a court or tribunal of a Member State with regard to a person in custody. The urgent preliminary procedure aims to ensure compliance with this obligation. Second, the Court insists on the fact that national courts have widest discretion in referring matters to the Court and is free to exercise that discretion at whatever stage of the proceedings. This cannot be called into question by the application of rules of national law. Third, the Court outlines the importance of the judicial independence for the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism. Not being exposed to disciplinary sanctions for sending a request for a preliminary ruling to the Court or choosing to wait for the reply to such a request before adjudicating on the legality of a pre-trial detention decision, constitutes a guarantee essential to judicial independence. It follows that the answer to the first question must be positive.

Second the referring court asks whether Article 4 and recital 16 of the directive require that the competent judicial authority – when examining the existence of reasonable grounds for believing that the suspect or accused person has committed the offence alleged – must examine the elements of incriminating and exculpatory evidence presented to it and must give grounds for its decision, not only indicating the evidence relied on, but also ruling on the objections of the defence counsel of the person concerned. The Court starts to recall its

jurisprudence by interpreting Article 3 and 4(1) of the directive as meaning that they do not preclude the adoption of preliminary decisions of a procedural nature 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 focusses on the last part of recital 16 of the directive which repeats the idea that making decisions on pre-trial detention is not comparable to public statements that put into danger the presumption of innocence. It also mentions Article 6 of the directive which imposes to any judge or court to seek both elements of inculpatory and exculpatory evidence and gives right to the defence to submit evidence. Therefore, if a national court takes a preliminary decision on a pre-trial detention following the examination incriminating and exculpatory evidence, these actions do not amount to presenting the suspect or accused person as being guilty.

In the light of these remarks, the Court concludes that Articles 4 and 6 of the directive, read together with recital 16 thereof, must be interpreted as meaning that the requirements deriving from the presumption of innocence do not preclude, where the competent court examines the reasonable grounds for believing that the suspect or the accused person has committed the offence with which he is charged, in order to give a ruling on the legality of a pre-trial detention decision, that court from comparing the elements of incriminating and exculpatory evidence presented to it and giving reasons for its decision, not only stating the evidence relied on, but also ruling on the objections of the defence counsel of the person concerned, provided that that decision does not present the person detained as being guilty.

Joined Cases C-508/18 and C-82/19 PPU, *Minister for Justice and Equality v OG and PI*, Judgment of 27 May 2019 (Grand Chamber)

On 27 May 2019, the Grand Chamber delivered its judgment in Joined Cases C-508/18 and C-82/19 on the interpretation of the EAW Framework Decision. Both cases originate from requests from Irish courts (Supreme Court and High Court), which were asked to review the decisions of lower courts on the surrender to Germany of two individuals residing in Ireland. In both procedures, the European Arrest Warrant had been issued by German public prosecutors; hence, the two cases deal in essence with the same question: can the public prosecutor – and more precisely a public prosecutor acting in accordance with rules such as those applying to German public prosecutors – be considered as an 'issuing judicial authority' for the purpose of Article 6(1) of the EAW Framework Decision? Along the lines of the Advocate General's Opinion (see below), the Court replies in the negative.

After some remarks on the importance of mutual trust within the EU and especially within the Area of Freedom, Security and Justice, the Court focuses on the EAW Framework Decision, which represents the first concrete measure in the field of criminal law implementing the principle of mutual recognition. While the notion of 'issuing judicial authority' is to be determined in accordance with national law, the Court notes that that term nonetheless requires an autonomous and uniform interpretation throughout the EU. Recalling its previous judgments on the matter (*Poltorak*, *Kovalkovas*), the Court clarifies that the expression 'judicial authority' of Article 6 of the EAW Framework decision does not only include national judges or courts of a Member State but also, more broadly, the authorities participating in the administration of criminal justice in the Member States, as distinct from, inter alia, ministries or police services which are part of the executive. This is because, in essence, the EAW Framework Decision regulates the principle of mutual recognition when it comes to both final court decisions and other judicial decisions concerning the pre-trial phase (see Article 1(1) of the EAW Framework Decision).

Against this backdrop, the Court states that an authority, such as the German public prosecutor's

office, which is competent, in criminal proceedings, to prosecute a person suspected of having committed a criminal offence so that that person may be brought before a court, must be regarded as participating in the administration of justice. However, this does not imply that the German public prosecutor's office complies with the independence requirement that the EAW Framework Decision imposes on issuing judicial authorities.

