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Newsletter

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

Please note that due to the impact of the COVID-19 pandemic, no significant legislative changes have been recorded during the period January-June 2020 in the area of EU Criminal Law. The uncertainty caused by the pandemic context may also have had an impact on events that are expected to take place in the coming period. Despite a rigorous selection of confirmed events, we invite you to regularly check the status of upcoming events which are listed below using the links provided. More information on the impact of COVID-19 in the field of judicial cooperation in criminal matter is available on the dedicated page of the e-Justice portal.

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 10 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) 2017/2226 and Regulation (EU) 2018/1861

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'), Eurodac, and 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 borders 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. The trilogues on these files should start as soon as the European Parliament adopt its mandate for negotiations.

Prevention of the dissemination of terrorist content online (TCO)

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, priority was attributed to the adoption of the Regulation. Since the beginning of 2020, there have been four technical meetings, on 23 January, 3rd and 18 February and 3rd March, and five JHA Council meetings, on 17 and 31 January, 13 and 27 February and 5 March. A number of articles have been provisionally agreed. However, due to COVID-19, as for most legislative files, negotiations were suspended. The fourth political trilogue on the proposal, which had been planned for 18 March 2020, had to be postponed. The political trilogues will be resumed as soon as possible after the summer holidays, the German Presidency attaching high importance to achieving an agreement as soon as possible.

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:

1. 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;
2. 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.
3. c) make mandatory for service providers to designate a legal representative in the Union to receive, comply with and enforce decisions aimed at gathering evidence by competent national authorities in criminal proceedings.

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

Following the information provided by the Commission and on the basis of the deliberation held in the October 2018 Council, the scope was kept as originally proposed by the Commission. At this meeting the Council also held a policy debate on the proposed involvement of another Member State in the procedure via a notification to the judicial authorities of that Member State. 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 non-suspensive notification procedure for limited cases and only concerning content data.

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

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

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

In the European Parliament, the proposals have been assigned to the LIBE Committee. On 2 April 2019, the rapporteur, Birgit Sippel, presented to the LIBE Committee a series of working documents, addressing various issues linked to the proposal for a Regulation (safeguards and remedies, enforcement of European Preservation Order, relation with third country law, etc.).

Since the beginning of the new legislature, the European Parliament made progress on both proposals. The draft report on the Proposal for a Regulation was tabled before the LIBE Committee on 24 October 2019, and further amendments were submitted. The rapporteur reintroduced in its report an automatic notification of the executing State, which should be able to refuse the recognition or 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.

For both proposals, the Council is still awaiting the adoption of the EP's final position in order to move to trilogues and finalise the legislative process.

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 Additional Protocol to the Council of Europe Convention on Cybercrime**. In that respect, the Commission started negotiations with the US on 25 September 2019, and also participates in the negotiations within the Council of Europe on the protocol which should be completed by the end of this year. After four rounds of negotiations, it appears that an agreement on the internal EU rules remains a precondition for significant progress in the EU-US negotiations.

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 11th of January 2019 and the 13th February 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. The first trilogue meeting took place on 5 November 2019 and the second meeting on 12 December 2019. Another trilogue meeting took place on 26 June 2020 where an agreement has been reached on the text between the European Parliament and the Presidency of the Council.

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.

CASE LAW

JUDGMENTS

Case C-704/18, *Kolev and Others*, Judgment of 12 February 2020 (Fifth Chamber)

On 12 February 2020, the Fifth Chamber of the Court of Justice delivered its judgment in case C-704/18, *Kolev and Others* (hereinafter 'Kolev II'), which follows up on a previous judgment of the Court itself (Case C-612/15, *Kolev and Others*, Judgment of 5 June 2018 (Grand Chamber) hereinafter 'Kolev I').

The facts of the case were the following. Kolev and other Bulgarian customs officers were accused of having taken part in a criminal conspiracy. They allegedly demanded bribes from drivers crossing the Turkish-Bulgarian border in order for them to avoid customs inspections. After a complex pre-trial phase in which the case was moved back and forth between the public prosecution service and the competent court, the defendants required the latter to apply Articles 368 and 369 of the Bulgarian Code of Criminal Procedure (hereinafter 'the Bulgarian Code'). In essence and with some degree of simplification, these Articles provide that pre-trial investigations cannot exceed a maximum duration of two years. Once two years have passed, the competent court could give one last opportunity to the public prosecutors to finalise their investigations, repair the potential infringements of procedural safeguards occurred, and eventually decide whether to halt the prosecution or bring the case for trial. If the prosecutors do not comply with the additional time limit granted by the court, if they do not remedy those infringements, or if they commit further infringements, the court would terminate the criminal proceedings. In the criminal proceedings against Kolev and the other co-defendants, the competent Bulgarian court could have terminated the criminal proceedings in accordance with these rules but, with an order of May 2015, it instead applied Article 249 of the Bulgarian Code, which allowed the court to terminate the trial phase and refer the case back to the prosecutor. The latter was therefore put in a position to remedy some infringements of procedural requirements that had occurred in the investigations concerning Kolev and the other co-defendants. Those infringements concerned the right to information and the right to access to the materials of the case, which are subject to the rules laid down in Directive 2012/13/EU. The Bulgarian appeal court ruled that the court of first instance should have closed the proceedings in accordance with Articles 368 and 369 of the Bulgarian Code, and referred the case back to that court. Before deciding on the matter, the first instance court lodged a request for preliminary ruling, from which the Kolev I case originated.

In Kolev I, the Court of Justice clarified – among the other issues – at which stage of the procedure detailed information on the charges should be provided to the accused person within the meaning of Article 6(3) of Directive 2012/13 (right to information about the accusation) (para. 99).

As for Article 7(3) of the Directive (right of access to the materials of the case), the Court of Justice ruled that 'it is for the national court to ensure that the defence has been granted a genuine opportunity to have access to the case materials', and provided explanations concerning the stage of

the procedure at which such access should be granted (para. 100).

After Kolev I, the referring Bulgarian court stated that, in principle, it could not implement the above-mentioned principles laid down by the CJEU in Kolev I with regard to Directive 2012/13. The order of May 2015, in which that court had applied Article 249 of the Bulgarian Code – that is, it had closed the trial phase and referred the case back to the prosecutor –, had indeed become final in the meantime. Therefore, the Bulgarian court was not in a position to implement itself the operative part of the Kolev I judgement regarding the infringements of the rights to information and access to the case file, since the case had been sent back to the prosecutor. In order to overcome this obstacle, however, the Bulgarian court decided to set aside the national provision that prevents from modifying the decision to terminate the trial phase in accordance with Article 249 of the Bulgarian Code. This order of the Bulgarian court of first instance was annulled by the competent appeal court, which sent the case back to the referring court and requested it to terminate the trial phase and refer the case back to the prosecutor. The remitting court therefore claims to be in a position in which – despite the Kolev I judgment, which had empowered it to repair the violations of the defendants' rights – it cannot remedy itself the procedural irregularities as it is forced to send the case back to the public prosecutor. The court thus requires the CJEU to clarify whether Article 267 TFEU can be interpreted in a way that in fact allows a national court not to apply a preliminary ruling in the main proceedings.

Before examining the question, the Court of Justice first rephrases it as follows: 'the question referred must be understood as asking, in essence, whether, in the light of the Court's interpretation of Article 6(3) and Article 7(3) of Directive 2012/13 in […] the Kolev judgment, Article 267 TFEU must be interpreted as precluding a provision of national law which obliges the referring court to comply with an injunction, imposed on it by a higher court, to refer the case in the main proceedings back to the prosecutor, following the termination of the trial phase of the criminal proceedings, so that procedural irregularities committed during the pre-trial phase of those proceedings be remedied' (para. 36).

