Eclan

European Criminal Law Academic Network

Newsletter

July – December 2019 Issue no. 22

www.eclan.eu

Contents

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

LEGISLATIVE INSTRUMENTS

NEW NEGOTIATIONS

No new legislative proposal has been presented. However, with the appointment of the new European Commission, the President, Ursula von der Leyen, has published on 19 September 2019 the mission letter addressed to the Commissioner for Justice, Didier Reynders. In the field of EU criminal law, the priorities mentioned are (1) enhancing judicial cooperation and improving information exchange in the fight against terrorism and extremism; and (2) supporting the setting up of the European Public Prosecutor's Office and working on extending its powers to investigate and prosecute cross-border terrorism. On the occasion of his hearing before the European Parliament on 2 October 2019, Didier Reynders also referred to possible future initiatives, such as seriously considering whether to bring forward a proposal to revise the European Arrest Warrant. He also stressed repeatedly the importance of making the EPPO operational by the end of 2020.

ON-GOING NEGOTIATIONS

Follow up to the ETIAS Regulation

Proposal for a Regulation of the European Parliament and of the Council establishing the conditions for accessing the other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) yyyy/xxx [ECRIS-TCN]

and

Proposal for a Regulation of the European Parliament and of the Council establishing the conditions for accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU) 2017/222

In September 2018, the Council of the EU and the European Parliament adopted two legislative acts, a Regulation establishing the **European Travel Information and Authorisation System ('ETIAS')** and an amendment of the Europol Regulation for the purpose of establishing ETIAS. ETIAS will be a centralised EU information system that will pre-screen visa-exempt third country nationals travelling to the Schengen area to identify potential risks to security, illegal immigration and public health. To assess those risks, personal data in the ETIAS applications will be compared with data present in records, files or alerts registered in EU information systems or databases (the ETIAS itself, the Schengen Information System ('SIS'), the Visa Information System ('VIS'), the Entry/Exit System '(EES') or Eurodac, and when established ECRIS-TCN), in the Europol databases and in certain Interpol databases).

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

proposal concerns amendments to the immigration branch of SIS, VIS, EES and ETIAS.

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

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

In the European Parliament, both files have been assigned to the Committee for Civil Liberties, Justice and Home Affairs (LIBE). Being of the view that an impact assessment is necessary, on 4 October 2019, the LIBE Committee requested the European Parliamentary Research Service (EPRS) to conduct a targeted substitute impact assessment. The substitute impact assessment was published on 20 December 2019.

Prevention of the dissemination of terrorist content online

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 upon online service providers for developing tools which would assist in the detection and removal of online content that incites to terrorist acts. These tools 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 comprehensive 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 2018.

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

The proposed Regulation further obliges Member States to ensure that their competent authorities have the capacity to intervene against terrorist content online. In addition, Member States are placed under a duty to inform and cooperate with each other and they are invited to make use of channels set up by Europol to ensure their co-ordination. It also imposes obligations on online

service providers to report to law enforcement authorities when they detect content which poses a threat to life or safety. Finally, online service providers are placed under a duty to preserve the content they remove - which functions as a safeguard against erroneous removal and ensures potential evidence is not lost for the purpose of the prevention, detection, investigation and prosecution of terrorist offences.

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

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

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

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

On 24 September 2019, the LIBE Committee adopted the decision to open inter-institutional negotiations. The first trilogue took place in October 2019 and discussions are still ongoing. For the Croatian presidency of the Council, in office between January and June 2020, special importance is attributed to the adoption of the Regulation.

Electronic evidence in criminal matters

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

and

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

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

What followed was extensive consultation with a wide range of stakeholders. In April 2018, two legislative proposals were published: a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and a Directive on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings. Their aim is to facilitate cross-border access to electronic evidence by creating a legal framework for judicial orders addressed directly to legal representatives of service providers - without the intervention of an authority of the Member State where their legal representative is located.

To that end, the two proposals aim to:

a) create a European Production Order, which will enable a judicial authority in one Member State to obtain electronic evidence directly from a service provider or its legal representative in another Member State, which will be obliged to respond in a designated timeframe;
b) create a European Preservation Order, which will enable a judicial authority in one Member State to request that a service provider or its legal representative in another Member State preserves specific data in view of a subsequent request to produce this data via mutual legal assistance, a European Investigation Order or a European Production Order.

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

Following the information provided by the Commission and on the basis of the deliberation held in the October 2018 Council, the scope was kept as originally presented. At this meeting the Council also held a policy debate on the l proposed involvement of another Member State 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 Member State at the stage of the request) should be kept, or whether it should be modified by introducing a notification procedure. the Presidency noted as an outcome that Member States were willing to continue working towards a compromise on the inclusion of a notification procedure.

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

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

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

In the European Parliament, the proposals have been assigned to the LIBE Committee. On 2 April

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

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

On 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.** In that respect, the Commission started negotiations with the US on 25 September 2019, and released a report on this first round of negotiations. The second round of negotiations was held on 6 November 2019 and the Commission stated in its report that an agreement could only be concluded following agreement on the internal EU rules.

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 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 initially 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.

Since then, the European Parliament appointed on 26 September 2019 a new rapporteur Marian-Jean Marinescu, and on 8 October 2019, the LIBE Committee adopted the decision to open interinstitutional negotiations.

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

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

ADOPTED TEXTS

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

Whistle-blowers 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 whistle-blower 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 whistle-blower 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 whistle-blowers in the protection of the EU's financial interest, urged the Commission to submit a proposal that would establish a European whistle-blowing protection programme. Similarly, in its resolution 'on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies' of 24 October 2017, the Parliament called, once again, on the Commission to take action on that front. The Committee on Legal Affairs also adopted a report on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies. Finally, a public consultation on whistleblowing was organised throughout 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 whistle-blowing.

In the European Parliament, the proposal was assigned to the Committee on Legal Affairs. Several Committees have given their opinion 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.

On 8 October 2019 the text was adopted by the Council after European Parliament's first reading and the Final act was signed on 23 October 2019, which was published in the Official Journal of the European Union on 26 November 2019.

CASE LAW

JUDGMENTS

Case C-38/18, *Massimo Gambino*, Judgment of 29 July 2019 (First Chamber)

On 29 July 2019, the First Chamber of the Court delivered its judgment 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 a 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. if, as was the case in the main proceedings, 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, since the new judge(s) 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 rights 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 referring court focuses its reasoning on Articles 16, 18, and 20(b) of the Directive. The Court of Justice first clarifies that Article 20(b) is not applicable since it concerns the protection of victims during criminal *investigations*, while the question has been referred in the framework of court proceedings. Article 16 requires the Member States to ensure that, in the course of criminal proceedings, victims obtain a decision on compensation by the offender within a reasonable time, while Article 18 obliges the Member States to ensure that 'measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying'.

The Court does not believe that victims' rights as enshrined in these two provisions are jeopardised by provisions such as the Italian ones. The core of the Court's reasoning is, in essence, that victims' rights shall be balanced with the rights of the suspects and accused persons and that, in cases such as those of the main proceedings, the latter shall prevail.

A number of arguments support this conclusion. First, Recital No 12 of the Directive expressly states that '[t]he rights set out in [the] Directive are without prejudice to the rights of the offender'. Second, defence rights as enshrined in the Charter (namely Articles 47 and 48(2)) shall be interpreted in the light of the ECtHR's case law, since they are provided for in a very similar way by Article 6 ECHR. This case law is clear in stressing the importance of the principle of immediacy: those who are required to decide on a given case shall hear the witnesses in person, as the reading of their statements may not be sufficient. It is true that hearing again the witnesses (who in this case are also the victims) may delay a decision on compensation of the victims (Article 16 of Directive 2012/29), yet this does not, as such, make it impossible to reach a decision on

compensation within a reasonable time. Besides, as argued also by the Advocate General in his Opinion, the right enshrined in Article 16 of the Directive cannot lead to violating the equally important defence rights of suspects and accused persons. Third, while Article 18 of the Directive lists some measures that shall be available to the victims, this provision does not include any limitation on the number of times a victim-witness shall be heard during court proceedings. Furthermore, Article 18 itself clarifies that the measures listed therein shall be '[w]ithout prejudice to the rights of the defence'.