In that respect, the Court points out that the EAW system entails a "dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person" (para. 67). At the first level, judicial protection should be ensured when a national decision such as a national arrest warrant is adopted. In addition, protection must be afforded at the second level, at which a European arrest warrant is issued. This second level of protection means that the judicial authority competent to issue an EAW must ensure that the conditions necessary for the issuing of the EAW have been observed and examine whether the issuing of the EAW complies with the principle of proportionality. It follows that the 'issuing judicial authority' must be capable of exercising its responsibilities independently, i.e. without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive. It is precisely at this second level that the Court finds an incompatibility between EU law and German law. The Minister for Justice has indeed an 'external' power to issue instructions in respect of German public prosecutors' offices, even though in practice this happens very rarely. For the Court's assessment, it is thus not relevant that German public prosecutor's offices act in accordance with the principle of legality, that there is a judicial remedy available for individuals to challenge the public prosecutors' decision to issue an EAW, and that, in the two specific cases at hand, no instructions was issued by the Ministers of the Länder concerned. As the Court points out, "any instruction in a specific case from the minister for justice to the public prosecutors' offices concerning the issuing of a European arrest warrant remains nevertheless, in any event, permitted by the German legislation" (para. 87), and this is sufficient to argue that German public prosecutors do not enjoy the degree of independence required by EU law. Therefore, the Court concludes, the concept of 'issuing judicial authority', within the meaning of Article 6(1) of the EAW Framework Decision, must be interpreted as not including public prosecutor's offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a EAW.

Case C-509/18, *Minister for Justice and Equality v PF*, Judgment of 27 May 2019 (Grand Chamber)

On 27 May 2019, the Grand Chamber delivered its judgment in Case C-509/18 on the interpretation of the EAW Framework Decision. Handed down on the same day as the above-mentioned judgment Minister for Justice and Equality v OG and PI, this case originates also from a request from an Irish court (Supreme Court was requested to rule on the EAW issued by the Prosecutor General of Lithuania. It deals with the same question: can the public prosecutor – and more precisely a public prosecutor acting in accordance with rules such as those applying to the Prosecutor General of Lithuania – be considered as an 'issuing judicial authority' for the purpose of Article 6(1) of the EAW Framework Decision? Unlike the Advocate General's Opinion, the Court, which has given a negative answer to this question in Minister for Justice and Equality v OG and PI concerning German public prosecutors, replies now in the positive. Although the line of argument is almost identical in the two judgments, the conclusions are different as the status of the Prosecutor General of Lithuania is different from that of German public prosecutors.

The Court starts with some remarks on the importance of mutual trust within the EU and especially within the Area of Freedom, Security and Justice, and then focuses on the EAW Framework Decision, which represents the first concrete measure in the field of criminal law implementing the principle of mutual recognition. While the notion of 'issuing judicial authority' is to be determined in accordance with national law, the Court notes that that term nonetheless requires an autonomous and uniform interpretation throughout the EU. Recalling its previous judgments on the matter (*Poltorak*, *Kovalkovas*), the Court clarifies that the expression 'judicial authority' of Article 6 of the EAW Framework decision does not only include national judges or courts of a Member State but also, more broadly, the authorities participating in the administration of criminal justice in the Member States, as distinct from, inter alia, ministries or police services which are part of the executive. This is because, in essence, the EAW Framework Decision regulates the principle of mutual recognition when it comes to both final court decisions and other judicial decisions concerning the pre-trial phase (see Article 1(1) of the EAW Framework Decision).

Against this backdrop, the Court states that authorities such as Lithuanian public prosecutors who are responsible of the organisation and direction of criminal investigations and have the power to issue an indictment must be regarded as participating in the administration of justice. In particular, the Prosecutor General of Lithuania prepares the ground, in relation to criminal proceedings, for the exercise of judicial power by Lithuanian criminal courts. However, this does not per se suffice to conclude that the notion of 'issuing judicial authority' covers also Lithuanian public prosecutors, and more precisely the Prosecutor General of Lithuania.

In that respect, the Court points out that the EAW system entails a "dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person" (para. 45). At the first level, judicial protection should be ensured when a national decision such as a national arrest warrant is adopted. In addition, protection must be afforded at the second level, at which a European arrest warrant is issued. This second level of protection means that the judicial authority competent to issue an EAW must ensure that the conditions necessary for the issuing of the EAW have been observed and examine whether the issuing of the EAW complies with the principle of proportionality. It follows that the 'issuing judicial authority' must be capable of exercising its responsibilities independently, i.e. without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive.

While German public prosecutors do not fall within the notion at hand because they may receive instructions from the executive, this is not the case of the Prosecutor General of Lithuania. Lithuanian public prosecutors indeed enjoy the benefit of independence conferred by the Lithuanian Constitution and by the provisions of the Law on the Public Prosecutor's Office of the Republic of Lithuania. Since the Prosecutor General of Lithuania is a public prosecutor, he has the benefit of that independence, which allows him to act free of any external influence, inter alia from the executive, in exercising his functions, in particular when he decides whether to issue an EAW for the purposes of prosecution. In that capacity, the Prosecutor General of Lithuania is also required to ensure respect for the rights of the persons concerned. The Court also adds that it was not in a position to ascertain whether a decision of the Prosecutor General of Lithuania to issue an EAW may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, which it is for the referring court to determine.

Against this backdrop, the Court concludes that the concept of 'issuing judicial authority', within the meaning of the EAW Framework Decision 2002/584, must be interpreted as including the

Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant.

Case C-646/17, *Moro*, Judgement of 13 June 2019 (First Chamber)

On 13 June 2019, the Court delivered its judgement in Case C-646/17 on the interpretation of Directive 2012/13 on the right to information in criminal proceedings.