After reminding the established principle according to which national courts are obliged to give full effect to the interpretation of EU law provided by the CJEU in judgements in preliminary ruling proceedings, the Court of Justice first notes that the Kolev judgement simply clarified the stage at which the defendants' procedural safeguards shall be guaranteed. On the contrary, that decision did not specify which national authority should be in the position to defend and ensure such safeguards. This implies that not only national courts, but also national prosecutors, are required to act in a way that ensures a fair balance between the respect for the rights of the defence and the need to guarantee the effectiveness of the prosecution and punishment of offences affecting the Union's budget. Therefore, the Court of Justice did not consider at all the potential compatibility of Article 249 of the Bulgarian Code with EU law.

Against this backdrop, the Court added that the decision in Kolev I does not lay down specific and detailed rules for the implementation of its principles concerning the rights to information and access to the case file. This is instead left to the procedural autonomy of Member States; hence the national rules that can help to remedy the occurred infringements shall not be less favourable than those governing similar domestic situations (principle of equivalence) and shall not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness). As for the former, the Court argues that there is no indication whatsoever that the order of the Bulgarian appeal court to send the case back to the public prosecutor infringes the principle of equivalence. As for the principle of effectiveness, the CJEU notes that it is not

competent to solve disagreements between national courts or national competent authorities. In any case, what it is of the essence is that the principle of effectiveness ensures an effective protection of individual rights derived from EU law. It follows from it that 'the referring court cannot be required to comply with the injunction imposed on it by the appeal court to refer the case in the main proceedings back to the prosecutor if that injunction undermined the effectiveness of Article 6(3) and Article 7(3) of Directive 2012/13, as interpreted by the Court in the Kolev judgment' (para. 53; emphasis added). The Court however adds that there is no element to believe that, should the case be referred back to the prosecutor, the exercise of the rights set out in Articles 6(3) and 7(3) of Directive 2012/13 and the effectiveness of these provisions would be undermined, as long as those rules are applied in accordance with the CJEU's interpretation.

The Court therefore concludes that, in light of its interpretation of the Articles 6(3) and 7(3) of Directive 2012/13 set out in Kolev I, Article 267 TFEU must be interpreted as not precluding a provision of national procedural law which obliges the referring court in the case giving rise to that judgment to comply with an injunction, imposed on it by a higher court, to refer the case back to the prosecutor, after the termination of the trial phase of the criminal proceedings, for procedural irregularities committed during the pre-trial phase of those proceedings to be remedied, to the extent that those provisions of EU law, as interpreted by the Court in Kolev I, are respected in the context of the pre-trial phase of the criminal proceedings or in that of the subsequent trial phase thereof.

Case C-688/18 PPU, *TX and UW*, Judgment of 13 February 2020 (Sixth Chamber)

On 2 April 2020, the Sixth Chamber of the Court of Justice delivered its judgment in case C-688/18 PPU, concerning the interpretation of Article 8(1) and (2) of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The request for a preliminary ruling concerned, in particular, the procedural consequences of defendants' non-participation in hearings for reasons within or beyond their control, as the referring court had doubt on whether national legislation complied with the Directive.

The Specialist Prosecutor's Office of Bulgaria charged TX and UW with participation in a criminal organization. In compliance with the Bulgarian legislation, TX and UW were informed of the conditions under which their trial could take place in their absence and of the fact that, in such a case, the final judgment would be binding on them and could not be challenged on the ground that they had not personally participated in the trial. At the trial, TX did not appear at the hearing held on 16 May 2018 because he was ill, while UW decided not to participate in that hearing. Both TX and UW were defended by their lawyers during the hearing and were sent copies of its transcripts. TX and UW appeared at the next hearing and, after consulting with their lawyers, stated that they were aware of the transcript of the hearing of 16 May 2018, including the evidence taken in their absence, and did not wish for that evidence to be taken again with their participation. According to the law, the steps taken in their absence were therefore not repeated. TX again did not appear at a hearing on 1 October 2018 because of illness and was represented by his lawyer. TX was sent a copy of the transcript of that hearing and, when he appeared at the next hearing, asked to repeat the examination of a witness, which was carried out in his absence. The court granted that request and conducted a further examination of that witness, giving TX the opportunity to fully participate and ask all the questions he wished to ask.

The reasoning of the Court provides for an interpretation of Directive 2016/343 and the right that defendants must enjoy to be present at their

trial. The Courts starts its arguments by underscoring that this right is not absolute and, under certain conditions, can be expressly or tacitly waved by the same suspects and accused persons. However, the Court states that this must happen "unequivocally" (para. 32). The two alternative condition upon which a trial can be held in the absence of the defendant, as set forth in Article 8(2) of the Directive, are that the defendant has been informed in due time of the trial and of the consequences of non-appearance (Art. 8(2)(a)), or that, having been informed of the trial, the defendant is represented by a mandated lawyer appointed by the person of the State (Art. 8(2)(b)).

The Court stresses that the right to participate in one own trial is based on the right to a fair trial, as enshrined in Article 6 of the ECHR as well as in Articles 47 and 48 of the Charter. Recalling the case-law of the ECtHR, the Court states that also the Strasbourg Court allows for the defendants to waive their right to take part in hearings, provided that this has been established unequivocally and minimum safeguards are put in place. In addition, the waiver cannot "run counter to any important public interest" (para. 37).

Referring to the main proceedings, the Court notes that, on the one hand, TX and UW were informed, according to the law, of the conditions in which the trial could take place if they do not appear without a valid reason and, on the other hand, their lawyers participated in all the hearings. In the case of UW, who deliberately waived his right to appear at one hearing, the Court underlines that both conditions laid down in point (a) and (b) of Article 8(2) of the Directive were complied with. At the same time, minimum proportionate safeguards were ensured and the waiver did not run counter to any important public interest. Concerning the situation of TX, who was unable to appear at hearings of his trial for a reason beyond his control, the Court examines both the case in which TX did not want to repeat the steps taken in his absence and the one where he asked to repeat the examination of the witness. In the first occasion, the Court observes that the fact of being informed of the steps taken during that hearing and having TX expressly stated that he did not want to have them repeated constitute an "unequivocal waiver of the right to be present at the hearing concerned" (para 46). Finally, referring to the situation in which FX had the examination of the witness repeated in his presence with his full participation, the Court affirms that in such a case FX "cannot be regarded as having been absent from his trial" (para. 48).

Therefore, the Court concludes that the rules provided for in Bulgarian legislation and concerning the participation of defendants in their trial, as applied in the main proceedings by the Bulgarian court, comply with Article 8(1) and (2) of Directive 2016/343.

Case C-717/18, *X*, Judgement of 3 March 2020 (Grand Chamber)

On 3 March 2020, the Grand Chamber delivered its judgment in Case C-717/18, *X*, which has given the Court of Justice the 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) of the Framework Decision on the European Arrest Warrant (EAW) is met. According to this provision, the requirement of double criminality is waived for a series of offences, including terrorism offences, only if they are punishable, in the issuing Member State, by a custodial sentence for a maximum period of at least three years.

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 in Spain for the offences of glorification of terrorism and humiliation of the victims of terrorism. The requested person was arrested in Belgium upon execution of an EAW issued by the Spanish National High Court (Audiencia Nacional). 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 facts for which the requested person had been sentenced 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 competent Belgian court of first instance, in its capacity as executing authority, took into account the version of the legislation that was in force at the time when the facts were committed and, as the threshold of three years was not met, assessed whether those facts were also subject to criminal sanctions in Belgium. As the dual criminality test failed, the court refused to execute the EAW. The competent Belgian prosecuting authority appealed this decision and the court of second instance lodged a request for a preliminary ruling, in order to clarify which version of the law of the issuing Member State was relevant to appreciate whether the threshold provided for in Article 2(2) of the EAW Framework Decision was met. Should the version in force at the time of the issuing the EAW be taken into account (that is, the version providing for a minimum maximum penalty of three years of imprisonment), no double criminality test should be carried out. On the contrary, if the executing authority had to base its decision on the version of the Spanish legislation that was in force at the time of the committed offences, as the Belgian court of first instance argued, the execution of the EAW would first require an assessment of double criminality. The Grand Chamber endorsed the latter approach.