The Court adds however two caveats. First, espousing the view of the AG, the Court notes that, according to the European Court of Human Rights (ECtHR), Member States, in order to determine whether it is possible to use the minutes ('*procès-verbal*')[1] of a victim's testimony as evidence, must examine whether the hearing of the victim can be decisive for the judgment and ascertain, with sufficient procedural safeguards, that the production of evidence in the context of criminal proceedings does not prejudice either the fairness of such proceedings (Article 47 of the Charter) or the defence rights (Article 48(2) of the Charter). Therefore, it is for the referring court to assess whether, in the main proceedings, similar conditions can lead not to hear again the victim. Second, if the court decides to hear again the victim, it shall nonetheless proceed – in accordance with Article 22 of the Directive – with an individual assessment of the victim to identify his or her specific protection needs and, if need be, let him or her enjoy the measures laid down in Articles 23 and 24 of the Directive.

Case C-377/18, *AH and Others* (Presumption of innocence), Judgment of 5 September 2019 (Second Chamber)

On 5 September 2019, the Second Chamber of the Court of Justice delivered its judgment in the case of *AH and Others*, where it deals with the interpretation of Directive (EU) 2016/343 on the presumption of innocence and the right to be present at the trial.

In the framework of Bulgarian criminal proceedings concerning organised crime, MH, one of the six co-defendants accused to be part of a criminal organisation, expressed his wish to enter into an agreement with the prosecutor, in which he admitted his guilt in exchange for a reduced sentence. The other five accused persons gave their 'procedural consent' to the conclusion of such an agreement, while specifically indicating that that did not mean that they were guilty and that they did not waive their right to plead not guilty. They were nonetheless mentioned in the text of the agreement between MH and the prosecutor and identified by their first name, patronymic, surname and national identity number. This may raise some problems of compatibility with Article 4(1) of the Directive, which expressly requires the Member States to 'take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty'. It is on this point that the Court of Justice is required to provide clarification.

After explaining that the Directive is applicable *ratione temporis*, *materiae*, and *personae*, the Court argues that the right to the presumption of innocence shall be interpreted in the light of the case of the ECtHR on the equivalent right enshrined in the ECHR. According to the Strasbourg Court, there is a violation of the presumption of innocence if a judicial decision contains a clear declaration, in the absence of a final conviction, that the person concerned has committed the crime in question. The choice of words by the judicial authorities and the particular circumstances in which this choice was are very

[1] At the time of writing, the decision has not yet been translated into English.

important in this context. The Court adds that the ECtHR itself has recognised that 'in complex criminal proceedings involving several persons who cannot be tried together, references by the national court to the participation of third persons, who may later be tried separately, may be indispensable for the assessment of the guilt of those who are on trial. […] however, […] if facts related to the involvement of third parties have to be introduced, the relevant court should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who are accused in the trial before it' (para. 44).

This overview of the ECtHR's case law is the premise for the conclusion reached by the Court of Justice, which thus considers that an agreement such that of the main proceedings may include references to the alleged accomplices of the defendant without violating their presumption of innocence, yet two conditions shall be met. First, those references shall be necessary to establish the criminal liability of the person who enters into an agreement with the prosecutor. This was the case of MH, since the crime of which he was accused is participation in a criminal organisation and such an organisation, according to Bulgarian law, requires at least the participation of three persons. Second, references to other persons shall also specify that they are prosecuted in the context of separate criminal proceedings and that their guilt has not been legally established. Such specification does not seem to be clearly spelled out in the agreement in question in the main proceedings, although the referring court seems to be in a position to amend the terms of that agreement.

Therefore, the conclusion of the Court is that the national procedural provision may be compatible with Article 4(1) of Directive 2016/343, if the two conditions it identified are respected (para. 50).

Case C-467/18, EP – *Rayonna prokuratura Lom*, Judgment of 19 September 2019 (Third Chamber)

On 19 September 2019, the Third Chamber of the Court of Justice delivered its judgment in the *EP – Rayonna prokuratura Lom* case, where the Court was called to interpret the field of application and a few provisions of three Directives on procedural safeguards in criminal proceedings, and namely: Directive 2012/13/EU on the right to information; Directive 2013/48/EU on the right of access to a lawyer; and Directive (EU) 2016/343 on the presumption of innocence and the right to be present at the trial.

The request for a preliminary ruling comes from a Bulgarian Court that is required to decide on the criminal proceedings concerning EP. EP's mother was killed in Bulgaria in August 2015 and EP was responsible for this crime. However, EP murdered his mother while being in a state of mental disorder (paranoid schizophrenia). For this reason, he was admitted to a psychiatric hospital a few days after the murder upon decision of a Bulgarian district court and on the basis of the Bulgarian Health Law. At the same time, criminal proceedings were initiated for the same facts, but the public prosecutor's office decided to discontinue the case as EP could not be held liable due to his mental state. Upon request of the public prosecutor, the competent Bulgarian court is instead required to order, according to Articles 427ff of the Bulgarian Code of Criminal Procedure (CCP), EP's committal to a psychiatric hospital.

Before doing so, the Bulgarian court requests the Court of Justice to answer some questions. Therefore, as clarified by the AG in his Opinion of 10 July 2019, two types of intervention occurred concurrently in this case: a) 'that relating to the application of the Health Law (Article 155 et seq.), pursuant to which the […] District Court […] decided at the outset that EP should be admitted to a psychiatric hospital'; and b) that corresponding to the criminal proceedings instituted by the public prosecution service; following the discontinuance of those proceedings, the referring court […] is required to give a final decision on committal

under the [CCP]' (para. 50 of the Opinion by AG Campos Sánchez Bordona).

In his Opinion for this case, the AG suggested that the provisions of the Bulgarian Health Law should be excluded from the Court of Justice's reply, since the procedures regulated therein cannot be considered as 'criminal proceedings' and, therefore, the above-mentioned Directives on procedural safeguards do not apply. On the contrary, the AG focuses his reasoning on the procedures governed by Article 427ff of the Bulgarian CCP. Instead of replying to the detailed and numerous questions referred by the Bulgarian court, however, the AG makes some remarks on the field of application of the Directives at hand.

The Court of Justice, similarly to the approach followed by the AG, reduces the questions to four.

First, the Bulgarian court asks whether Directives 2012/13 and 2013/48 must be interpreted as applying to judicial proceedings that authorise, on therapeutic and safety grounds, the committal to a psychiatric hospital of persons who, in state of insanity, have committed acts representing a danger to society and, if so, at what point in time must the person concerned be informed of the rights conferred on him or her by Directive 2012/13. While conceding that, *prima facie*, the two Directives do not seem applicable to judicial proceedings such as those governed by Articles 427ff of the Bulgarian CCP, the Court argues that, upon closer inspection, they shall instead apply to these procedures as well. The concept of 'criminal proceedings' for the purpose of these Directives, indeed, should be 'regarded as also covering proceedings for committal to a psychiatric hospital which, although they do not lead to a "sentence" in the strict sense, nevertheless result in a measure involving a *deprivation of liberty*, provided that such a measure is justified not only on therapeutic grounds but also on *safety grounds*, in respect of persons who have committed acts constituting a criminal offence, but whose mental state, at the time of the acts punishable under criminal law, justifies their being the subject of a measure of committal to a psychiatric hospital rather than a criminal penalty, such as a prison sentence' (para. 41; emphasis added). The Court notes that measures involving a deprivation of liberty such as psychiatric or medical care measures are covered by Article 5 ECHR on the right to liberty and security and, consequently, by Article 6 of the Charter on the same right and by Directives 2012/13 and 2013/48. Further arguments that support this conclusion flow from the references of the two Directives to "vulnerable suspects and accused persons". As far as the point in time in which the persons concerned must be informed of the rights conferred on them by Directive 2012/13, the Court underlines that the communication, in order to be effective, must take place at an early stage of the proceedings. Therefore, Directive 2012/13 must be interpreted as meaning that persons suspected of having committed a crime 'must be informed *as soon as possible* of their rights from the moment when they are subject to suspicions which justify, in circumstances other than an emergency, the restriction of their liberty by the competent authorities by means of coercive measures and, at the latest, before they are first officially questioned by the police' (para. 54; emphasis added).