The acts in this case occurred in Italy. On 15 September 2016, Mr Moro was assigned for concealment of jewellery belonging to Mr Legrottaglie. In the aftermath, Mr Moro admitted that he stole the jewellery himself so that the offence of concealment had instead to be considered as theft. Mr Moro's lawyer asked for the application of a negotiated plea (called *"patteggiamento"*) under Italian criminal law. This request has been declared inadmissible because of the expiry of the time-limit. The judge invited the public prosecutor to modify the charge in order to allow Mr Moro to benefit from the negotiated plea. The public prosecutor decided not to change the characterization of the offence and referred to the Tribunale di Brindisi (referring court). It has to be noted that the Constitutional court of Italy declared unconstitutional the fact that the reopening of the delay for asking the application of a negotiated plea is permitted when it concerns the recharacterization of facts whereas such a possibility is excluded when the modification solely concerns the recharacterization of the offence. In this context, the referring court decided to stay the proceedings and asked the same question to the Court of justice in the light of Articles 2, 3, and 6 of Directive 2012/13 (hereinafter 'the directive') as well as of Article 48 of the Charter.

After having declared admissible the request for a preliminary ruling, the Court rephrased the question submitted to it and evaluated the situation with regard to the fourth paragraph of Article 6 of the directive and Article 48 of the Charter.

First, according to the fourth paragraph of Article 6 and the interpretation given by the Court, the accused person must be informed promptly of any changes in the information given, including the modification of the characterization of the facts, in order to ensure that the accused persons may exercise correctly and effectively their rights of defence. The Court considers that the fact that the accused person admitted to having committed the theft himself, which lead to a change in the characterization of the offense, corresponds, in fact, to a modification in the characterization of the facts. Therefore, the Court states that the right for the accused person to be promptly informed does not require the obligation for the Member state concerned to grant him/her the possibility to reopen the delay for the application of a negotiation plea.

Second, regarding the interpretation of Article 48 of the Charter with respect to this specific case, the Court holds the same reasoning. The second paragraph of Article 48 of the Charter imposes the respect of the rights of the defence for the accused persons. This right includes the right for the accused person to be informed of any change in the characterization of the facts against him/her. In this case, as the modification of the characterization of the facts ensues directly from the spontaneous declarations of the accused persons, the Court considered that its rights of the defence have been respected. Therefore, the only circumstance that the national law does not grant the same rights to the accused persons as regards the possibility to ask for the application of a negotiated plea depending on the fact that the modification deals with the facts on which the charge is based or with the characterization of the offence, does not violate the rights of the defence of the accused person.

Case C-573/17, *Popławski*, Judgement of 24 June 2019 (Grand Chamber)

On 24 June 2019, the Court delivered its judgment 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 custodial sentence. Polish courts issued an EAW in 2013 for the purposes of executing this sentence. The District Court of Amsterdam made a first request for a preliminary ruling concerning the provision in Dutch law for an additional ground for optional non-execution of the EAW, namely the possibility for the Netherlands as executing State to refuse surrender if the person is staying in, or is a national or resident of the country and if the State undertakes to enforce that sentence in accordance with its domestic law. In its judgment of 29 June 2017, the Court of Justice ruled on the incompatibility of such provision with the EAW Framework Decision and recalled the obligation for the national judge to interpret national law in conformity with EU law.

The District Court of Amsterdam was then faced with the dilemma of how to interpret national law in accordance with EU law, as the Dutch legislator had not amended the law. It brings two new legal questions before the Court of Justice. The first one concerns the question whether in light of the principle of primacy it can disapply national law that is not in conformity with the EAW Framework Decision. The second question concerns an alternative approach under which the national court argues that it may potentially apply Framework Decision 2008/909 (transfer of prisoners, hereafter FD 2008/909) to the recognition and enforcement of the sentence issued against Mr Popławski.

The Court replies first to the second question regarding the possibility to apply Framework Decision 2008/909, and addresses the possibility foreseen under Article 28 (2) of the text allowing 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), 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. The Netherlands had made such declaration on time, but withdrew it in 2018, and there is an open question whether the Republic of Poland had done such declaration. The Court stressed the need to give a strict interpretation of Article 28 (2) of FD 2008/909 since it derogates from the general arrangements laid down in Article 28 (1), and it is implemented unilaterally by each Member State. On the basis of the wording of this article, the Court pinpoints that the declaration to which it refers must be made by the Member State on the date that the Framework Decision is adopted, and *a posteriori* declaration does not satisfy the conditions laid down by the EU legislator for that declaration to produce legal effects. The circumstance that the Republic of Poland had expressed its intention to make a declaration in accordance with Article 28 (2) of FD 2008/909 does not amount to a declaration for the purposes of that provision. The Court shares here the same views as those expressed by AG Sánchez Bordona, and this implies that the FD 2008/909 is applicable to the case of Mr. Popławski.