First, the fact that Article 2(2) of the EAW Framework Decision uses the present indicative ('The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years…') is irrelevant for the legal question raised. In line with the Advocate General's Opinion, the Court argues that the present indicative is usually used to express the mandatory nature of a provision and, in any case, does not allow to infer any indication that is relevant for assessing the conditions of application of Article 2(2).

Second, Article 2(1) of the EAW Framework Decision allows the issuing of an EAW for the purpose of enforcing a decision to convict when the sentence or detention order provides for a penalty of at least four months of imprisonment. The minimum of four months, the Court clarifies, is to be determined by looking at the sentence actually imposed in accordance with the law of the Member State applicable to the facts giving rise to that decision and 'not to the sentence which could have been passed under the law of that Member State applicable at the date of issue of that arrest warrant' (para 23). The same rationale – that is, the relevance of the issuing Member State's legislation that was in force at the time of the facts for the surrender procedure – applies to Article 2(2), which provides for a minimum threshold of penalty that allows the executing authority not to carry out any dual criminality test. A different interpretation would undermine the consistent application of the two provisions.

Third, Article 8 of the EAW Framework Decision supports the stance endorsed by the Court. In particular, Article 8(1)(f) provides that the EAW form, which is included in the Annex to the EAW Framework Decision, shall mention 'the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State'. In turn, section (c) of that form requires to specify the 'maximum length of the custodial sentence or detention order which may be imposed for the offence(s)' or the 'length of the custodial sentence or detention order imposed'. The Court argues that such phrasing, and especially the use of the term 'imposed', implies that the legislation that shall be evaluated by the executing authority in accordance with Article 2(2) of the EAW Framework Decision is the legislation that was in force at the time of the

facts: it is such legislation – and not the legislation in force at the time when the EAW is issued – that determines which sentence has been imposed or could be imposed on the person concerned.

Fourth, the purpose and rationale of the EAW itself further support the Court's conclusion. Since the aim of the EAW Framework Decision is to ensure as much automaticity as possible in the execution of requests for surrender, it would be unreasonable to require the executing authority to assess whether the legislation in force at the time of the facts, which is mentioned in the EAW form, has changed in the meantime. This would also create uncertainty and run counter to the requirements of foreseeability that stem from the principle of legal certainty.

Fifth, the Court warns that, should a different position be adopted, Member States would be given the untenable power to amend national legislation in a way that would allow them to 'bring within the scope of [Article 2(2) of the EAW Framework Decision] persons who, at the date of the acts constituting the offence, could have benefitted from verification of the double criminality of the act' (para 39).

The Court adds a final remark that seems somehow intended to assuage the concerns of Member States and judicial authorities about the effectiveness of the EAW system, which is not undermined by the present decision of the Court. Even when the threshold of three years mentioned in Article 2(2) of the EAW Framework Decision is not met, the EAW can still be executed. However, the executing authority shall first undertake the dual criminality test.

Therefore, the Court concludes that Article 2(2) of the EAW Council Framework Decision must be interpreted as meaning that, in order to ascertain whether the offence for which an EAW has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the EAW was issued.

Case C-183/18, *Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB)*, Judgment of 4 March 2020 (First Chamber)

On 4 March 2020, the First Chamber of the Court of Justice delivered its judgment 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 implements 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.

The Court addresses the second question first. As for its first limb – that is, whether or not the notion of 'legal person' shall be construed as an autonomous concept of EU law – the Court argues that the structure and rationale of the Framework Decision make it clear that the definition of crimes and the components of criminal liability are defined by the law of the issuing Member States. It is therefore according to such legislation that the notion of 'legal person' shall be interpreted, with the further consequence that a decision imposing a financial penalty on a legal person shall be recognised and executed in the executing Member State even if the latter's legislation does not contemplate corporate criminal liability. This is coherent with the purpose of Framework Decision 2005/214/JHA, which does not aim to harmonise national criminal legislation but rather to facilitate the mutual recognition of decisions that impose financial penalties. As for the second limb of the question, the Court argues 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.

The CJEU therefore concludes that, for the purposes of Framework Decision 2005/214/JHA, the concept of 'legal person' must be interpreted in the light of the law of the issuing Member State.

Moving on to the first question, the Court restates some principles that it had already singled out in previous cases, including *Pupino* and *Popławski*. Since framework decisions do not have direct effect, national law that is incompatible with them cannot be disapplied. However, their binding nature requires that national authorities shall interpret national legislation in conformity with framework decisions. Such interpretation shall neither lead 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) nor to an interpretation of national law that is contra legem. However, national authorities cannot claim that they are prevented from interpreting national provisions in conformity with a given framework decision only because the established interpretation of such national provisions by courts and scholars is not consistent with EU law. Against this backdrop, the Court makes some considerations to help the referring court in its task to determine whether national law (Polish law, in this case) can be interpreted in a way that is compatible with EU law.

First, the notion of 'offender', which is used in Polish implementing legislation, can refer to both natural and legal persons, as was also claimed by the Polish government. Second, as the Advocate General had argued, in these circumstances there is no need to interpret the notion of 'author' in the same way as in substantive criminal law, that is, in a way that would make it impossible to impose a financial penalty on legal persons. Third, the Court adds that the case file suggests that a number of Polish judges have already executed Dutch decisions imposing financial penalties on legal persons for road traffic offences. Finally, such an interpretation of Polish legislation would not aggravate the liability of legal persons: in the main proceedings, such liability follows from Dutch legislation, so that the issues to be addressed in Poland only concerns the enforcement of the penalty.

On the first question, the Court therefore concludes that the provisions of Framework Decision 2005/214/JHA must be interpreted as meaning that they do not oblige national courts to disapply incompatible national legislation since

they do not enjoy direct effect. However, the competent executing authority has to interpret national law to the greatest extent possible in conformity with those provisions in order to ensure a result that is compatible with objective sought by that Framework Decision.

Case C–314/18, *SF – Rechtbank Amsterdam*, Judgement of 11 March 2020 (Fourth Chamber).

On 11 March 2020, the Fourth Chamber of the Court delivered its judgement in Case C-314/18, which concerns the interpretation of Article 1(3) and Article 5(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter the "EAW FD"), as well as that of Articles 1(a) and (b), 3(3) and (4), 8(2) and 25 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or detention orders for the purpose of their enforcement in the European Union (hereinafter "FD 2008/909").

In a case where the surrender of a Dutch citizen is sought by the UK for the purpose of criminal proceedings, the referring court is uncertain whether the issuing Member State, as the State in which the judgment will subsequently be delivered, can, under the guarantee provided for in Article 5(3) of the EAW FD, make the return of the person concerned to the executing Member State subject to the condition, not only that the decision imposing a custodial sentence or detention order has become final, but also that any other proceedings relating to the offence in respect of which surrender was requested have been definitely closed.

Therefore, the Court is invited to clarify the time frame in which the requested person must be returned to the executing state of his residence within the meaning of art. 5(3) of the EAW FD.

Moreover, as to a letter from UK authorities stating that "a transfer under [EAW FD] does not allow the Netherlands to alter the duration of any sentence imposed by a [United Kingdom] court", the referring court raises the question whether the executing Member State, once it has surrendered the person concerned on the basis of the guarantee set out in Article 5(3) of the EAW FD, may, on the basis of Article 25 of FD 2008/909, adapt the custodial sentence or detention imposed on that person in the issuing Member State beyond what is allowed under Article 8(2) of FD 2008/909.

The Court first recalls that the EAW FD aims, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, at facilitating and accelerating judicial cooperation. To reach this goal, a high level of trust must exist between the Member States. Accordingly, while execution of the EAW constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly. However, to increase the chances of social reintegration of the national or resident of the executing Member State who is subject of an EAW, the EAW FD allows him to serve the custodial sentence or detention order in that State.

