Eclan
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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

LEGISLATIVE INSTRUMENTS

The EU-UK relationship in criminal matters post Brexit

The negotiations on the framework and content of the future relationship between the United Kingdom and the EU started in 2018. One of the main challenges in the negotiations is the partnership agreement between the two in the field of criminal law particularly now that the UK is considered a third country outside of Schengen.

Moreover, the EU needs to ensure that post Brexit the UK will maintain equal standards regarding human rights and data protection. These standards are important for the EU's policy area, and specifically the issues concerning mutual trust, human rights and exchange of personal data.
The details of the future relationship are set out in the Political Declaration, that accompanies the Withdrawal Agreement. The Declaration sets out the framework for the future relationship and it was agreed jointly by the European Union and the United Kingdom in October 2019.

On 3 February 2020, the European Commission put forward the draft recommendation for the future EU-UK partnership. Based on this recommendation, the EU Council of Ministers adopted on 25 February 2020 the negotiating directives for the new partnership. Said directives define the scope and terms of the future partnership, as well as they cover all areas of interest for the negotiations including law enforcement and judicial cooperation in criminal matters. In line with the Political Declaration agreed between the EU and the UK and the negotiating directives approved on 25 February 2020, the European Commission reached a draft text of the Agreement on the New Partnership with the UK. This draft text was transmitted to the UK on 18 March 2020 and it supports the negotiations.

The first round of negotiations between the EU and the UK took place from the 2nd of March to the 5th of March 2020 in Brussels, Belgium.

The ninth round of negotiations on the future partnership was held between 29th of September and 2nd of October 2020. In the statement of this round by Michel Barnier, the respect of fundamental rights and individual freedoms, which are pre-conditions for the EU-UK future police and judicial cooperation in criminal matters, were listed as positive new developments.

On 24 December 2020 the EU and the UK reached an agreement on Trade and Cooperation. After approval by the Council, the EU-UK Trade and Cooperation Agreement was signed on 30 December 2020, and it will be provisionally in force from 1 January 2021 until 28 February 2021 (whithin this period the EP is expected to provide its consent). The Agreement includes under its Part Three a substantial set of provisions on Law Enforcement and Judicial Cooperation in Criminal Matters. These provisions cover, inter alia: Cooperation with Europol (Title V), Cooperation with Eurojust (Title VI), Surrender (Title VII), Mutual assistance, including Joint Investigation Teams (Title VIII), Exchange of criminal record information (Title IX) and freezing and confiscation (Title XI). With regard to surrender the judicial nature of the EAW procedure is maintained, while the removal of the requirement of double criminality for 32 categories of offences will become subject to the condition of reciprocity

(see Article LAW.SURR.79 of the EU-UK Trade and Cooperation Agreement). The grounds for refusal recall those provided under the EAW system, leaving however some margins for the revival, upon notification, of the political offence exception (Article LAW.SURR.82) and the nationality exception (Article LAW.SURR.83). In this regard, the provisions on surrender of the Trade and Cooperation Agreement resemble the corresponding provisions of the Surrender Agreement between the EU and Iceland and Norway. Concerning the cooperation with EU JHA Agencies, the Trade and Cooperation Agreement will allow for both the establishment of contact points and for the secondment of UK Liaison officers at Europol (Article LAW.EUROPOL.50) and at Eurojust (Liaison Prosecutor, Article LAW.EUROJUST.66) as well as for the exchange of both personal and non-personal data. The main features of the EU-UK Trade and Cooperation Agreement will be presented in the next issue of the ECLAN Newsletter.

NEW NEGOTIATIONS

EU agencies and bodies

Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation

On January 2020, the European Commission Published the new work programme for 2020. Under the section 'Promoting our European way of Life' the European Commission stated its intention to strengthen the Europol mandate in order to reinforce operational police cooperation.
Following this, on May 2020 the Commission published an Inception Impact Assessment on a prospect proposal for the regulation to strengthen the mandate of Europol. The assessment was open for comments until 9 July 2020.
According to the European Commission, the initiative aims to revise the mandate of Europol and it will:

- enable Europol to deal with the evolving nature of internet-based and financial crime;
- align Europol's procedures for cooperating with non-EU countries with those of other EU agencies; and
- bring Europol's data protection rules into line with existing EU rules.