The Court then moves to the second question, addressing the consequences of the principle of primacy of EU law for the national judge facing a national provision contrary to Framework Decisions, and the possibility to disregard/disapply it. The Court starts its analysis by recalling its

general and well-established case law regarding the primacy of EU law, stressing notably that a national court's obligation to disapply a provision of its national law which is contrary to a provision of EU law, if it stems from the primacy afforded to the latter provision, is nevertheless dependent on the direct effect of that provision in the dispute pending before that court. In this regard, the two Framework Decisions, adopted prior the entry into force of the Lisbon Treaty and subject to Article 9 of Protocol (No 36), do not have direct effect, and the Dutch national judge cannot be required to disapply a provision of national law which is contrary to these two instruments. However, the Court stresses that the national judge is still bound by the obligation of interpreting national legislation in conformity with EU law, in order to achieve - to the greatest extent possible - the result sought by these texts. The Court rejects the argument under which a national court claims that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law. The Court then recalls its arguments in the case *Popławski* I analyzing the national provision at stake and comes back to the solution brought forward by the referring national court, namely to treat the EAW Framework Decision as a formal legal basis for the purpose of applying Article 6 (3) of the OLW in the version applicable until the entry into force of the Law on the mutual recognition and enforcement of custodial and suspended sentences in 2012. The Dutch Minister, called to intervene in the main proceedings, has not accepted such interpretation, thus blocking the possibility for Mr. Popławski's sentence to be executed in the Netherlands. The Court, by analogy to its previous case law, stresses that the national court cannot invoke the interpretation of the Minister which is not compatible with EU law to not fulfil its obligation of interpretation in conformity with EU law.

The Court finishes its analysis by examining whether there is a possible interpretation of national law treating the EAW Framework Decision like a Convention under the previous legal regime compatible with EU law. The Court highlights one of the purposes of the EAW Framework Decision, which is to preclude the risk of impunity, and the consequences that may have the failure to interpret national law in conformity with the text, namely the impossibility to surrender Mr. Popławski to Poland and to have his sentence actually executed in the Netherlands. While the Court leaves the final appreciation to the national court, it indicates clearly that the national judge would adopt an interpretation of the law of the Netherlands in conformity with the objectives pursued by the EAW Framework Decision if it interpreted that law in such a way that the refusal to execute the EAW at issue in the main proceedings, issued by the Republic of Poland, is subject to the guarantee that the custodial sentence which Mr Popławski received will actually be enforced in the Netherlands, even if the law of the Netherlands provides that that refusal occurs automatically. Such interpretation would indeed guarantee the national authorities to ensure an outcome that is compatible with the objective pursued by the EAW Framework Decision.

AG'S OPINIONS

***Gambino and Hyka* (C-38/18) – Opinion delivered on 14 March 2019 (AG Bot)**

On 14 March 2019, AG Bot delivered his Opinion in Case C-38/18, which concerns the interpretation of Directive 2012/29/EU establishing minimum standards on the rights,

support and protection of victims of crime. The request for preliminary ruling was lodged by a first instance Italian court, which has doubts about the compatibility of its national law with the Directive. The Italian code of criminal procedure allows the defendant to ask witnesses to be heard again if the composition of the court has changed, e.g., as was the case in the main proceedings, if one of the judges has been replaced after witnesses have already been examined. In the light of the principles of immediacy and orality, it would not suffice to read the witnesses' previous statements for the new judge(s) who should be in a position to hear those statements in person. When the witness is also a victim of the crime, however, the new testimony may jeopardise the victim's right and cause him or her further distress. At the same time, this may also be a stratagem of the defendant to prolong the duration of proceedings, in this way frustrating the possibility to redress the damage the victims suffered from the crime.

The AG's stance is that the legislation at hand is *not incompatible* with the Directive on victims, as the Directive does not prohibit national courts to summon again the victim to testify in court. The AG reaches this conclusion through the following steps. First, he underlines the adversarial nature of the Italian criminal procedure, which is founded on the principles of orality and immediacy. In essence, judges should be physically present when witnesses and defendants make their statements, and the parties should be able to discuss the available evidence before the court. It is thus unsurprising that Italian law provides for a rule like the above-mentioned one, which allows the defendants to ask the witness to be heard again if the court's composition has changed.

Second, it is true that the Directive lays down a number of provisions on the protection of the victims, yet none of them forbids to hear them again in the circumstances such as those of the main proceedings. In particular, and with the exception of minors, the EU legislator does not aim to limit the number of appearances of victims before courts, not even when the victim is vulnerable and would need specific measures for his or her protection. Indeed, the Directive itself clarifies that a special measure envisaged to protect the victim shall not be made available "where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings" (Article 23(1) of the Directive on victims of crime).

Third, the AG notes that the Directive leaves some discretion to Member States in implementing it, so that they can take into account the specificities of their criminal justice systems. Furthermore, the Directive is clear in specifying that the victims' rights shall be without prejudice to those of the offender, and this is especially important when the victim is also a witness.