The Court further recalls that the return of the person concerned may occur only after the decision has become final, within the meaning of CJEU's case-law. The Court, in the *Van Vemde* case, indeed, underlined the particular importance attached to the unchallengeable nature of that judgment, excluding decisions which are subject to appeal. Once that sentencing decision has become final, however, the return of the person should occur as soon as possible.

The Court then states that, in a situation where a final decision under FD 2008/909 has been issued but the person is still required to be present in the

issuing State by reason of other procedural steps forming part of the criminal proceedings relating to the offence underlying the EAW, the objective of facilitating the social rehabilitation of the person concerned must be balanced with both the complete effectiveness of criminal proceedings and the safeguarding of the procedural rights – enshrined in Articles 47 and 48 CFREU – of the person concerned.

It follows that, when defining the time of the transfer of the person sought to the executing State after the custodial decision has been issued, the issuing judicial authority shall assess whether concrete grounds relating to the safeguarding of the rights of defence of the person concerned or the proper administration of justice make his presence essential in the issuing Member State, after the sentencing decision has become final and until such time as a final decision has been taken on any other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW. However, this balancing exercise must not have the effect of systematically and automatically postponing the return of the person concerned. The ruling of the Court therefore differs from the opinion of AG Pikamae who had concluded that "having regard to the objective pursued by that provision, namely to facilitate the social reintegration of convicted persons, the competent authorities of the issuing Member State must however do everything within their power to ensure that such a return takes place within as short a time as possible" (point 91).

As to the second question referred, the Court recalls that Article 8 of the FD 2008/909 lays down strict conditions governing the adaptation, by the competent authority of the executing State, of the sentence imposed in the issuing State. Therefore, interpreting Article 25 of that Framework Decision as allowing – when a person is surrendered on the basis of the guarantee set out in Article 5(3) of the EAW FD – to go beyond these conditions would entirely undermine the principle of mutual recognition as consistently delimited by the Court's case-law.

Accordingly, the executing State cannot refuse the surrender of the person concerned on the mere ground that the issuing Member State issues a reservation with regard to its possibility to adapt the sentence that may be imposed in the latter.

Case C-659/18, *VW*, Judgment of 12 March 2020 (Second Chamber)

On 12 March 2020, the Second Chamber of the Court of Justice delivered its judgment in case C-659/18, concerning the interpretation of Article 3(2) of Directive 2013/48 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, as well as of Article 47 of the Charter. The request for a preliminary ruling was issued by the Court of Preliminary Investigation of Badalona (Spain), which had doubts as to whether the case-law of the Spanish Constitutional Court and the Supreme Court complies with Article 3(2) of that directive and Article 47 of the Charter.

On 20 April 2018, the Spanish police filed a report against VW for driving without license and forgery of documents. Criminal proceedings concerning these facts were brought before the referring court, which on 27 September 2018 issued an arrest warrant against VW after several unsuccessful attempts to summon him. According to Spanish law, the appearance of the person under investigation is an obligation, as in the case of persistent absence of that person at the conclusion of the investigation, the hearing cannot be held and judgment cannot be given, therefore paralyzing the proceedings. On 16 October 2018, the referring court received a letter from a lawyer stating that she was entering an appearance in the proceedings on behalf of VW. However, according to the case-law of the Spanish Constitutional Court and the Supreme Court, Article 24 of the Spanish Constitution and Article 118 of the Code of

Criminal Procedure allow for the right of access to a lawyer to be subject to the obligation for the investigated person to appear before the court.

The referring court asks, in essence, whether Article 3(2) of Directive 2013/48, read in the light of Article 47 of the Charter, precludes national legislation, as interpreted by national case-law, from allowing that the exercise of the right of access to a lawyer may, at the pre-trial stage, be delayed until the suspect or accused person appears in person before the investigating judge.

Before replying to the referred question, the Court addresses the applicability of Directive 2013/48 to the case at hand as well as the application of and the possible derogations from the right of access to a lawyer in the main proceedings. Concerning the applicability of the directive, Article 2(1) states that it applies to suspects or accused persons in criminal proceedings, from the time when they are made aware by the authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. The situation of VW, against whom Spanish authorities initiated criminal proceedings and issued an arrest warrant, falls therefore within the concept of a "suspect" made aware of the criminal proceedings. The Court stresses, in this regard, that what is relevant is that the Spanish authorities took procedural steps aiming at informing VW of his status of suspect and, since he instructed a lawyer to represent him in court, VW received this information, no matter how this information reached him.

As regards to the application and possible derogations of the right at issue under Directive 2013/48 in the main proceedings, the Court begins its reasoning by observing that Article 3(2) of that directive requires that suspects and accused persons have access to a lawyer without undue delay. In particular, the Court recalls that the access to a lawyer must be ensured, inter alia, "before they are questioned by the police or by another law enforcement or judicial authority" (Article 3(2)(a)) and "where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court" (Article 3(2)(d)). In the case at hand, therefore, VW's right of access to a lawyer must be, in principle, guaranteed.

The Court then moves on to ascertain whether Directive 2013/48, read in the light of Article 47 of the Charter, allows Member States to derogate from the right of access to a lawyer in the case where the suspect has been summoned to appear before an investigating judge and has failed to appear. The Court points out that, under Article 3(5) of the directive, Member States may temporarily derogate from the application of the right at issue "where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty". Moreover, according to paragraphs (a) and (b) of Article 3(6), a temporary derogation may also occur "where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person", or "where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings". Underscoring that the list of derogating circumstances provided for in Article 3(5) and (6) of the directive is exhaustive and must be interpreted strictly, the Court affirms that "the request for a preliminary ruling does not mention any of the circumstances referred to in Directive 2013/48" (para. 41).

Therefore, the Court concludes that Article 3(2) of Directive 2013/48, read in the light of Article 47 of the Charter, precludes national legislation from delaying the exercise of the right of access to a lawyer at the pre-trial stage for the reason that the suspect or accused person has failed to appear before an investigating judge.

Case C-234/18, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo – BP e.a.*, Judgement of 19 March 2020 (Third Chamber)

On 19 March 2020, the Third Chamber of the CJEU issued its Judgement in Case C-234/18. In this case, the Court had the opportunity to clarify the scope of the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (hereinafter the "FD 2005/212"), as amended by the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (hereinafter the "Directive 2014/42").

In the referred case, the Bulgarian Commission for combatting corruption has instituted proceedings to freeze assets said to have been obtained illegally by BP and others. The referring court observed that, in its national law, civil proceedings related to the confiscation of assets such as those in question are brought irrespective of whether the person under inquiry has been convicted by final judgment. The referring court is therefore unsure of the compatibility of that law with the minimum standards for asset confiscation laid down by Directive 2014/42, which provides that confiscation may be effected upon assets that have been obtained by way of a criminal offence for which the offender has been convicted by final judgment. In those circumstances, the referring court decided to stay the proceedings and refered six questions to the CJEU.

While the Bulgarian (and Czech) government claims to the inadmissibility of the case because the deadline to implement the Directive 2014/42 did not pass when the proceedings have been initiated before the referring court, the Court recalls that "where it is not obvious that the interpretation of an EU provision bears no relation to the facts of the main action or its purpose, the objection alleging the inapplicability of that provision to the case in the main action does not relate to the admissibility of the request for a preliminary ruling, but concerns the substance of the questions" (CJEU, *Slovenské elektrárne*, 12 December 2019 (Fifth Chamber), C-376/18, pt. 29).

In that regard, Advocate General Sharpston stated that, although the Directive 2014/42 cannot be relied upon before the national courts in respect of proceedings initiated before the period prescribed for its implementation, the Directive 2014/42 amended the FD 2005/212 from the date on which the directive entered into force as provided for by Article 9(1) of Protocol No 36 on transitional provisions.

Moreover, the Court, recalling Advocate General's Opinion, states that the Directive 2014/42 only partially amended the FD 2005/212. Therefore, the Court considers that the provisions of the latter are necessarily part of the elements of EU law which, having regard to the purpose of the main proceedings and the information provided by the national court, must be taken into account by the Court so that the latter may respond in a useful manner to the questions referred.