Second, the referring court asks whether the right to an effective remedy as enshrined in Article 47 of the Charter, Article 8(2) of Directive 2012/13 and Article 12 of Directive 2013/48 is compatible with Articles 427ff of the Bulgarian CCP. According to Bulgarian law, the competent court, which orders the committal to psychiatric hospitals of persons who committed a crime in an unsound state of mind, cannot verify whether, during the initial investigation, the person concerned was granted the minimum procedural guarantees for the exercise of his or her right of defence. In the light of the importance of the right to an effective remedy in EU law in general (cf. Article 47 of the Charter), and more particularly in the Directives at hand, the Court concludes for the incompatibility

between EU law and national legislation if 'that legislation does not enable the court with jurisdiction to verify that the procedural rights covered by those directives were respected in proceedings prior to those before the court, which were not subject to such judicial review' (para. 63). In the proceedings before the referring court, it will be for the latter to assess whether this principle applies to Bulgarian legislation since the same court mentions that it should be possible to apply, by analogy, ordinary criminal procedure in order to protect the rights of the person concerned.

Third, the referring court doubts of the compatibility with EU law, and more precisely with Article 6 of the Charter (right to liberty and security) and Article 3 of Directive 2016/343 (presumption of innocence), of Articles 155ff of the Bulgarian Health Law, which do not allow the court that decides on the committal of a person to a psychiatric hospital to verify that that person has been afforded procedural safeguards in parallel criminal proceedings to which he or she is subject. The Court of Justice deals rather quickly with this question, as it argues that the Directive does not apply to the proceedings governed by Articles 155ff of the Health Law because they have a therapeutic purpose and do not fall within the notion of 'criminal proceedings'. Likewise, as nothing suggests that such procedures constitute application of EU law pursuant to Article 51(1) of the Charter, the Charter does not apply either.

Finally, the referring court asks whether, in proceedings such as those governed by Articles 427ff of the Bulgarian CCP, the presumption of innocence (Article 3, Directive 2016/343) requires that the public prosecutors provide proof that the person whose committal to a psychiatric hospital is sought is the perpetrator of acts deemed to constitute danger to society. The Court replies in the affirmative. It ought to be noticed that the AG had argued that the Directive at hand does not apply *ratione temporis* to the main proceedings, since the Member States were not obliged to comply with the Directive until 1 April 2018, while those proceedings were definitely discontinued on 1 March 2018. By looking at the date of the entry into force (31 March 2016), rather than at the deadline for the implementation of the Directive (1 April 2018), the Court of Justice takes the opposite view. That said, the Court first underlines that Directive 2016/343 – akin to Directive 2012/13 and 2013/48 (see above) – applies to procedures such as those provided for by Articles 427ff of the Bulgarian CCP, since they lead to deprivation of liberty on safety grounds. The Court then adds that the public prosecutors, in accordance with Article 6 of the Directive on the burden of proof, bears such burden for establishing that the criteria laid down by law for authorising the committal of a person to a psychiatric hospital are met.

Case C-489/19 PPU, *NJ (Parquet de Vienne)*, Judgment of 9 October 2019 (Second Chamber)

On 9 October 2019, the Second Chamber of the Court of Justice delivered its judgement in Case C-489/19 PPU, *NJ (Parquet de Vienne)*. This represents a further episode of the saga opened with the case *OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau)* discussed in the previous edition of the newsletter, where the Court argued that German public prosecutors do not enjoy a sufficient degree of independence to be considered 'issuing authorities' for the purposes of the European Arrest Warrant Framework Decision (EAW FD). In the case of NJ, who was subject to an EAW issued by Austrian authorities, the question concerns Austrian public prosecutors, with respect to whom a German court, in its capacity as executing authority, entertains doubts as to their independence.

On 17 September 2019, AG Sharpston delivered her Opinion in this case. The AG clarified that the Austrian court that is competent to endorse the EAW cannot be considered as the real author

('*auteur effectif*')[2]. The competent judicial authority under Austrian law is the public prosecutor's office and the Austrian court only endorses the EAW. Against this backdrop, the AG explains the reasons why, in her view, Austrian legislation does not run afoul of the principles that shall underpin the EAW system. She points out that Austrian system neutralises potential illegal consequences of the executive's intervention in the EAW procedure and respects the principle that underpins the whole functioning of the EAW system, namely mutual trust among the Member States.

In its judgment, the Court, espousing in essence the view of AG Sharpston, argues that the Austrian system is compatible with the EAW Framework Decision, as interpreted by the Court in *OG and PI*.

According to Austrian legislation, public prosecutors are subject to directions or instructions from the executive (the Federal Minister of Justice). They are also responsible for issuing EAWs. However, Austrian legislation provides for a careful examination far from being a simple *nihil ostat* by a court of the EAW issued by the public prosecutor (the 'endorsement procedure'), an examination that concerns the legality and proportionality of the EAW, as well as the respect of fundamental rights and the factual circumstances of the warrant. The court can also order the police (or carry out itself) further investigations that it considers necessary and the decision on the EAW can be appealed. Without the positive decision by the court, the EAW issued by the public prosecutors does not produce legal effects and cannot be transmitted.

After summarising the main findings of the *OG and PI* case, and especially those concerning the dual level of protection of procedural rights that the requested person should enjoy in surrender procedures, the Court acknowledges that Austrian public prosecutors may not meet the criterion of objectivity and independence that the EAW FD requires from issuing authorities, as they are not entirely independent from the Federal Minister of Justice. The question therefore arises as to whether decisions on the issue of an EAW in Austria can be regarded as satisfying the minimum requirements on which their validity depends as regards the objectivity and independence of the review carried out when those decisions are adopted. As anticipated, the Court replies in the affirmative by clarifying that 'the concept of "decision" must be understood as referring to the act in the form which it takes *when it is executed*. Indeed, it is at that time and in that form that the decision to issue the EAW is likely to impinge on the right to freedom of the person requested' (para. 42; emphasis added). It follows that the decision to issue an EAW according to Austrian law is compatible with the EAW FD for three reasons.

Firstly, without the endorsement of the competent Austrian court, which meets the needed requirements of objectivity and independence, Austrian EAWs do no produce legal effects and cannot be transmitted. Secondly, the endorsement procedure allows the competent Austrian court to review in-depth the decision by public prosecutors. In that procedure, indeed, the court evaluates the legality and proportionality of the arrest warrant, taking into account the particular circumstances of each specific case, including the effects of the surrender procedure and the transfer of the person concerned on his/her social and family relationships. If the executive has given some instructions, they shall be included in the file to which the court has access. Thirdly, the court is not bound by the results of the investigations carried out by public prosecutors and it could also order additional investigations or carry them out itself. Unlike the German system, where the decisions of public prosecutors to issue an EAW were subject to (potential) *ex post* judicial review which depended on the choice of the concerned person to appeal those decisions, the Austrian system

[2] At the time of writing, the AG's Opinion has not yet been translated into English.

provides for an objective and independent review by a court that takes place *ex officio* before the arrest warrant produces legal effects and can be transmitted.

Hence, for the reasons exposed above, the Court concludes that EAWs issued by public prosecutors, under Austrian law, fall within the concept of 'European Arrest Warrant' for the purposes of the EAW FD (para. 49).

Case C-128/18, *Dumitru-Tudor Dorobantu*, Judgment of 15 October 2019 (Grand Chamber)

On 15 October 2019, the Grand Chamber of the Court of Justice delivered its judgment in the *Dorobantu* case, which represents another ruling in the judicial saga opened by the seminal decision in *Aranyosi and Căldăraru*. In *Dorobantu*, the Higher Regional Court of Hamburg, in its capacity of executing authority for the purposes of the Framework Decision on the European Arrest Warrant (EAW FD), raises four main questions. In essence, they concern the extent to which the executing authorities can scrutinise the criminal justice system of the Member State to which the requested person should be surrendered, in order to reach a decision on whether that person would be subject to inhuman and degrading treatment – which is prohibited by Article 3 ECHR and Article 4 of the Charter – if detained in the issuing Member State.

First, the German court demands clarification on the extent and scope of the review that the executing judicial authority, which holds information showing that there are systemic or generalised deficiencies in detention conditions in the issuing Member State, must undertake for the purpose of assessing whether there are substantial grounds for believing that the requested person, once surrendered, will run a real risk of being subjected to inhuman or degrading treatment. The German court queries, in particular, whether that review must be comprehensive or, on the contrary, limited to cases of manifest inadequacies in those conditions of detention (para. 41). The CJEU argues that this assessment by the executing authority cannot be limited to the review of obvious inadequacies since the prohibition of inhuman and degrading treatment is absolute: as a consequence, 'the respect for human dignity that must be protected pursuant to that article would not be guaranteed if the executing judicial authority's review of conditions of detention in the issuing Member State were limited to obvious inadequacies only' (para. 62). In addition, the individualised judgment requested since *Aranyosi and Căldăraru* onwards does not require an assessment that takes into account all the prisons in the issuing Member State. On the contrary, it is limited to the relevant physical aspects of the conditions of detention in the prisons in which, according to the information available, it is actually intended that the person will be detained (e.g., personal space available to the detainees, sanitary conditions, and detainees' freedom of movement within the prison). In this context, the additional information that the executing authorities may ask from the issuing authorities plays an important role in the assessment to be conducted by the former. In principle, the executing authority shall rely on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention in a particular prison infringe Article 4 of the Charter. Once assurances have been given, therefore, it is only in exceptional circumstances that the executing authorities can find that the surrender will jeopardise the right of the person concerned not to be subject to inhuman or degrading treatment.