Fourth, the conclusion that rules such as the Italian ones at hand do not exceed the margins of discretion that Member States enjoy in implementing the Directive is accompanied by two caveats: i) in accordance with Article 22 of the Directive, national authorities shall in any case proceed with a timely and individual assessment to identify specific protection needs of the victims and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings; in that respect, the AG notes, victims in Italian proceedings can benefit from different measures of protection such as the possibility to be examined behind closed doors; and ii) the Member States are free to provide for further guarantees and protection to the benefit of victims, as long as this does not impair either the fairness of the proceedings or the offender's defence rights.

Fifth, to strengthen his conclusion, the AG conducts an extensive analysis of the European Court of Human Rights' case law on the testimony of victims in criminal proceedings. In essence, according to the ECtHR, it is of the utmost important that the court that will decide on a given

case hears the victim's testimony, and this principle is not violated by – but is rather implied in – the Directive on victims. At the same time, the ECtHR allows for some exceptions to this principle, by assessing on a case-by-case basis whether they violate the fairness of the proceedings as a whole. Also in the light of this case law, the AG therefore reiterates his view according to which the provisions of Italian law at hand do not violate EU law, yet he adds that, when the defendants asks for the victim-witness to be heard again, competent national authorities should proceed with a timely and individual assessment to identify specific protection needs of the victims, in line with Article 22 of the Directive. He also asks the Court to clarify that Member States are free to ensure even more protective measures to the benefit of victims as long as these measures do not violate the offender's fundamental rights.

The last part of the Opinion shortly addresses the right of victims to obtain a decision on compensation by the offender within a reasonable time (Article 16 of the Directive on victims of crime), which may be impaired if the victim-witness is examined again. Although national provisions as the Italian ones may have this negative impact on victims' rights, the AG argues that this does not run counter to the Directive on victims. As the Directive itself acknowledges, the protection of victim rights shall be ensured without any prejudice to the offenders' rights. Hence, defendants cannot be deprived of their defence rights – including that to examine or have examined witnesses against him or her – just because proceeding have to be quickly disposed of to ensure a prompt decision on the victims' right to compensation. In circumstances such as those of the main proceedings, the principles of immediacy and orality shall prevail on conflicting interests.

Gavanozov (C-324/17) – Opinion delivered on 11 April 2019 (AG Bot)

On 11 April 2019, AG Bot delivered his Opinion in Case C-324/17, *Gavanozov*, which will give the Court of Justice the first opportunity to rule on the EIO Directive. The request for preliminary ruling was lodged by the Specialised Criminal Court, Bulgaria and concerns the compatibility between Bulgarian law and the EIO Directive, notably Article 14 on legal remedies.

In the Bulgarian criminal proceedings against Mr Gavanozov, national authorities had to search the residential and business premises of Y, which represented a company that might have been involved in the illegal activities of Mr Gavanozov, with a view to seizing some specific documents that might have been kept in those premises. Likewise, Y had to be heard as witness. As Y was based in Czech Republic, Bulgarian authorities issued an EIO requesting Czech authorities to carry out those measures. The problems arose with regard to the legal remedies available against these measures.

Article 14(1) of the EIO Directive requires Member States to ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO. Article 14(2) then specifies that the substantive reasons for issuing the EIO may be challenged only in an action brought in the *issuing* State (Bulgaria, in this case). According to Bulgarian legislation, however, persons whose premises are searched or goods are seized cannot apply for a review of the lawfulness of the decision to carry out searches and seizures. Likewise, witnesses cannot challenge the judicial decision that authorises their examination. Those situations are not even covered by the provisions allowing for compensation for damage in the event of unlawful judicial decisions. The Bulgarian court thus wonders about the compatibility between Bulgarian law and the EIO Directive.

The Advocate General first argues that Article 14 of the EIO Directive *precludes* a legislation which does not provide for any legal remedy against the substantive reasons for issuing an EIO requesting a search, the seizure of specific items, and the hearing of a witness. EU legislature assumes that remedies are available at the national level and thus requires they also apply to the EIO. Especially in the context of judicial cooperation in criminal matters, the need to respect the right to an effective remedy is of the essence, and this also concerns witnesses – not only suspects and accused persons – as the multiple references of the EIO Directive to 'party concerned' (e.g., Article 14(4) of the EIO Directive) or 'person concerned' confirm.

According to the AG, therefore, not only Bulgarian legislation does *not* comply with the EIO Directive, but Bulgarian authorities could not even issue an EIO. When remedies can be activated against the EIO, grounds for non-recognition or non-execution of EIOs, especially that concerning the violation of human rights, become really effective as the executing authority is in a position to become aware of the full context in which the EIO has been issued. Furthermore, the availability of judicial remedies is key to ensure the functioning of the mutual recognition mechanism. The ECtHR has repeatedly held that the inability of a third party to challenge investigative measures such as searches and seizures represents a blatant lack of effective protection of the right to a private life. Therefore, if it cannot be presumed that a Member State respects fundamental rights, no mutual trust can be required from other Member States, with the consequence that the whole functioning of the mutual recognition system is stalemated.