The Court then rephrases the question referred as whether the FD 2005/212 is to be interpreted as opposing a Member State's law which provides that the confiscation of illegally acquired assets is ordered by a national court at the end of a procedure which is not subject either to the finding of a criminal offense or *a fortiori* to the conviction of the alleged offenders.

Having regard to the objectives and provisions of the FD 2005/212, especially its article 2, the Court asserts that the Framework Decision does not apply to the confiscation of instrumentalities and proceeds from illegal activities which are ordered by a court of a Member State in the course or as a result of a procedure which does not relate to the detection of criminal offences.

Moreover, the article 2(2) of the FD 2005/212, which provides that Member States may use procedures other than criminal proceedings to deprive the author of tax offenses of the proceeds of the offence, does not prevent Member States to establish confiscation procedure other than criminal proceedings in cases not relating to tax offenses. Such an interpretation would go beyond the scope of the minimal provisions laid down by the FD 2005/212.

Furthermore, although the confiscation proceeding such as the one pending before the referring court is initiated by the Commission for combatting corruption when the latter is informed that a person is accused of having committed criminal offences, this procedure is of a civil nature and coexists, in national law, with a criminal law confiscation regime.

Consequently, the Court concludes that the FD 2005/212 must be interpreted as not precluding a Member State's law which provides that the confiscation of illegally acquired proceeds is issued by a national court at the end of a procedure which is not subject either to the finding of a criminal offence or, *a fortiori*, to the conviction of the alleged perpetrators of such an offence.

Case C-2/19, *A. P.*, Judgment of 26 March 2020 (First Chamber)

On 26 March 2020, the First Chamber of the Court of Justice delivered its judgment in case C-2/19, which concerns the interpretation of Framework Decision 2008/947/JHA (FD 2008/947). This Framework Decision introduces a specific mutual recognition mechanism for judgments or probation decisions imposing probation measures or alternative sanctions. In particular, the mechanism allows for shifting the responsibility for the execution and supervision of these measures or sanctions from the Member State that issued the sentence (issuing Member State) to the Member State in which the sentenced person resides (executing Member State).

The request for a preliminary ruling refers to the recognition in Estonia of a judgment of the City Court of Riga (Latvia) by which A. P. was sentenced to a suspended term of three years' imprisonment. The issue at hand concerns whether the scope of application of FD 2008/947 covers a suspended sentence subject to the sole condition not to commit a new criminal offense during the probation period.

Before analyzing the case in its substance, the Court rejected the argument of the Latvian Government on the inadmissibility of the request because founded on an incorrect interpretation of Latvian law. The Court declares the request admissible recalling its past case law, according to which "questions relating to EU law enjoy a presumption of relevance" (para. 26), and considering the Latvian Government's argument as not sufficient to rebut that presumption.

Moving to the substance of the case, the Court takes a different view from the opinion of the AG and determines that the obligation not to commit a new criminal offense during a probation period must be considered a probation measure within the meaning of FD 2008/947. The reasoning of the Court starts with recognising this kind of obligation is not expressly mentioned among the probation measures and alternative sanctions listed in Art. 4(1) of FD 2008/947. Notwithstanding, the Court affirms that the category of measures referred to as "instructions relating to behavior", mentioned in letter d) of the cited provision, must be read as encompassing the obligation not to commit a criminal offense.

The Court reaches this conclusion through a number of arguments stemming from the analysis of the text, legislative context, and purpose of the Framework Decision.

First, as a textual argument the Court states that the obligation not to commit new criminal offences may fall under the probation measure referred to in Art. 4(1)(d) of FD 2008/947 as "instructions relating to behavior", in accordance with the use of these terms in everyday language.

Second, the Court deems such interpretation consistent with the legislative context of Art.

4(1)(d) of FD 2008/947. On the one hand, although the core of the mechanism established by the Framework Decision relates to the supervision of probation measures, including the obligation not to commit a new offense in the scope of the provision would not make it the only probation measure of Art. 4(1) of FD 2008/947 not to require periodical supervision by a specific authority. Indeed, several other measures referred to in the same article do not have to be specifically supervised, such as the obligations not to enter certain localities, places or defined areas, to avoid contact with specific persons, and to avoid contact with specific objects, as referred to in Article 4(1)(b), (f) and (g). On the other hand, Art. 14(1) of the Framework Decision provides the authorities of the executing Member State, which recognized the judgement or the probation decision, with jurisdiction over all decisions in the case of the commission of a new criminal offense, such as the modification of a probation measure, modification of the duration of the probation period, or revocation of the suspension. Excluding the obligation not to commit a new criminal offense from the list of Art. 4(1), and therefore not allowing for the recognition of a simple suspended sentence, would prevent the authorities of the Member State of residence from taking such decisions. The Court stresses that this restrictive interpretation leads to the following "paradoxical result" (para. 50). If the same obligation not to commit a new crime, imposed with a suspended sentence, were coupled with another obligation listed in Art. 4(1) FD such as to "inform a specific authority of any change of residence" (Art. 4(1)(a) of FD 2008/947), then the recognition of the judgment would be allowed and the authorities of the Member State of residence would be entrusted with the subsequent jurisdiction and powers of supervision.

Third, the Court states that by including simple suspended sentences among the judgements covered by FD 2008/947 would contribute to attain the three objective that are the purpose of the Framework Decision, namely "facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public by preventing recidivism, and facilitating the application of suitable probation measures and alternative sanctions, in the case of offenders who do not live in the Member State of conviction" (para. 52).

As a closing remark, the Court stresses that Art. 2(2) of FD 2008/947 specifies that the probation measures imposed along with the suspended sentence must be included in the text of the judgment or the separate probation decision. The authority of the issuing Member State has to specify the conditions on which the suspension of the execution of the sentence depends, in order to allow the executing Member State to identify the imposed probation measures based on the judgement or the probation decision.

The Court therefore concludes that Art. 1(2) and Art. 4(1)(d) of FD 2008/947 must be interpreted as meaning that recognition of a judgment imposing a custodial sentence suspended upon the sole condition that the sentenced person comply with an obligation not to commit a new criminal offence during a probation period falls within the scope of the Framework Decision. It leaves then to the referring court to establish whether the mentioned obligation results from the judgement of the main proceedings.

Case C-897/19 PPU, *I.N.*, Judgment of 2 April 2020 (Grand Chamber)

On 2 April 2020, the Grand Chamber of the Court of Justice delivered its judgment in case C-897/19 PPU, concerning the interpretation of Article 18 TFEU and the Agreement between the EU and Iceland and Norway on the surrender procedure between the Member States and the two EFTA States (Agreement on surrender proceedings). The ruling defines the obligations of a Member State in the case of a request of extradition from a third country targeting a national of an EFTA State.

I.N. is a Russian national who acquired the Icelandic nationality on 19 June 2019, after having been granted the status of refugee in that country on 8 June 2015. Iceland is an EFTA State and is party to the Agreement on the European Economic Area (Agreement on the European

Economic Area). On 30 June 2019 I.N. was arrested by the Croatian authorities while on holiday, in execution of an international wanted persons notice issued on 20 May 2015 by Interpol's Bureau in Moscow. On 6 August 2019, the Russian authorities sent a request of extradition for I.N., in accordance with the provisions of the European Convention on Extradition. Since no extradition treaty exists between Croatia and Russia, the Croatian constitution precludes extradition of its own nationals, but not non-nationals. The embassy of Iceland forwarded a note from the Icelandic Government asking that I.N. be guaranteed safe passage to Iceland with a minimum of delay.

On 30 September 2019, I.N. lodged an appeal to the Supreme Court of Croatia, challenging the decision of the County Court of Zagreb to execute the request of extradition to Russia. I.N. stated that in case of extradition there would be a concrete risk of being subjected to torture and inhuman and degrading treatment. In the appeal, he stated that his status as refugee in Iceland had been recognized taking into account precisely the specific criminal proceedings in Russia upon which the request of extradition is based.