Second, as Mr Dorobantu will be detained in a multi-occupancy cell, the Court of Justice is required to clarify which standards shall apply in the assessment of whether the personal space for detainees violates Article 4 of the Charter. In the absence of EU standards on the matter, the Court of Justice entirely relies on the case law of the ECtHR, according to which there is a strong

presumption of a violation of Article 3 ECHR when the personal space available to a detainee is below 3 m^2 in multi-occupancy accommodation. The calculation of this space should not include sanitary facilities but should instead include the space occupied by furniture, provided that the detainees still have the possibility of moving around normally within the cell. It is interesting to note that, while the Member States are free to provide more favourable detention conditions according to their own national legislation, surrender shall be subject to compliance with the European requirements and not with the more stringent ones set out by national law: 'The opposite solution would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined by EU law, undermine the principles of mutual trust and recognition which the EAW FD is intended to uphold and would, therefore, compromise the efficacy of that framework decision' (para. 79).

Third, the referring court sought clarification on the importance that should be attached, in the assessment of whether the surrender of the requested person violates Article 4 of the Charter, to the existence of an effective mechanism for monitoring conditions of detention in the issuing Member State. The Court specifies that, albeit an important factor, the existence of this mechanism cannot as such justify a decision by the executing authority that rules out the real risk of inhuman or degrading treatment. Therefore, even though the executing authority is informed of the existence in the issuing Member State of effective legal remedies that allow reviewing detention conditions, it is still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy itself that its decision 'on the surrender of that person will not expose him, on account of those conditions, to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter' (para. 81).

Finally, the Court stresses although it is important to ensure that judicial cooperation at the EU level functions smoothly, the effectiveness of such cooperation and of the instruments on mutual recognition cannot be weighed against considerations relating to the violation of the fundamental right not to be subject to inhuman or degrading treatment. That right, which is absolute, could not be in any way limited for reasons connected with the functioning of criminal justice systems.

Case C-324/17, *Ivan Gavanozov*, Judgment of 24 October 2019 (First Chamber)

On 24 October 2019, the First Chamber of the Court of Justice delivered its judgment in Case C-324/17, *Gavanozov*, which represents the first decision in which the Directive on the European Investigation Order (EIO) is examined. The request for a preliminary ruling was lodged by the Specialised Criminal Court in Bulgaria and concerns the compatibility between Bulgarian law and the EIO Directive, notably Article 14 on legal remedies.

In the Bulgarian criminal proceedings against Mr Gavanozov, national authorities had to search the residential and business premises of Y, who 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. In that context, the Bulgarian authorities wished to hear Y as a witness, who was residing in the Czech Republic. The 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 in the issuing State.

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.

While in his Opinion, AG Bot had argued that Bulgarian legislation was incompatible with EU law as it fails to protect the right to an effective remedy, the Court of Justice takes a different view.

The Court reformulates the questions and focuses its judgment on the form that the issuing authorities – the Bulgarian court in this case – are required to complete and that is annexed to the EIO Directive. Indeed, according to the Court, the referring court wishes to know how to complete Section J of the form set out in Annex A to Directive 2014/41: it is asking, in essence, whether Article 5(1) of Directive 2014/41, read in conjunction with Section J of the form referred to in Annex A to that directive, must be interpreted as meaning that the judicial authority of a Member State must, when issuing an EIO, include in that section a description of the legal remedies, if any, which are provided for in its Member State against the issuing of such an order. Section J of the EIO form requires the issuing authorities to 'indicate if a legal remedy has already been sought against the issuing of an EIO, and if so [to] please provide further details (description of the legal remedy, including necessary steps to take and deadlines)' (section J, point 1, Annex A to the EIO Directive). As the text of the form suggests, therefore, the description of the legal remedy available in the issuing Member State 'must be included *only* if a legal remedy *has been sought* against an EIO' (para. 28, emphasis added).

According to the Court, the same conclusion holds true when looking at section J, point 2 of the form, which requires the issuing authority to specify the name and contact details of the competent authority of the issuing Member State that is able to give additional information about the legal remedies, legal assistance, and interpretation and translation service in that Member State. The reason for including information on remedies section J of the EIO is to 'provide the executing authority with the minimum official information required to enable it to adopt the decision on the recognition or execution of the EIO in question and, as appropriate, to carry out the measure requested within the time limits laid down in […] that directive' (para. 36). Therefore, the Court concludes that Article 5(1) of the EIO Directive, which refers to the form, must be interpreted as meaning that the issuing judicial authority, when issuing an EIO, does *not* have to include in section J of the form a description of the legal remedies, if any, which are provided for in its Member State against the issuing of such an order.

Case C-653/19 PPU, *DK – Spetsializirana prokuratura*, Judgment of 28 November 2019 (First Chamber)

On 28 November 2019, the First Chamber of the Court of Justice delivered its judgment in case C-653/19 PPU, which originates from a request for a preliminary ruling lodged by a Bulgarian court and concerns the interpretation of Directive (EU) 2016/343 on the presumption of innocence and the right to be present at the trial.

Suspected of serious crimes, DK was remanded in custody in June 2016 in the context of criminal proceedings initiated against him and then referred to the Specialised Criminal Court of Bulgaria to stand trial. His applications to this court to be released were all rejected. According to Bulgarian law, indeed, once a person held in detention on remand is referred to a court, the latter shall first review the merits of that detention. If the outcome of the review is positive, the release of the person

cannot be granted unless that person makes an application to that end and proves the existence of *new circumstances* justifying his release. The Bulgarian court has thus expressed doubts over the compliance of such legislation with EU law, and more precisely Article 6 ('Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. […]') and recital 22 ('The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person. The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence […]') of Directive 2016/343.

On 19 November 2019, AG Pitruzzella delivered his Opinion in this case where he concluded that Article 6 of Directive 2016/343 does not regulate the burden of proof with respect to the decision of maintaining the persons concerned in pre-trial detention. After expressing some concerns over the lack of harmonisation at the EU level on matters concerning pre-trial detention, the AG posited that Article 6 of the Directive and recital 22 do *not* apply to this case. The provision and the recital do not aim to regulate the issue of the burden of proof in proceedings concerning (the continuation of) pre-trial detention, as they instead refer to *decisions on guilt* only. After all, the AG noted, the Directive aims to ensure a minimum harmonisation of some aspects of the presumption of innocence, as was also confirmed by the Court in its previous decisions on pre-trial detention and its compatibility with Directive 2016/343, i.e. *Milev I*, *Milev II*, and the order in *RH* of 12 February 2019. However, as the AG noted, in *RH*, the Court referred to Article 6 of the Directive to strengthen its arguments and it concluded that this provision is not incompatible with national legislation such as that of those proceedings, so the order in *RH* does not really provide any useful guidance in the case of DK.

The Court follows largely the views expressed by the AG. Judges argue that the Directive is clear in making a distinction between 'decisions on guilt' and other 'decisions' to be taken in the framework of criminal proceedings. As for the former, they are subject to the above-mentioned rule of Article 6 of the Directive, which however does not apply to the latter. All the other procedural decisions do not fall within the remit of Article 6, and this holds true for decisions on pre-trial detention such as those of the main proceedings: 'A judicial decision having as its sole purpose the potential continued detention on remand pending trial of an accused person seeks only to resolve the question whether that person must be released or not, in the light of all the relevant circumstances, without establishing whether that person is guilty of having committed the offence with which he is charged' (para. 35). Other provisions of the Directive thus apply to these decisions that do not concern the guilt of the person concerned, such as Articles 3 and 4, which require that these decisions do not refer to that person as being guilty.