Second, the referring court asks whether individuals may rely on Article 14(2) of the EIO Directive to challenge the substantive reasons for issuing an EIO, in the absence of legal remedies at the national level. The AG replies *in the negative*, since Article 14(2) does not in fact create an action that allows to challenge the substantive reasons for issuing an EIO in the issuing or executing State. At the most, it is for the Commission to bring an action for infringement against the Member States that do not implement that provision correctly.

Finally, the referring court asks whether the person against whom a criminal charge is brought is a 'party concerned' within the meaning of the EIO Directive, where measures to collect evidence are directed at a third party, in this case Y, and that party is also a 'party concerned'. The referring court raises the issue arguing that, in case of an affirmative answer, Article 14(2) would form the basis making a legal remedy available to the parties concerned; as seen, however, the AG posits that Article 14(2) cannot directly empower interested parties to challenge national decisions, so that the answer to this question would be superfluous. Nonetheless, his take is that the answer should be in the *affirmative*, since investigative measures directed at a third party may also affect the interests of the person against whom a criminal charge is brought, e.g. if the evidence collected is used against him or her. Therefore, the concept of 'party concerned' does not only include a witness subject to the investigative measures requested in an EIO, but also the person against whom a criminal charge has been brought but who is not subject to the investigative measures indicated in an EIO.

Dorobantu (C-128/18) – Opinion delivered on 30 April 2019 (AG Campos Sánchez-Bordonna)

On 30 April 2019, AG Campos Sánchez-Bordona delivered his Opinion in Case C-128/18, *Dorobantu*. The case originates from a request for preliminary ruling lodged by a German court in its capacity as executing authority of an EAW issued by Romanian authorities, and it falls in the stream of cases following up on the *Aranyosi and Căldăraru* judgment. In *Dorobantu*, the Court of Justice is in essence required to specify the level of review that executing authorities must carry out when applying the *Aranyosi and Căldăraru* criteria, and which factors should be taken into account in their assessment.

After summarising *Aranyosi and Căldăraru*, the AG notes that the CJEU has already delivered another judgement where it clarifies the scope of the executing authorities' review of detention conditions in the issuing Member State, and namely Case C-220/18 PPU, *ML*, which, in the AG's view, "answers most of the questions asked by the referring in the present case" (para. 40).

When dealing with the German court's question concerning the *level of review* of the conditions of detention in the establishment in which the person surrendered is likely to be incarcerated, therefore, the AG reminds that the CJEU, in *ML*, was clear in positing that such a review involves an examination of all relevant material aspects of the detention (space factor, duration of the restriction on personal space, etc.) and excludes the irrelevant ones (e.g. opportunities for religious worship). The conditions to be assessed to ascertain whether a violation of the right not to be subject to inhuman or degrading treatment has occurred are clearly inspired by the case law of the European Court of Human Rights, and especially the case *Muršić v. Croatia*, with which the Court of Justice aligned itself in the *ML* judgement. In addition, the executing authority may seek assurance by the issuing authorities on the detention conditions that the person whose surrender is sought will face, and the AG underlines that the executing authority cannot call into question and check the reliability of that assurance against the available information on the conditions of detention in the Member States concerned. As he points out, "[i]f there were such an assessment, far from encouraging the mutual confidence which should prevail in relations between the issuing and executing judicial authorities, it would give rise to mutual mistrust and, indirectly, call into question the simplified surrender system on which the European arrest warrant is based" (para. 56).

Moving on to the further questions of the referring court, which concerned the *criteria* to be taken into account when making a specific and precise assessment of the real risk of inhuman and degrading treatment resulting from the conditions of detention in the issuing Member State, the AG first stresses the relevance of the *space factor*. In that respect, the CJEU, espousing the ECtHR's approach, ruled in *ML* that a strong presumption of violation of Article 3 ECHR arises when the personal space available to a detainee is below 3 m^2 in multi-occupancy accommodations. According to the AG, this is not an absolute minimum though, since the space factor, albeit crucial, must form part of an overall assessment of the conditions of detention which must take into account all the relevant material aspects, including whether the detainee is held in a single-occupancy or multi-occupancy cell. Furthermore, the minimum personal space must not include the space occupied by the sanitary facilities within a cell but should include the floor space occupied by furniture. If a prisoner has less than 3 m^2 in multi-occupancy accommodations, the ECtHR assesses whether there are other material aspects of detention which are able to rebut the presumption of breach of Article 3 ECHR, and which the Court of Justice had already endorsed in *ML*.

In particular, the factors that the executing authority must take into account in its review, in addition to the personal space available to a prisoner, are: a) *duration and extent of the restriction* on personal space, bearing in mind that the relative brevity of such a restriction does not per se rule out the risk of inhuman or degrading treatment; b) the prisoner's *freedom of movement* outside the cell and out-of-cell activities available to him or her; and c) the *general appropriateness of infrastructure and services*. Factors that do not have an obvious relevance in the context of custodial sentences, e.g. possibility to smoke, shall not instead be taken into account. The assessment by executing authorities should also take into account the *type of prison*, as the conditions for a person held in a maximum security prison are different from those of detained persons in an open prison on a day-release programme. Hence, the executing authority must assess whether the lack of personal space is compensated

for by adequate material conditions of detention in the light of the just mentioned factors.