On 21 October 2020, the Home Affairs Ministers of the European Union met informally to discuss the challenges and the operational needs of the agency. To this end, they adopted a Declaration entitled 'Ten Points on the Future of Europol'.

The new proposal for a regulation was presented on 9 December 2020.

According to the proposal, the new regulation will strengthen Europol by:

- enabling Europol to cooperate effectively with private parties, addressing lack of effective cooperation between private parties and law enforcement authorities to counter the use of cross-border services, such as communication, banking, or transport services, by criminals;
- enabling Europol to effectively support Member States and their investigations

with the analysis of large and complex datasets, addressing the big data challenge for law enforcement authorities;

- strengthening Europol's role on research and innovation, addressing gaps relevant for law enforcement;

- strengthening Europol's cooperation with third countries in specific situations and on a case-by-case basis for preventing and countering crimes falling within the scope of Europol's objectives;

- clarifying that Europol may request, in specific cases where Europol considers that a criminal investigation should be initiated, the competent authorities of a Member State to initiate, conduct or coordinate an investigation of a crime which affects a common interest covered by a Union policy, without the requirement of a cross-border dimension of the crime concerned;

- strengthening Europol's cooperation with the European Public Prosecutor's Office (EPPO);

- further strengthening the data protection framework applicable to Europol;

- further strengthening parliamentary oversight and accountability of Europol.

The proposal also states that this initiative is linked with the proposal amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters to enable Europol to enter data into the SIS.

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Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol

On 9 December 2020, the European Commission presented a proposal for a regulation amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol.

This proposal is closely linked with and complements other EU legislative instruments, notably on Europol, insofar as this proposal grants Europol additional rights to process and exchange data within its mandate, in SIS.

In the context of on-going EU efforts to facilitate the detection of persons involved in terrorism-related activities, including foreign terrorist fighters, the Commission identifies several gaps in the sharing of third-country sourced information. While Europol holds valuable information on suspects and criminals that it received from third countries and international organisations, it is not able to provide directly and in real-time frontline officers with the information they need. According to the proposal, this is partly due to the rules governing access to Europol's information systems, in addition to the fact that Europol is not able to issue alerts in SIS as the most widely used information-sharing database in the EU that is directly accessible for border guards and police officers.

In order to address this security gap, the proposed regulation aims to establish a new alert category specifically for Europol, in order to provide information directly and in real-time to frontline officers. It is intended to enable Europol to issue

'information alerts' on suspects and criminals as a new alert category in SIS, for exclusive use by Europol in specific and well-defined cases and circumstances. The purpose of the new alert category is that in case of a 'hit', the alert would inform the frontline officer that the person concerned is suspect of being involved in a criminal offence falling within the competence of Europol.

The proposal includes additional amendments to Regulation (EU) 2018/1862 in order to align its provisions concerning data protection, in particular the right of access, rectification of inaccurate data and erasure of unlawfully stored data, remedies and liability with Regulation (EU) 2016/794 and Regulation (EU) 2018/1725 insofar as those alignments are necessary due to the new alert category to be entered by Europol.

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.

On 7 December 2020, the LIBE Committee decided to open interinstitutional negotiations. Consequently, the Committee's report for both files was tabled and voted in plenary on 17 December and a first political trilogue could take place on 13 January.

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.

The European Economic and Social Committee adopted its opinion on 18 September 2018.

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.

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. Under the Croatian presidency of the Council, in office between January and June 2020, trilogues came to a standstill, partly due to COVID-19, partly due to EP reluctance to engage. Four technical meetings, on 23 January, on 3 and 18 February and 3 March, and five JHA Counsellors' meetings, on 17 and 31 January, 13 and 27 February and 5 March, took place. 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 and finally took place on 24 September 2020 under the German presidency.