The non-applicability of Article 6 of the Directive, which in turn implies the non-application of the Charter (para 40), is not contradicted by para. 56 of the Court's order in the *RH* case (C-8/19 PPU), which reads as follows: 'Article 6 of Directive 2016/343 […] specifically states […] that that provision applies to any obligation on the judge or the competent court to seek both elements of inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law'. As the Court clarifies, this paragraph only aims to explain the context surrounding Article 4 of the Directive but cannot be read as justifying the application of Article 6 to a procedure leading to the adoption of a decision to remand in custody. The Court therefore concludes that Article 6 of Directive 2016/343 and Articles 6 and 47 of the Charter 'do not apply to a national law that makes the release of a person held in detention on remand pending trial conditional on that person

establishing the existence of new circumstances justifying that release' (para. 42).

Case C-671/18, *Centraal Justitieel Incassobureau (CJIB)* (execution of financial penalties), Judgment of 5 December 2019 (First Chamber)

On 5 December 2019, the First Chamber of the Court of Justice delivered its judgment in case C-671/18, which concerns the interpretation of Framework Decision 2005/214/JHA on mutual recognition of financial penalties. On 9 November 2017, the Dutch Central Fine Collection Agency delivered a decision requiring Z.P. to pay a financial penalty in respect of a road traffic offence committed by the driver of a vehicle registered in Poland under his name. That decision was notified to Z.P. by placing it in his letterbox; he did not exercise his right to contest the decision in the following six weeks, so that the decision became final in December 2017. In May 2018, the Dutch agency, in accordance with Framework Decision 2005/214, lodged a request for recognition and execution of the decision at the District Court of Chełmno in Poland. The latter, which is the referring court, requires the Court to clarify some aspects of that Framework Decision. Z.P. claimed that the decision was incomprehensible to him and that on the date of the contested offence, he had sold the vehicle in question, although he had failed to inform the authority responsible for the registration of the vehicles.

The Court of Justice, rephrases the questions referred to it.

Firstly, the Court examines Article 7(2)(g) of the FD – which provides for a ground of refusal when the 'person concerned […] was not, in accordance with the law of the issuing State, informed personally or via a representative […] of his right to contest the case and of time limits of such a legal remedy' – and Article 20(3), which allows each Member State to oppose the recognition and the execution of decisions 'where the certificate […] gives rise to an issue that fundamental rights or fundamental legal principles […] may have been infringed'. In particular, the referring court asks whether these two provisions must be interpreted as meaning that, where a decision requiring payment of a financial penalty has been notified in accordance with the national legislation of the issuing Member State indicating the right to contest the case and the time limits for such a remedy, the execution may be refused since it transpires that the person concerned has not had sufficient time to contest that decision. The related question is whether the fact that the decision to be recognised and enforced is administrative in nature has any effect on the obligations of the competent executing authorities.

After highlighting the objective of the Framework Decision and the fact that, as in any mutual recognition instrument, the grounds for refusal must be interpreted restrictively, the Court contends that – as is clear from the wording of Article 7(2)(g) – the EU legislator has 'left it to the Member States to decide on the manner in which the person concerned is to be informed of his right to contest the case, of the period for such a legal remedy and of when that period begins, provided that the notification is effective and the exercise of the rights of the defence is guaranteed' (para. 35). In the case at hand, Z.P. was duly notified of the decision of the Dutch competent agency and his right to contest that decision in accordance with Dutch law within a period of six weeks. Therefore, it cannot be argued that the principle of the effective judicial protection was violated. Furthermore, 'nothing in the order for reference indicates that […] Z.P. did not have sufficient time to prepare his defence' (para. 42). The Court adds, it is for the referring court to verify whether the person was in fact provided with the decision and had sufficient time to prepare his defence. If such verification is positive, the request for recognition and execution shall be enforced. As for the nature of the decision imposing a fine, it is irrelevant whether it was issued by a judicial or administrative

authority since Article 1 of the FD does not limit the application of the principle of mutual recognition of financial penalties to decisions issued by judicial authorities.

Therefore, the Court answers to the first question that a decision requiring payment of a financial penalty which meet the conditions stated above - namely that it has been notified in accordance with the law of the issuing Member state, indicating the right to contest the case and the time limit for such a legal remedy - cannot be refused recognition and execution within the meaning of Article 7(2) (g) and Article 20(3) of the Framework Decision provided that the person concerned has had sufficient time sufficient time to contest that decision.

The Court then moves on to the second question, which is whether Article 20(3) of the Framework Decision must be interpreted as authorising the competent executing authority to refuse to recognise and execute a decision requiring payment of a financial penalty where such a penalty has been imposed on the person in whose name the vehicle in question is registered on the basis of a *presumption of liability* laid down in the national legislation of the issuing Member State. This may indeed jeopardise the right to presumption of innocence. Recalling a case of the ECtHR that concerned the Dutch system of fines concerning road traffic offences (*Falk v. the Netherlands*), the Court notes that presumptions of fact or of law exist in every criminal law system and are not, as such, prohibited under the ECHR nor they violate the presumption of innocence as long as the persons who are fined on their basis can challenge the fine before a trial court. Furthermore, it is clear that Z.P. could have obtained the annulment of the fine, had he been able to prove that he was not the owner, or was not in possession, of the vehicle at the time of the offending conduct. Hence, in relation to this second question, the Court concludes that a decision based on a presumption of liability may not be regarded as a ground for its non-recognition and non-execution within the meaning of Article 20(3), provided that that presumption may be rebutted (para. 58).

Joined Cases C-566/19 and C-626/19 PPU, *JR and YC* ; Case C-627/19 PPU, *Openbaar Ministerie v ZB* (parquet de Bruxelles); Case C-625/19 PPU, *Openbaar Ministerie v XD* (parquet suédois), Judgments of 12 December 2019 (First Chamber)

In Cases C-566/19 and C-626/19 (*JR and YC*), C-625/19 (*XD*) and C-627/19 (*ZB*) rendered on 12 December 2019, based on its previous rulings in cases *OG and PI*, *PF* and *NJ* dealing with the interpretation of the EAW Framework Decision 2002/584 (EAW FD), the Court provided further clarification on the requirements to be satisfied for a public prosecutor to be considered as an 'issuing judicial authority' within the meaning of Article 6(1) of the EAW FD.

Courts in Luxembourg and the Netherlands suspended the execution of EAWs issued by prosecutors in Belgium, France and Sweden, and asked the CJEU, through the urgent preliminary reference procedure, whether they qualified as "judicial authorities" for the purposes of issuing EAWs. The questions were raised in relation to EAWs issued by the Belgian public prosecutor for the purposes of executing a custodial sentence (case C-627/19 PPU), and in relation to EAWs issued by French (case C-625/19 PPU) and Swedish prosecutors (joined cases C-566/19 and C-626/19 PPU) for the purposes of conducting a criminal investigation. While all cases deal in essence with the same question – can a prosecutor acting in accordance with applicable rules in France, Belgium and Sweden be considered as an 'issuing judicial authority' for the purpose of Article 6(1) of the EAW Framework Decision? -, clarifications were sought in particular with regard the requirement of independence and the scope of effective judicial protection to be afforded to individuals who are subjects of EAWs.

On 26 November 2019, AG Campos Sánchez-Bordona delivered no less than three Opinions: one on the Swedish Public Prosecutor (Case C-625/19), one on the French Public Prosecutor (joined cases C-566/19 and C-626/19) and one on the Belgian public prosecutor (case C-627/19).

The Court issued three judgements as well. However, the Court disagreed with the majority of the AG's views.

As the independence of the Swedish and Belgian Prosecution authorities had not been a matter of debate in Cases C-625/19 and C-627/19, neither AG Campos Sánchez-Bordona nor the Court expressed examined that question. However they did determine whether the French Public Prosecutor's Office is an independent institution, as required to be considered as a judicial authority within the meaning of Article 6(1) EAWFD (question from Case C-566/19).

The AG strongly stated he did not consider the French public prosecutor to be independent not only because it can receive general instructions from the French Minister of Justice but also due to the hierarchical structure characteristic of public prosecutor's offices in France and recalled the view of the CJEU in the *OG and PI* judgment (para.73 and 87).

The Court did not follow the AG's opinion. Indeed, regarding the independence of the French public prosecutor's office, the Court replies positively. To reach this conclusion, the Court first recalls that the concept of 'issuing judicial authority' must be given an autonomous meaning capable of encompassing the authorities of a Member State which, without being judges or courts, participate in the administration of criminal justice and act independently. This last condition presupposes the existence of statutory and organisational rules capable of ensuring that the authorities concerned are not exposed, when issuing an EAW, to any risk of being subject to orders or individual instructions from the executive.