The executing authority can also take into account the *legislative and structural measures* adopted by the issuing Member State which contribute to improving the protection of incarcerated person (e.g. the right to complain), yet these general measures, as such, cannot mitigate the real risk that the person to be surrendered will be subject to inhuman or degrading treatment during the detention period. The executing authority cannot instead weigh the need to ensure the protection of the detainee's rights against the requirements stemming from compliance with the principles of mutual trust and recognition and from the effective functioning of the European arrest warrant system. The protection against inhuman or degrading treatment is indeed an absolute right that cannot be subject to any exception.

***Openbaar Ministerie v SF* (C-314/18) – Opinion delivered on 16 May 2019 (AG Pikamaë)**

On 16 May 2019, AG Pikamäe delivered his Opinion in Case C-314/18, which concerns the interpretation of the Council Framework Decision on the European Arrest Warrant. UK authorities requested the surrender of SF from Dutch authorities, which intended to rely on Article 5(3) of the EAW Framework Decision. This provision allows executing authorities, when the EAW is issued for the purposes of prosecution, to subject the surrender of the requested person to the condition that that person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him or her in the issuing Member State. The two issues that arose in the surrender procedure of SF can be summarised as follows: i) can the return of SF to the Netherlands be delayed until *other* proceedings in respect of the offence for which the surrender was requested, e.g. confiscation proceedings, have been finalised and executed by UK authorities? ii) can executing authorities consider whether the custodial sentence imposed on SF corresponds to the sentence which they would themselves have imposed for the offence concerned and, if necessary, *adapt* that sentence accordingly?

As for the first question, the AG's view is that, in circumstances such as those of the main proceedings, the person concerned should be returned to the executing Member State only *after* the time when the other stages of the criminal procedure in which a penalty or an additional measure, such as a confiscation order, may be imposed are definitely closed. This conclusion is first justified by the need to ensure the effectiveness of criminal prosecutions, as confiscation orders play a crucial role in combating crime. They aim indeed to deprive criminals of the financial gain following from their illegal conducts, which is usually the main motive for cross-border organised crime. Furthermore, it is true that a provision like Article 5(3) of the EAW Framework Decision aims to increase the prospects of the social reintegration of the requested person on expiry of the penalty to which he or she has been sentenced, yet this objective is not absolute and may be weighed against other requirements, especially bearing in mind that the Member States enjoy some discretion in implementing the EAW Framework Decision.

The AG also notes that the presence in the issuing Member State of the person to be surrendered during the proceedings concerning measures such as confiscation orders is in the interest of that same person as well: "Since a confiscation order is capable of substantially affecting the rights of the persons who are prosecuted and since that order is part of the criminal proceedings for the purpose of determining the penalty, it is important to ensure the protection of the procedural rights which those persons enjoy, which include the right of the accused to appear in person at his trial, which is included in the right to a fair trial" (para. 67).

This conclusion of the AG is however accompanied by four clarifications: i) the proceedings concerning an additional measure such as a confiscation order must relate to the *same offence* that gave rise to the issuing of an EAW for the purposes of a criminal prosecution; ii) the determination of such an additional penalty must also form part of the criminal proceedings for the purposes of which the EAW was issued, i.e. it must be a confiscation order made in the context of *criminal proceedings* and not in the context of civil or administrative proceedings; iii) in order to avoid that the objective of Article 5(3) (increasing the prospects of the social reintegration of the requested person) are undermined by an excessive duration of these 'additional' criminal proceedings, competent authorities of the issuing Member States must ensure that the period between the final imposition of a custodial sentence and the determination of additional measures is *as brief as possible*; iv) for the same reason, the return of the person whose surrender is requested *cannot* be delayed until a penalty or an additional measure has been *executed*.

As for the second question, which concerns the extent to which executing authorities that intend to rely on Article 5(3) of the EAW Framework Decision are allowed to adapt the sentence issued by the issuing authorities, the AG's stance is that executing authorities *cannot* adapt that sentence in such a way as to make it correspond to the sentence that would have been imposed in that Member State for the same offence. The AG notes that, when executing authorities subject the surrender to the condition mentioned in Article 5(3) of the EAW Framework Decision, the provisions of the Council Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences apply. As the CJEU pointed out in *Ognyanov*, Article 8 of this Framework Decision provides for strict conditions governing the adaptation, by the executing authorities, of the sentence imposed in the issuing States – and those conditions are the sole exceptions to the obligation imposed on those authorities to recognise and execute the foreign judgment. In particular, Article 8(2) allows the authority of the executing Member State to adapt the foreign sentence when that sentence exceeds the maximum penalty provided for similar offences under their national law.

Furthermore, the CJEU has already mentioned in *Ognyanov* and other judgments that the re-examination by executing authorities of the analysis carried out in the context of the judicial decision adopted by issuing authorities runs against the principles of mutual recognition and mutual trust. Therefore, in circumstances such as those of the main proceedings, where the same offence can be punished with life imprisonment in the UK and with imprisonment up to 12 years in the Netherlands, it is only within the limits of Article 8(2) of the Framework Decision 2008/909 that Dutch authorities may adapt the UK sentence to the their national system.