The Supreme Court of Croatia, before examining whether there is a real risk of I.N.'s fundamental rights being violated by his extradition to Russia, refers a request for a preliminary ruling in order to know whether it has the obligation to inform Iceland about Russia's request of extradition so that that State can seek the surrender of I.N. The referring court, in essence, asks whether the principles set in the *Petruhhin* case oblige to interpret EU law, including the EEA Agreement, as meaning that when a Member State, to which a national of an EFTA State has moved, receives an extradition request from a third State, it must inform that EFTA State of that request and, in the case of a request, surrender that national in accordance with the Agreement on surrender proceedings in order to prosecute that person for offences and avoid impunity.

Upon request of the referring court, the case was dealt with under the urgent preliminary ruling procedure. The case was assigned to the Grand Chamber, which replied in the positive to the question referred by the referring court. The Court firstly starts its arguments with some preliminary considerations on the question referred, then examines the applicability of EU law in the case at issue, and finally assesses the possible justifications to the restriction on the freedom to provide services.

The Court begins its reasoning recalling the *Petruhhin* case, where it was established that "Articles 18 and 21 TFEU must be interpreted as meaning that, when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it" through a European Arrest Warrant (para. 37). According to that ruling, the surrender has to be granted under the condition that the Member State has jurisdiction to prosecute its national for the offences committed abroad.

The Court considers whether the rules set in *Petruhhin* apply not only to EU citizens, but also to Icelandic nationals. The Court observes that the prohibition of "any discrimination on grounds of nationality," referred to in Article 18 TFEU, is not intended to apply to cases of a possible difference in treatment between nationals of Member States and those of third States (para. 40). Nonetheless, as Iceland applies the Schengen acquis and is party to the EEA Agreement, the Court notes that in order to ascertain whether the *Petruhhin* principles may apply to the main proceedings, it is necessary to take into consideration not only the relevant European law norms, but also the EEA Agreement and its interpretation.

Referring to the applicability of EU law to the case at hand, the Court observes that when there is no extradition convention between the EU and a third State, the matter falls within the competence of the Member States, but the latter are required to exercise that competence in accordance with EU law. At the same time, as an international agreement concluded by the EU, the EEA Agreement is, in principle, governed by EU law. In that perspective, it is for the Court to "ensure that the rules of the EEA Agreement which are identical in substance to those of the FEU Treaty are interpreted uniformly within the Member States" (para. 50). The fact that I.N. entered Croatia in order to take his holiday there falls within the freedom for the recipients of services to go to another Member State in order to receive a service, as referred to in Article 36 of the EEA Agreement. This provision, according to the Court, must be given the same interpretation as Article 56 TFEU. It follows from the foregoing that Croatia, in the case at hand, is "obliged to exercise its competence in respect of extradition to third States in a manner that complies with the EEA Agreement, in particular Article 36 thereof ensuring the freedom to provide services" (para. 54).

In the last part of its reasoning, the Court analyses the possible justifications for the restriction on the freedom to provide services. The Grand Chamber underscores that the unequal treatment, established by the Croatian law, allowing in cases as the one at hand for the extradition of an EFTA national but not a Croatian national, gives rise to a restriction of the freedom enshrined in Article 36 of the EEA Agreement. The Court admits such restriction "only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions" (para. 59). Preventing impunity through the extradition of people who have committed an offence, continues the Court, must be considered legitimate. However, a restriction of the freedom laid down in Article 36 of the EEA Agreement can be justified only by measures that are proportioned and necessary to the aim they seek to attain, therefore only if the objective cannot be attained by less restrictive measures.

The applicability of EU law to the case at issue entails that the provisions of Article 19(2) of the Charter, prohibiting the extradition to a State where there is a serious risk that the person would be subjected to inhuman or degrading treatment, are applicable to Russia's request for the extradition of I.N. Therefore, according to the Court, if I.N. invokes a concrete risk of inhuman or degrading treatment if extradited, the Croatian court must verify, before carrying out that extradition, whether the extradition may prejudice the rights referred to in Article 19(2) of the Charter. The Grand Chamber states that, for the purposes of that verification, the referring court must take into consideration the fact that I.N. was granted asylum by Iceland on the ground of the risks of suffering inhuman and degrading treatment in his country of origin in reference to the specific proceedings that originated the extradition request. The Court specifies that "the existence of a decision of the Icelandic authorities granting that person asylum must thus lead the competent authority of the requested Member State, such as the referring court, to refuse extradition, pursuant to application of Article 19(2) of the Charter" (para. 68).

In case the referring court considers that Article 19(2) of the Charter does not preclude the execution of the extradition request, the Grand Chamber adds that it will remain necessary to examine whether an alternative and less prejudicial means exists, such as a surrender on I.N. to Iceland for prosecution, which allows to effectively avoid impunity. The Court therefore states that the ruling adopted in *Petruhhin* must be applied by analogy to the case at hand, considering the proximity of the legal systems of EFTA States to those of Member States, the degree of mutual confidence expressed in the preamble of the Agreement on the surrender

procedure, and their capacity to guarantee a fair trial.

Therefore, the Court concludes that, given the existence of a surrender agreement between an EFTA State and the European Union, when a national of that EFTA State, who was granted asylum by the same State before acquiring the nationality, has moved to a Member State and the latter receives an extradition request from a third State pursuant to the European Convention on Extradition, it is for the competent authority of the Member State to verify that the extradition would not infringe the rights covered by Article 19(2) of the Charter. The grant of asylum must be a particularly substantial piece of evidence in the context of that verification. In any event, before considering executing the request for extradition, the requested Member State is obliged to inform the EFTA State and, upon request of that state, surrender the person to it, in accordance with the provisions of the surrender agreement, provided that that State has jurisdiction to prosecute that person for the offences committed abroad.

Case C-615/18, *UY – Staatsanwaltschaft Offenburg*, Judgement of 14 May 2020 (Fifth Chamber)

On 14 May 2020, the Fifth Chamber of the CJEU delivered its Judgement in Case C-615/18. On this occasion, the Court took the opportunity to further develop its recent case-law regarding the interpretation of article 6 of the Directive 2012/13/UE of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (Directive 2012/13).

The request for preliminary ruling was lodged by a German court, which expressed doubts about the compatibility of German law with the Directive. The German Code of Criminal Procedure allows to order that the accused person in case he/she is not residing in the country, "authorises a person residing within the jurisdiction of the competent court to accept service". In the referred case, at the request of the Public Prosecutor's Office, UY granted authority to accept service on his behalf to an officer of a local court after being accused of failure to stop after a road accident. The form granting authority to accept service was in German but had been translated via phone by a relative of the accused person. The form did not include any other details regarding the legal and factual consequences of that authority to accept service, in particular regarding any duty on the part of the accused person to make enquiries. UY has been imposed a fine and a three-month driving ban by the local court. The penalty order was served, with a translation in Polish, on the authorised person who sent the order to the known address of the accused person in Poland by ordinary post. As no appeal had been lodged, the penalty order acquired the force of *res judicata*, the driving ban came therefore into effect. Later, UY was the subject of a roadside check by the police while driving a lorry on a public road. Consequently, criminal proceedings were brought against him for negligently driving a vehicle without a driving licence. The referring court, assuming that the accused person was not aware of the penalty order, expressed concerns as to whether the national legislation applicable to the accused is compatible with Article 6 of Directive 2012/13 and Articles 21, 45, 49 and 56 TFEU. In essence, the Court has been asked whether those provisions must be interpreted as meaning that they preclude the rules of a Member State by virtue of which a person residing in another Member State is liable to a criminal penalty if it fails to comply, from the date on which it acquires *res judicata*, with an order imposing driving ban. Provided that, on the one hand, the time limit for two weeks to file an opposition against this order begins to run from the service of the latter not on the person concerned, but on his/her authorized agent. On the other hand, the accused person was unaware of the existence of such an order at the date he/she disregarded the resulting driving ban.