According to the Court, the evidence presented suffices to demonstrate that the French public prosecutor's office has the power to assess independently, in particular in relation to the executive, the necessity and proportionality for issuing an EAW and to exercise this power objectively, taking into account incriminating and exculpatory elements. Their independence is not called into question by the facts that they are responsible for public action, that the Minister of Justice can send them general instructions on criminal policy or that they are placed under the direction and control of their hierarchical superiors, themselves members of the prosecution, and therefore required to comply with their instructions. Their sufficient independence is further reinforced by the express prohibition in the French Code of Criminal Procedure of individual instructions.

Secondly, the Court had also to clarify the requirement laid down in its recent case-law (*OG and PI*, the *PF* and *NJ* judgments), according to which the decision to issue an EAW must be subject to a judicial remedy respecting the requirements of effective judicial protection when it is taken by an authority taking part in the administration of justice without being a court. This requirement derives from the dual level system of judicial protection that persons subject to an EAW must benefit.

The Court stresses that the existence of such a judicial remedy does not constitute a condition for the authority to be regarded as an issuing judicial authority. Then, the Court indicates that it is the Member States' role to ensure that their legal systems effectively guarantee the dual level of judicial protection (when the National Arrest Warrant – NAW – is issued and when the EAW is issued) required by means of procedural rules which they implement, and which may differ from one system to another.

In these cases, the French and Swedish systems meet these requirements, since the national procedural rules make it possible to assess that the proportionality of the prosecutor's decision to issue an EAW can be subject to judicial review before, at the same time or after the adoption of this decision. In particular, such assessment is already carried out by the court which adopts the national arrest warrant likely to found, subsequently, the EAW.

In Case C-627/19, the EAW in question had been issued by the Belgian public prosecutor for the execution of a custodial sentence imposed by a final sentence. In this event, the Court held that the requirements arising from effective judicial protection do not imply that a separate appeal against the decision of the public prosecutor's office must be foreseen. The Court notes that, in such circumstances, judicial review is carried out by the enforceable judgment on which the EAW is based. Furthermore, the proportionality of the EAW also results from the sentence imposed, since the EAW FD provides that it must consist of a sentence or a security measure lasting for a period of time of at least four months. The Belgian system, in which EAWs for the execution of a custodial sentence are based on a judgment, delivered by a court, therefore meets the EAW FD's requirements.

AG's Opinions

"AGRO IN 2001" – Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v BP et al. (C-234/18) - Opinion delivered on 31 October 2019 (AG Sharpston)

On 31 October 2019, AG Sharpston delivered her Opinion in Case C-234/18, giving her the opportunity to clarify some issues concerning confiscation at the EU level.

The case originates from a request for a preliminary ruling from a Bulgarian court. An individual BP was suspected of having committed the crime of embezzlement and was reported by the competent public prosecutor's office to the Bulgarian Commission for combating corruption, which launched an inquiry into the facts. As the Bulgarian Commission concluded that some irregularities were committed by that person, it instituted in May 2015 proceedings before the referring court to freeze assets said to have been illegally obtained by BP. The proceedings related to the confiscation of these assets, which are considered 'civil proceedings' according to Bulgarian law, were introduced in March 2016. The criminal proceedings against the same person were launched in 2017 and are still pending. The questions for preliminary ruling referred by the Bulgarian court concern, in essence, the compatibility between Bulgarian law – which allows confiscation of assets irrespective of final convictions – and EU law, more precisely Directive 2014/42, which instead provides that confiscation may be ordered on assets that have been obtained by way of a criminal offence for which the offender has been convicted by final judgment.

For the AG, the Directive 2014/42 is not applicable to the main proceedings. First, the alleged crime committed by the person concerned – embezzlement – does not fall within the scope of the instruments listed in Article 3 of Directive 2014/42. It falls instead within the remit of Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, which has been partially repealed by Directive 2014/42. Second, as the deadline for transposition of the Directive was 4 October 2016 and the 'civil proceedings' in the case at hand had initiated in March 2016, the

Directive does not apply *ratione temporis*. The AG therefore considers that the Framework Decision 2005/212/JHA applies instead.

Against this backdrop, and upon request of the Court, the AG first analyses whether Article 2(1) of Framework Decision 2005/212/JHA – 'Each Member State shall take the necessary measures to enable it to confiscate […] instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year […]' – and Article 1, fourth indent of the same Framework Decision – "confiscation" means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property' – shall be interpreted as precluding the possibility for Member States to enact a confiscation regime as the Bulgarian one where confiscation does *not* depend on a final criminal conviction. The AG replies in the negative since, in essence, the Bulgarian civil proceedings at hand do not fall within the scope of the Framework Decision: they are neither 'criminal proceedings' nor proceedings 'in relation to a criminal offence or criminal offences' (Article 1, fourth indent). The Framework Decision indeed relates only to criminal matters. It aims to ensure compatibility of Member States' legislation to the extent necessary for their cooperation in criminal matters, and it obliges them to take the necessary measures to confiscate crime-related instrumentalities and proceeds. As the AG notes, the Bulgarian proceedings in question are civil law proceedings and have 'only one point of contact with criminal proceedings: they are initiated by the national independent authority when it is informed that a person has been charged with a certain criminal offence' (para. 67). For the rest, they follow non-criminal law rules.

Second, the AG shortly deals with Article 5 of the Framework Decision, according to which that legal instrument 'shall not have the effect of altering the obligation to respect fundamental rights and fundamental principles, including in particular the presumption of innocence, as enshrined in Article 6 of the Treaty on European Union'. However, since the case falls outside the field of EU law, as mentioned above, neither Article 5 of the Framework Decision nor Article 48 of the Charter on the presumption of innocence applies in the main proceedings.

The overall conclusion of the AG is therefore that Framework Decision 2005/212/JHA 'does *not* preclude confiscation proceedings such as those pending before the national court, where those proceedings are not "in relation to a criminal offence" and their issue does not depend upon a criminal conviction' (para. 75; emphasis added).

VW (Right of access to a lawyer in case of failure to appear) (C-659/18) – Opinion delivered on 7 November 2019 (AG Bobek)

On 7 November 2019, AG Bobek delivered his Opinion in Case C-659/18, which concerns the interpretation of Directive 2013/48 EU on the right of access to a lawyer. The request for a preliminary ruling comes from a Spanish court and concerns VW, who is suspected of a criminal offence and, despite being summoned by the competent Spanish court to be heard, did not appear before such court. The several attempts to summon him were unsuccessful since his whereabouts were unknown. A few months later, an arrest warrant was therefore issued for him to be brought before the court. A lawyer subsequently sought to intervene in the proceedings on behalf of VW, showing her appointment by VW. However, according to Spanish legislation as interpreted by national courts, once a person does not appear when first summoned, his or her right of access to a lawyer can be denied until that person is arrested and heard by the court.

The referring court thus queries whether such legislation is compatible with Article 47 of the Charter and Article 3(2) of Directive 2013/48. The AG replies in the negative with a three-step reasoning.

First, he clarifies that Directive 2013/48 is applicable to the main proceedings. There are no doubts on the applicability *ratione temporis* and *ratione personae*, since the deadline for the implementation of the Directive had already passed when the facts of the case took place and VW is clearly a 'suspect'. The applicability *ratione materiae* is instead more contentious: while it is self-evident that the proceedings at stake are of criminal nature, it may be debated whether VW had been 'made aware by the competent authorities' of the fact that he was suspected of having committed a crime, as required by Article 2(1) of Directive 2013/48. The problem arises since VW's whereabouts were unknown when he was first summoned, so that one may argue that VW was in fact not made aware of the suspicions entertained by the Spanish public authorities. AG Bobek does not however share this view and emphasises that what really matters is 'that there was […] an official decision or other procedural step as required by national law made by the competent authorities, addressed towards the person in question, *seeking to inform him that he is to be treated as a suspect or accused person*. Conversely, that provision does not require that information to be conveyed in a specific manner' (para. 31; emphasis added). After all, the AG adds, there can be different reasons why an official notification might fail to reach its recipient, yet this should not mean that the latter is automatically deprived of his or her right of access to a lawyer.