ACADEMIC ACTIVITIES

VACANCY – CONTACT POINT FOR GREECE

In order to fulfil the Network's objectives, and considering its development and evolution, the ECLAN network is looking for a new contact point for Greece.

Candidates are invited to send a CV as well as a motivation letter (of maximum one page) before September 30th 2019 to the following email address: eclan@ulb.ac.be.

Description of the post:

- Participation to the Annual Contact Points Meeting.
- Participation to the scientific and academic activities of the network (conferences, publications)
- Collaboration to other activities, e.g. participation and/or support to the Summer School, organisation of Annual PhD Seminar, draft of national reports in the framework of research projects, submissions of applications for EU-funded projects, etc.
- Act as intermediary between experts in national criminal law of the Member State represented and the network

Profile:

- Expertise as academic or researcher in the field of EU criminal law
- Availability to take part in the network's activities
- Well-established position in the national academic/scientific environment of the MS represented.
- Good knowledge of English.

CALL FOR PAPERS

Call for papers – Conference "Towards European Criminal Law" (Nantes, France | 6-7 Feb. 2020). The conference will be structured around three main topics:

1. Scope and Impact of the Intervention of European Union Law on Criminal Procedure;
2. Scope and Impact of the Intervention of Criminal Procedure on EU Procedural Law;
3. The Need to Construct European Principles to Frame Criminal Procedure.

The organisers invite papers exploring issues related to these three topics. Abstracts, presentations and papers can be in English of French. Young scholars are especially encouraged to submit. Link

PUBLICATIONS

Books

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

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

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

N. Ní Loideain, *EU Data Privacy Law and Serious Crimes. Data Retention and Policymaking*, OUP, 2019, 280 p.

S. Quattrocolo, S. Ruggeri (eds), *Personal Participation in Criminal Proceedings. A Comparative Study of Participatory Safeguards and in abstentia Trials in Europe*, Springer, 2019, 733 p.

T. Rafaraci, R. Belfiore (eds), *EU Criminal Justice. Fundamental Rights Transnational Proceedings and the European Public Prosecutor's Office*, Springer, 2019, 214 p.

P. Simon, *La compétence d'incrimination de l'Union européenne*, Bruylant, 2019, 559 p.

B. Van Alsenoy, *Data Protection Law in the EU: Roles, Responsibilities and Liability*, Intersentia, 2019, 694 p.

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

K. Ligeti, M. Simonato (eds), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU*, Hart Publishing, August 2019, 400 p. (forthcoming).

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

J. Öberg, *Limits to EU Powers. A Case Study of EU Regulatory Criminal Law*, Hart Publishing, November 2019, 256 p. (forthcoming)

UPCOMING EVENTS

Summer school, *Summer Course on European Data Protection Law*, ERA, Trier, 9-13 September. Link

Conference, *Computer Forensics in Legal Proceedings*, ERA, Zagreb, 30 September – 1 October 2019. Link

Conference, *Countering Terrorism in the EU*, Annual Conference 2019, ERA, Trier, 10-11 October 2019. Link

Conference, *Legal Science: Functions, Significance and Future in Legal Systems*, University of Latvia, 16-18 October 2019. Link

Symposium, *Transnational Criminal Enforcement by EU Criminal Justice Agencies: From Cooperation to Integration*, Swedish Network of European Legal Studies, Lund, 17-18 October 2019. Link

Seminar, *Defence in Future EPPO Proceedings*, ERA, Trier, 17-18 October 2019. Link

Annual Forum on Combatting Fraud in the EU 2019, *Detecting and Preventing Fraud Affecting EU Financial Interests*, ERA, Barcelona, 21-22 October 2019. Link

Seminar, *Artificial Intelligence (AI) and the Criminal Justice System*, ERA, Rome, 24-25 October 2019. Link

Conference, *EU Criminal Law Measures after Brexit, Part I, Mutual Legal Assistance, Extradition, and Investigation*, ECLA, London, 5 November. Link

Conference, *Update on the EU Policy and Legislative Anti-Money Laundering Framework 2019*, ERA, Trier, 7-8 November 2019. Link

International Congress of Penal Law 2019, *Criminal Justice and Corporate Business*, LUISS, Rome, 13-16 November 2019. Link

Conference, *Annual Conference on EU Criminal Justice 2019*, ERA, Lisbon, 14-15 November 2019. Link

Conference, *The Establishment of the European Public Prosecutor's Office: Simple Evolution or Revolution within the European Area of Criminal Justice?,* UGA – ULB, Grenoble, 21-22 November. Link

Conference, *EU Criminal Law Measures after Brexit, Part II, Confiscation, Money Laundering, records & intelligence (and AGM)*, ECLA, London, 3 December 2019. Link

Seminar, *Recent Case law of the European Courts on Privacy and Data Protection Law*, ERA, Trier, 9-10 December 2019. Link