First, the Court recalls that Article 6 lays down specific rules relating to the right of any suspect or accused person to be informed of the offence that they are suspected or accused of having committed, quickly and in sufficient detail to guarantee the fair character of the proceeding and to allow the effective exercise of the rights of defense. Recalling its *Covaci* ruling, the Court adds that even if the service of such an order takes place only after the judge has ruled on the merits of the charge, the fact that the accused person is empowered to form opposition against it, before the same judge, confirms that this judge rules only provisionally and that the service of that order represents the first opportunity for the accused person to be informed of the accusation against him. Therefore, such situation falls within the scope of article 6 of Directive 2012/13. Moreover, referring to its judgments in cases *Covaci* and *Tranca e.a.*, the Court observes that both the objective of enabling the accused person to prepare his defence and the need to avoid any kind of discrimination between accused persons with a residence within the jurisdiction of the national law concerned and accused persons who have to appoint an authorized agent to accept service of judicial decisions, require the whole of that period to be available to the accused person. In other words, the whole period of 15 days to file opposition should be available to the accused person from the moment the order is served to him. The Court then notes that German Criminal Law provides that if a person was prevented from observing a time limit through no fault of his own, he shall be granted restoration of the status quo ante upon application. Therefore, it seeks whether this provision complies with the requirements of article 6 of the Directive 2012/13. The referring court noted that this restoration is permitted only if the accused person proves that he sought information to the authorized person regarding a possible order served as well as that such restoration does not have a suspensive effect. Against that background, the Court concludes that such requirements do not comply with the provisions of article 6 of the Directive 2012/13.

Second, the Court addresses the question whether article 6 of the Directive 2012/13 allows for a person to be convicted for having infringed a driving ban on a date when the order was invested with *res judicata*, at a time when this person did not know the existence of such an order. The Court points out that the effectiveness of article 6 of Directive 2012/13 would be seriously undermined if a person was to be convicted on the ground that he had infringed a ban imposed by a criminal order, such as that at issue in the main proceedings, which was not communicated in compliance with the requirements of this article. It is therefore for national courts to give national law an interpretation which preserves the effectiveness of article 6 of the Directive 2012/13 and, otherwise, to leave any national provision which would be contrary to it unapplied.

Consequently, the Court rules that article 6 of the Directive 2012/13 does not preclude national legislation according to which a penalty order issued against a person not resident in that Member State acquires the force of *res judicata* after service on an authorized agent, even where the accused person has not been made aware of the order, provided that the accused person:

(1) is properly served with the order once he/she becomes aware of it, and has his/her position fully restored to the status *quo ante*, and
(2) may not be held criminally liable for not complying with the measures imposed in the order, based on the fact that he or she did not make attempts to learn about the outcome of the prior proceedings from the authorized agent

Furthermore, it precludes the law of a Member State which permits a person residing in another Member State to be convicted for non-respecting, as from the date when it acquired the authority of *res judicata*, an order having condemned him to a

driving ban, even though this person was unaware of the existence of such an order on the date when he disregarded the ban.

Case C-634/18, *JI*, Judgment of 11 June 2020 (First Chamber)

On 11 June 2020, the First Chamber of the Court of Justice delivered its judgment in case C-634/18, concerning the interpretation of Article 4(2)(a) of Framework Decision 2004/757 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (FD 2004/757). The referring court had asked, in essence, whether Article 4(2)(a) of FD 2004/757, read in conjunction with Article 2(1)(c) thereof, and Articles 20, 21 and 49 of the Charter, precludes a Member State from classifying as a criminal offence the possession of a significant quantity drugs, while leaving the interpretation of the concept of "significant quantity" to the discretion of the national courts, on a case-by-case basis.

Criminal proceedings were brought against JI before the Polish District Court of Slupsk, for possessing a significant quantity of narcotic drugs and psychotropic substances for his personal use, an offence under Article 62(2) of Poland's Law on combating drug addiction. This law implemented Framework Decision 2004/757. In particular, Article 62(2) of the law provides that the possession of a significant quantity of drugs is punishable by a restriction of liberty between 1 and 10 years, an aggravating circumstance implementing Article 4(2)(a) of Framework Decision 2004/757. Neither FD 2004/757 nor the Polish law on combating drug addiction define the concepts of "significant" or "large" quantity of drugs and the national interpretation of the provision is left to Polish courts on a case-by-case basis. Against this backdrop, the District Court of Slupsk issued a request for a preliminary ruling, having doubts on the compatibility of national legislation with the principles of legality and equality before the law.

Before answering the question of the referring court, the Court deems necessary to justify its jurisdiction over the case, as several parties intervening in the proceedings objected that, on the one side, the preliminary request asked for an interpretation of national law and, on the other side, the facts at issue fall outside the scope of FD 2004/757. First, the Court recalls that in preliminary ruling proceedings it is not for the Court to rule on the conformity of national provisions with EU law or to interpret national law, but it nonetheless has jurisdiction to give national courts "full guidance on the interpretation of EU law in order to enable it to determine the issue of conformity or compatibility for the purposes of the case before it" (para. 18). In the second place, referring to the fact that the possession of drugs for personal consumption falls outside the scope of FD 2004/757, the Court recalls its past case law where it has repeatedly affirmed that an interpretation of EU law in situations outside its scope is justified where EU provisions have been made applicable to such situations by national legislation "in a direct and unconditional way" (para. 26). This is to ensure consistency in how internal situations and situations governed by EU law are treated.

Moving on to the substance of the case, the Court observes that Article 4(2)(a) of FD 2004/757 requires Member States to enact an aggravating circumstance when the offence related to the possession of drugs linked to trafficking, as referred to in Article 2(1)(c) of the framework decision, involves "large quantities of drugs". Article 4(2)(a) of FD 2004/757 does not give any definition of the concept of "large quantity of drugs". However, as framework decisions constitute only an instrument of minimum harmonization, the Court affirms that Member States "have a wide margin of discretion" as regards the implementation of the concept of "large quantity of drugs" in their national law (para.

41). Therefore, the differences between the national measures implementing the framework decision in the national legal orders do not infringe the principle of non-discrimination of Article 21 of the Charter.

Then, the Courts analyses the interaction between the discretion enjoyed by national courts in the interpretation of national law and the principles of equality before the law, non-discrimination, and legality of criminal offences and penalties, as referred to in Articles 20, 21 and 49 of the Charter, respectively.

First, referring to the Opinion of the Advocate General, the Court underlines that judicial discretion does not constitute, as such, an infringement of the principles of equality before the law and non-discrimination enshrined in Articles 20 and 21 of the Charter. In the second place, the Court recalls that the principle of legality enshrined in Article 49(1) of the Charter, as well as Article 7(1) of the ECHR, require that criminal law provisions "comply with certain requirements of accessibility and predictability as regards both the definition of the offence and the sentencing" (para. 48). According to the Court, these requirements are met when individuals can have knowledge of the acts and omissions criminalized by the national legislation "from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it" (para. 49).

Based on the above, the Court replies to the referring court's question that Article 4(2)(a) of FD 2004/757, read in conjunction with Article 2(1)(c) thereof, and Articles 20, 21 and 49 of the Charter, do not preclude Member States from providing for aggravated criminal penalties while leaving their interpretation to national courts on a case-by-case basis, provided that their interpretation is reasonably foreseeable.

AG'S OPINION

JZ (C-806/18) – Opinion delivered on 23 April 2020 (AG Szpunar)

On 23 April 2020, Advocate General Szpunar delivered his Opinion in Case C-806/18, JZ, which concerns the compatibility of national criminal legislation on the illegal stay of third-country nationals with EU law.