Second, the AG discusses the scope of the right of access to a lawyer pointing out that the Directive requires that it should be granted 'without undue delay' (Article 3(2) of Directive 2013/48). In particular, according to Article 3(2)(d), that right should be granted to suspects when 'they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court'. This is clearly the situation of VW, which may also fall, according to the AG, within the remit of Article 3(2)(a), according to which the right shall be granted to suspects 'before they are questioned by the police or by another law enforcement or judicial authority'. The Spanish government however contended that the Directive does not apply since Article 3(3) requires lawyers to be allowed to participate in a number of procedural activities, none of which was undertaken in the case of VW. The AG rebuts this argument by claiming that, on the one hand, the situation of VW seems to fall squarely under Article 3(3)(b), which requires Member States to 'ensure that suspects […] have the right for their lawyer to be present and participate effectively *when questioned*' (emphasis added). On the other hand, the AG adds that not only Article 3(3) looks like a mere illustration of what shall be covered by the Directive (rather than a closed list), but that also the case law of the ECtHR has posited that 'the fact that a defendant, in spite of having been properly summoned, does not appear in court, cannot, even in the absence of an excuse, justify depriving him of his right to be defended by counsel' (para. 48).

Finally, the AG moves on to the analysis of the derogations to the right of access to a lawyer that the Directive itself allows, as provided for by Article 3(5) and 3(6). The list of these derogations is exhaustive: if the Member States were allowed to add further exceptions, the minimum harmonisation sought by Directive 2013/48 would actually turn out to be 'illusory harmonisation' (para. 51). That said, the AG explains why none of those derogations applies in the case of VW.

The AG lingers instead over Article 3(6)(b), which allows temporary derogations when 'immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings'. The central argument of the Spanish government, in fact, is that the delay in the access to a lawyer is imposed by the need to ensure the proper and swift course of criminal proceedings, because it may be crucial to obtain statements from VW and/or potential clarification of the facts. The AG strongly criticises such an argument. While he does not underestimate the importance of criminal proceedings being swift, he does not agree that the

delay in the exercise of the right is imposed by the imperative need to prevent 'substantial jeopardy' in criminal proceedings. A mere delay in the procedure (such as that following from granting the right of access to a lawyer), in and of itself, does not entail the existence of a credible risk that the procedure will be irremediably or significantly compromised. Even more, the argument of the Spanish government seems further contentious since, even if VW is brought before the court without a lawyer, he would still be entitled to remain silent, so that it is questionable that the sacrifice of his right of access to a lawyer will produce the expected results, namely obtaining statements from him and/or potential clarification of the facts. Therefore, the derogation envisaged by the Spanish does not fall within the remit of Article 3(6)(b) of Directive 2013/48.

In the light of the foregoing, the AG suggests that Article 3(2) of Directive 2013/48 […] shall be interpreted as precluding a national provision or judicial practice such as that at issue in the main proceedings (para. 66).

Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB) (C-183/18) – Opinion delivered on 12 November 2019 (AG Pikamäe)

On 12 November 2019, AG Pikamäe delivered his Opinion in Case C-183/18, which concerns the interpretation of Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties. The request for a preliminary ruling was lodged by a Polish court, which received from Dutch authorities a request for recognition and enforcement of a Dutch decision issued on 25 November 2016. That decision imposed a fine for a road traffic offence on the driver of a vehicle belonging to Bank BGŻ BNP Paribas Gdańsk, a legal entity that is based in Gdańsk (Poland). The Polish legislation that implemented the Framework Decision uses the term 'offender' to define the scope *ratione personae* of the transposing legislation. In the Code of Criminal Procedure, however, that term includes only natural persons whereas, under Articles 1 and 9 of the Framework Decision, that Framework Decision also applies to decisions imposing financial penalties on *legal persons*. The referring court therefore asks, first, whether it shall disapply the national rule that runs afoul of the Framework Decision provisions or replace it with the rule contained in the Framework Decision. Second, the referring court seeks clarification on the concept of 'legal persons' by asking, on the one hand, whether this is an autonomous concept of EU law (or whether it shall be instead interpreted according to the law of the issuing or executing Member State) and, on the other, whether it also covers a branch of a legal person notwithstanding the fact that that branch does not have legal personality in the executing State. This second limb of the second question is linked with the fact that, according to Polish law, Bank BGŻ BNP Paribas Gdańsk has no legal personality (i.e. no capacity to act as a party in judicial proceedings) separate from that of Bank BGŻ BNP Paribas S.A., whose seat is in Warsaw.

When addressing the first question, the AG first notes that it is clear that the Framework Decision also applies to the mutual recognition of judgments imposing financial penalties on legal persons. Article 9(3) states that 'a financial penalty imposed on a legal person shall be enforced even if the executing State does not recognise the principle of criminal liability of legal persons'. It seems clear, therefore, that Polish legislation has not implemented the Framework Decision correctly. Yet, framework decisions do not have direct effect and cannot lead to the disapplication of incompatible national law, nor to the criminal liability of individuals being aggravated or determined on the basis of a framework decision alone (i.e. without any national implementing measure). It follows that it is for the referring court to determine whether national law (Polish law, in this case) can be interpreted in a way that is

compatible with EU law. The AG makes nonetheless some considerations to help the referring court in its task.

First, he suggests that the notion of 'offender', which is used in the Polish implementing legislation, can refer to both natural and legal persons. Even though the notion in Polish substantive criminal law does not refer to legal persons, there is no need in this case to interpret it in the same way as in substantive criminal law. Framework Decision 2005/214 does not aim to harmonise substantive criminal law. Second, it cannot be claimed that the Framework Decision aggravates the liability of legal persons. In the main proceedings, such liability follows/derives from Dutch legislation, so that the issues to be addressed in Poland only concerns the enforcement of the penalty. Against this backdrop, the AG suggests that the provisions of Framework Decision 2005/214 must be interpreted as meaning that a decision transmitted for execution which imposes a financial penalty on a legal person must be executed by the executing State even if the national provisions implementing that framework decision do not provide for the possibility of executing a decision which imposes such a penalty on a legal person […](para. 57).

Moving on to the second question, the AG first contends that the concept of 'legal person' shall not be interpreted as an 'autonomous concept' of EU law but rather according to the meaning given to it by the legislation of the *issuing* Member State. The AG argues that, by reading the above-mentioned Article 9(3) of the Framework Decision, one should conclude that the EU legislator precisely aimed to avoid the introduction of any autonomous concept in the field, as it instead refers back to the law of the Member States. Furthermore, in the scheme of Framework Decision 2005/214, it is 'the law of the issuing State [that] governs liability and the penalty and determines the entity on whom that penalty is imposed, with the effect that the concept of "legal person" must be interpreted in the light of the law of the issuing State' (para. 66). As for the second limb of the second question, the AG notes that it is Bank BGŻ BNP Paribas Warsaw that should be regarded as the entity legally liable for Bank BGŻ BNP Paribas Gdańsk, since the former has legal personality and in fact it forms a single entity with the latter. It follows that the Dutch request can be transferred to the court having jurisdiction in Warsaw where Bank BGŻ BNP Paribas Warsaw has its seat.

Hence, the AG concludes that the provisions of Framework Decision 2005/214 […] must be interpreted as meaning that the concept of "legal person" is not an autonomous concept of EU law, but must be interpreted in the light of the law of the issuing Member State, as including an entity without legal personality such as the entity at issue in the main proceedings, provided that entity forms a single organisational unit with an entity that does have legal personality (para. 83(2)).

***X* (C-717/18) – Opinion delivered on 26 November (AG Bobek)**

On 26 November 2019, AG Bobek delivered his opinion in case Case C-717/18, *X (Hof van Beroep te Gent)*, which has given the Court of Justice an opportunity to clarify which point in time (and therefore the relevant national law) the national courts should take as a basis in order to rule on whether the minimum maximum threshold as set out in Article 2(2) EAWFD was met.

The case relates to an EAW for the execution of a custodial sentence issued by Spanish authorities against a Spanish rapper and composer. He had been sentenced for several offences amongst which glorification of terrorism and humiliation of the victims of terrorism. The requested person was arrested in Belgium after the Spanish Supreme Court rejected the appeal in cassation and issued an EAW with a view to executing the custodial sentence.

The EAW indicated that the offences fell under the category 'terrorism' and that the length of the

maximum custodial sentence for the offence was three years, following an amendment to the Spanish Criminal Code in 2015. Yet the offences that gave rise to the penalty were committed in 2012-2013, at a time when these offences were punishable, under the Spanish Criminal Code, by a prison sentence of maximum two years.