With an order of March 2013, JZ, who had already been declared an undesirable foreign national by a Dutch order of April 2000 in accordance with Dutch legislation implementing Directive 2008/115, was subject to a five-year entry ban, which is regulated by Article 11 of that Directive. The order of March 2013 lifted the previous declaration of undesirability (from the moment in which the entry ban would take effect), but the effects of the two orders were the same: JZ had to leave the Netherlands immediately. As a matter of fact, JZ had not left the Netherlands neither after the order of April 2000 nor after that of March 2013. According to Article 197 of the Dutch Code of Criminal Law, foreign nationals who remain in the Netherlands while knowing, or having serious reason to suspect, that they have been declared to be undesirable pursuant to a statutory provision or that an entry ban has been imposed on them are liable to, inter alia, a term of imprisonment not exceeding six months. JZ had remained in the Netherlands despite the entry ban, hence he was sentenced to a prison term of two months by the Court of Appeal of Amsterdam. Since JZ had never left the country, however, the entry ban had not technically entered into force, as the case law of the Court of Justice has already clarified: in Case

C-225/16, *Ouhrami*, the CJEU argued that 'the starting point of the duration of an entry ban, as referred to in [Article 11 of Directive 2008/115], which in principle may not exceed five years, must be calculated from the date on which the person concerned actually left the territory of the Member States' (emphasis added). Therefore, the question raised by the Dutch Supreme Court is whether the provisions of Directive 2008/115 preclude national legislation which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national when the conduct declared to be criminal is defined by reference to the imposition of an entry ban which has not yet taken effect.

The AG first reminds that, according to the established case law of the Court of Justice, the deprivation of liberty on an illegally staying third-country national in principle frustrates the objectives of Directive 2008/115, which aims to ensure the orderly return of the person concerned. There are however two exceptions. First, if the competent national authorities follow the return procedure established by the Directive and the third-country national is still staying illegally with no justified ground for non-return, then an imprisonment sentence would not contradict the aim of the Directive. With reference to a previous case by the CJEU, this is called the 'Achughbabian' situation. While prima facie the situation of JZ seems similar, a closer examination leads to a different conclusion. The Dutch authorities followed the return procedure but JZ was not sentenced because such procedure was unsuccessful, but rather because he had violated the entry ban by continuing to stay in the Netherlands.

Second, the imprisonment of third-country nationals is compatible with EU law when the return procedure has been applied and they re-enter the territory of an EU Member State in breach of an entry ban (the 'Celaj' situation). JZ's position is however different since he has never left the Netherlands. In sum, the AG explains that 'the present case does not concern the question whether a Member State can, in a situation such as that at issue in the main proceedings, provide for the imposition of a sentence of imprisonment (yes, it can), but rather the actual implementation of that possibility by the Netherlands legislature, in so far as Article 197 of the Code of Criminal Law penalises an illegal stay of a person who has knowledge of an entry ban which, in cases such as that in the main proceedings, has not yet begun to take effect for want of an initial return' (para. 33; emphasis in the original).

Against this backdrop, AG Szpunar first argues that Article 197 of the Dutch Code of Criminal Law is not very clear, since it blurs the Directive's distinction between a return decision and an entry ban. He then clarifies that the situation at hand falls within the scope of Directive 2008/115, which does not harmonise national criminal legislation on third-country nationals' illegal stay but can preclude such legislation if it hampers the Directive's objective to ensure an orderly return of the persons concerned. As a consequence, the issue raised by the Dutch Court falls within the scope of application of the Charter of Fundamental Rights of the European Union (CFREU). In essence, the question is whether the limitation of liberty that follows from the application of Article 197 of the Dutch Code of Criminal Law complies with the requirements set out in Article 52 of the Charter. According to the latter provision, any limitation on the exercise of the Charter's rights and freedoms must be provided for by law, respect the essence of those rights and freedoms, and be subject to the principle of proportionality. Furthermore, when the Charter rights correspond to the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the meaning and scope of those rights shall be the same as those laid down by the ECHR.

Enshrined in Article 6 CFREU, the right to liberty is also laid down in Article 5 ECHR, which should therefore be taken into account as the minimum threshold of protection. The AG points out that,

according to the case law of the European Court of Human Rights, 'any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also in the sense that lawfulness concerns the quality of the law, implying that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness' (para. 47). Similar guarantees are required by Article 49 CFREU, which lays down the principle of legality (nullum crimen sine lege).

The AG argues that it is for the national court to analyse the compatibility of Article 197 of the Dutch Code of Criminal Law with the Charter, read in conjunction with the ECHR as interpreted by the Strasbourg Court. In other words, the national court should assess whether Article 197 clearly criminalises the breach of the obligation to leave the territory of the Netherlands. If such an assessment gives a negative outcome, the principle of legality would not be complied with. The AG therefore draws the conclusion that Directive 2008/115 does *not* preclude a Member State's legislation that provides for a sentence of imprisonment to be imposed on an illegally staying third-country national 'when the offending conduct is defined by reference to the imposition of an entry ban which has not yet taken effect in the absence of the departure of the person concerned, *provided that* that legislation is *sufficiently specific* to allow the scope and application of the offence to be identified and interpreted, which is for the national court to verify' (para. 50; emphasis added).

ACADEMIC ACTIVITIES

VACANCY – CONTACT POINTS FOR GREECE AND FRANCE

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

Candidates are invited to send a CV as well as a motivation letter (of maximum one page) before **the 15th of September 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

E. Herlin-Karnell, *The Constitutional Structure of Europe's Area of 'Freedom, Security and Justice' and the Right to Justification*, Hart Publishing, 2019, 200p.

S. Coutts, *Citizenship, Crime and Community in the European Union*, Hart Publishing, 2019, 264p.

K. Franko, *Globalization and Crime*, SAGE Publishing, 2019, 3rd ed., 320p.

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, 219p.

C. BILLET, A. TURMO (dir.), *Coopération opérationnelle en droit pénal de l'Union européenne*, Larcier, 2020, 232p.

E. Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice. A role for proportionality* ?, Hart Publishing, 2020, 248p.

G.-L. Gatta, V. Mitsilegas, S. Zirulia (eds.), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on "Crimmigration"*, Hart Publishing, 2020 (forthcoming), 272p.

I. Wieczorek, *The Legitimacy of EU Criminal Law*, Hart Publishing, 2020 (forthcoming), 272p.

L. Bachmaier Winter e.a. (Eds.), *The Right to Counsel and the Protection of Attorney-Client Privilege in Criminal Proceedings. A Comparative View*, Springer, 2020.

A. Weyembergh and E. Sellier (eds.), *Criminal Procedures and Cross-Border Cooperation in the EU's Area of Criminal Justice. Together but apart?*, éditions de l'Université de Bruxelles, 2020 (forthcoming), 459p.

L. Lavrysen, N. Mavronicola (eds.), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR*, Hart Publishing, 2020 (forthcoming), 312p.

C. Brière, *The External Dimension of the EU's Policy against Trafficking in Human Beings*, Hart Publishing, 2021 (forthcoming), 288p.

U. Turksen, *Countering Tax Crime in the European Union. Benchmarking the OECD's Ten Global Principles*, Hart Publishing, 2021 (forthcoming), 224p.

UPCOMING EVENTS

Conference, *EU Police and Judicial Cooperation. Where are we going and what are the consequences of the Danish position?*, København, Denmark, 24th September 2020, Link

Seminar, *Procedural Rights in Light of the European Arrest Warrant and Detention*, ERA, Zagreb, 12 October 2020, Link

Webinar, *AK European Criminal Law*, Frankfurt, 29 October 2020, Link

Course, *Prosecuting Environmental and Serious Economic Crimes as International Crimes. Advanced Issues in the EU Criminal Law and Policy*, Dubrovnik, Croatia, 2nd – 6th November 2020, Link

Conference, *Collection and Admissibility of Evidence in Europe*, ECLAN Annual Conference, University of Vienna, 5th – 6th November 2020, Link

Conference, *Annual Conference on EU Criminal Justice 2020*, ERA, Dublin, 12th-13th November 2020, Link