The Belgian Court refused to execute the EAW and made a request for a preliminary ruling. Although the Belgian court never questioned the fact that the offences were related to terrorism, it expressed doubts as to which version of the law of the issuing Member State is relevant to appreciate whether the threshold provided for in Article 2(2) EAW FD is met. According to that provision, the requirement of double criminality is waived for a series of offences, including terrorism offences, only if they are punishable by a custodial sentence of at least three years. Initially, the Belgian Court asked two questions, but the AG treated them together as they both seek to ascertain what relevant national law is applicable when the level of sanction has changed between the moment of the facts and the moment the sentence was pronounced.

To answer, AG Bobek proceeded to a thorough analysis of Article 2(2) of the EAW FD, interpreting the text, context and purpose of the Article as well as the principle of legality.

First, he underlines how crucial Article 2(2) EAW FD is since it waives the double criminality requirement under two conditions: (i) it is only with regard to the 32 offences listed in that provision that surrender pursuant to an EAW must be granted without verification of double criminality; and (ii) the offence on the basis of which the EAW was issued must be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years. However, he stresses that the wording of Article 2(2) does not offer a conclusive answer to the questions raised by the referring court, since it does not state explicitly the precise point in time at which those offences must be punishable on those terms. It was argued that the use of the present tense in the expression 'are punishable' indicates that the relevant time is the moment when the EAW is issued but legal language normally uses the present tense in establishing general rights or obligations, without making any statements on, or limiting in any way, the temporal applicability of such provisions. The use of the present tense in itself and in a rather generic and neutral form can hardly determine the interpretation of the provision. Additionally, it was argued that Article 2(1) and (2) should be interpreted differently because Article 2(1) refers to acts and Article 2(2) to offences. The use of the same word 'punishable' in both paragraph 1 and 2 of Article 2 would normally suggest that those paragraphs should be interpreted in the same way. The argument against that interpretation just outlined is based on a rather peculiar a contrario reasoning, which relies on the fact that the word 'punishable' is used to qualify two different nouns ('acts' and 'offences'). The AG estimates that a purely textual interpretation is inconclusive, and he thus turns to the context and purpose of the provision.

Secondly, for the contextual analysis of the internal system of Article 2, it is difficult to imagine how the assessment of the length of penalties referred to therein could be made without taking into account the law which is actually applicable to the case. AG Bobek disagrees with the Spanish and Belgian Governments, since according to him, the reason why Article 2(2) refers to 'offences' and not 'acts' has nothing to do with a desire on the part of the legislature to establish different temporal frameworks for the assessment of the conditions laid down in different paragraphs of one and the same provision. That logic is corroborated by the form annexed to the EAW FD read in conjunction with Article 8(1) of that instrument. As there was some discussions of the interpretative value of the annexed form, the AG takes the time to recall that annexes form an integral part of the legal act to which they are attached. Moreover, there is no

contradiction between the terms of the Annex containing the EAW form and the legal provisions of EAW FD. The modus operandi of the EAW FD strives for a balance between, on the one hand, mutual trust, and on the other, minimal residual control. The fact that Article 2(2) EAW FD relies on a system of self-declaration, only providing for a minimum and *prima facie* review by the executing judicial authority, does not mean that the underlying criteria to be used by the issuing judicial authority are not subject to any rules. The opposite is true: there are only two conditions, but those two conditions must be observed strictly by the issuing Member State.

Thirdly, regarding the logic and operability of the EAW system, AG Bobek asserts that the interpretation advocated by Spanish and Belgian Governments would lead to a rather counter-intuitive situation that would hinder the smooth functioning of the system of the EAW by encouraging additional requests for information. The undeniable virtue of the interpretation of Article 2(2) EAW FD as referring to the law actually applicable to the case is that it offers a foreseeable and stable frame of reference. In other terms, the AG considers that the relevant law applicable to appreciate whether the requirement of double criminality should be waived is the law applicable at the time the offences were committed. By contrast, the competing interpretation advocated would risk making a moving target of the legal framework underlying the EAW for the purposes of applying Article 2(2) EAW FD. It would mean that the legal framework taken into account could potentially be subject to repeated changes and there would be no limits to the potential to re-issue EAWs concerning the same offences under different legal frameworks.

The only remaining argument in this regard is an appeal to effectiveness. Regarding the analysis of its purpose, the EAW FD is the flagship of mutual trust in EU judicial cooperation in criminal matters. Its clear aim is to facilitate and accelerate judicial cooperation. Following that logic, it was argued that the reliance on the law in force in the issuing Member State at the time of issuing the EAW would best serve the objectives of the EAW FD. The AG clarifies that the effectiveness of the EAW FD is not the only value pursued by that instrument. The effectiveness of a specific EAW in an individual case (individual effectiveness) should not be mistaken for the effectiveness of the EAW FD (structural effectiveness).

To respond the arguments of the person requested, the AG examines the principle of legality and concludes that it is not relevant in the present case. Indeed, according to the case-law of the ECtHR, the principle of legality is not applicable to instances of international cooperation for the enforcement of criminal sanctions. Consideration of the principle of legal certainty lends further support to the interpretation of Article 2(2). Interpreting the wording of Article 2(2) in such a way that the relevant law for assessing the condition relating to the length of the penalty could subsequently change at any time would lead to an unpredictable situation, which it would be difficult to reconcile with the requirements of clarity and foreseeability imposed by the principle of legal certainty.

In conclusion, the AG proposes that the Court answer the question referred by Court of Appeal of Ghent, Belgium as follows: "Article 2(2) [EAWFD] shall be interpreted as referring, for the purposes of assessing the threshold maximum period of at least 3 years imposed therein, to the criminal legislation that is applicable in the issuing Member State to the specific criminal offence(s) to which the EAW relates."

ACADEMIC ACTIVITIES

VACANCY – CONTACT POINT FOR ITALY

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 Italy.

Candidates are invited to send a CV as well as a motivation letter (of maximum one page) **before 31 March 2020** 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.

PUBLICATIONS

Books

C. Fijnaut, *A Peaceful Revolution – The development of Police and Judicial Cooperation in the European Union*, Intersentia, 2019, 824 p.

C. Billet, A. Turmo (dir.), *La coopération opérationnelle en droit pénal de l'Union européenne*, Larcier, 2020 (forthcoming).

D. Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne*, 3rd ed., Groupe Larcier, 2020 (forthcoming)

D. Meyer, F. Kauff-Gazin, C. Haguenau-Moizard (eds), *Droit pénal de l'Union européenne – Etat des réalisations*, tome 2, Bruylant, June 2020 (forthcoming)

K. Ligeti, A. Marletta (eds), *Punitive Liability of Heads of Business in the EU: A comparative Study*, Kluwer-CEDAM, 2019, 366 p.

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

K. Ligeti, M-J Antunes, F. Giuffrida (eds), *The European Public Prosecutor's office at launch. Adapting national systems, Transforming EU Criminal Law*, Kluwer-CEDAM, 2020 (forthcoming)

L. Mancano, *The European Union and Deprivation of Liberty. A legislative Analysis from the Perspective of the Individual*, Hart Publishing, 2019, 272 p.

V. Mitsilegas, A. di Martino, L. Mancano (eds), *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis*, Hart Publishing, 2019, 496 p.

UPCOMING EVENTS

Kick-off meeting, EU law enforcement Network (EULEN), University of Ultrecht, 16-17 January 2020, Link

Conference, *Towards European criminal procedural law*, University of Nantes, 6-7 February 2020, Link

Conference, *Cross-border Investigations within the EPPO and with Non-participating Member States – Investigating and prosecuting PIF offences in cooperation with the EPPO*, ERA, Trier, 6-7 February 2020, Link

Conference, *Procedural Rights in the EU: Status Quo and the Need for Further Measures*, ERA Lisbon, 27-28 February 2020, Link

Conference, *Post-Brexit Cooperation in Criminal Justice*, ERA, Brussels, 3 March 2020, Link

Conference, *White-Collar Crime in the EU 2020*, ERA, Trier, 12-23 March 2020, Link

Conference, *Collection and Admissibility of Evidence in Europe (provisional title)*, ECLAN Annual Conference, University of Vienna, 16-17 April 2020, Link

Conference on *extradition and surrender*, Leiden University, 14-15 May 2020, Link

W.G. Hart Legal Workshop, '*New Perspectives on Jurisdiction and the Criminal Law*', Institute for Advanced Legal Studies, University of London, 29-30 June 2020, Link

Summer School, '*The EU Area of Criminal Justice*', ECLAN, 29th June - 3rd July 2020, Brussels, Link.