Since the beginning of the German Presidency (1st July 2020), three technical trilogues/meetings on 1 and 13 October and 9 December, and eight JHA Counsellors' meetings on 6 July, 22 and 29 September, 7 and 27 October, 5-6 November and 1 December 2020 have been held. The fifth political trilogue was completed on 29 October 2020, and a sixth and final trilogue took place on 10 December 2020.

After the recent terrorist attacks in Europe, on 13 November 2020, the EU Home Affairs Ministers published a joint statement reiterating their commitment to complete the negotiations on the proposal by the end of the year. On 10 December 2020, the Council presidency and the European Parliament reached a provisional agreement on the draft regulation. Both the Council and the Parliament still have to complete the formal legislative procedure for adoption at early second reading before the Regulation can enter into force. This will happen in spring 2021. The Regulation will apply from 12 months after its entry into force.

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 offering services in the Union 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. Due to the centrality of this issue, the Ministers were invited to discuss whether the approach taken in the proposal (that orders could be addressed directly to service providers without the involvement of any other Member State at the stage of the request) should be kept, or whether it should be modified by introducing a notification procedure. The Presidency noted as an outcome that Member States were willing to continue working towards a compromise on the inclusion of a notification mechanism with not suspensive effect that would be applicable only in limited cases for 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 the enforcement of an order, on the basis of specific grounds for refusal provided for in the text. Similarly, the draft report on the proposal for a directive was tabled on 11 November 2019, and amendments submitted on 9 December 2019.

On 7 December 2020 the LIBE Committee adopted the decision to open interinstitutional negotiations. The LIBE Committee tabled its reports for plenary regarding the proposed regulation and the proposed directive on 11 December 2020 which was voted on 14 December 2020.

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 progress on the internal EU rules is essential for bringing forward the EU-US negotiations.

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EU agencies and bodies

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.

The establishment of the Controller of procedural guarantees has been included in the Regulation 2020/2223 (Art 1 (9) inserting the new art 9a in Regulation 883/2013). The new provisions introduced by Regulation 2020/2223 do not include the prior authorisation of the Controller for certain investigative measures (which was the most controversial part of the 2014 proposal) but only a complaint mechanism. The 2014 proposal, however, has not yet been withdrawn.

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ADOPTED TEXTS

Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 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 the European Anti-Fraud Office 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.

On 30 September 2020, the Permanent representatives Committee (Coreper) endorsed the final compromise text and the the Council adopted its position at first reading on 4 December 2020. The European Parliament approved the Council position at first reading in its Resolution of 17 December 2020. The revised Regulation was signed on 23 December and was published in the Official Journal on 29 December 2020. It shall enter into force on the 20th day following the date of this publication.

CASE LAW

JUDGMENTS

Case C-129/19, Presidenza del Consiglio dei Ministri, Judgment of 16 July 2020 (Grand Chamber)

On 16 July 2020, the Grand Chamber of the Court delivered its judgment in Case C-129/19, regarding the interpretation of Article 12(2) of Directive 2004/80/EC relating to compensation on crime victims. The facts of this case concern an Italian citizen, BV, residing in Italy, who was sexually assaulted on the territory of this Member State in October 2005. The perpetrators were sentenced to prison and ordered to pay €50,000 to BV. As they fled and their whereabouts remained unknown, the victim could not be compensated by them from the assault. In February 2009, BV brought a claim before the *Presidenza del Consiglio dei Ministri* for compensation for the harm allegedly suffered as a result of the failure by Italy to transpose, within the appropriate time, Directive 2004/80. In the first instance, the *Presidenza del Consiglio dei Ministri* were ordered to pay BV the sum of €90,000, which was reduced on appeal to €50,000. At the end of the day, this amount was reduced to €4,800 according to the Ministerial Decree of 31 August 2017, which determines the amounts of compensation for victims of violent intentional crime.

The case was brought before the Supreme Court of Cassation, which decided to stay the proceedings and to refer two questions to the Court of Justice for a preliminary ruling. First, the referring court asks, in essence, whether EU law must be interpreted as meaning that the rules on the non-contractual liability of a Member State for damage caused by the breach of that law apply, on the ground that that Member State did not transpose, within the appropriate time, Article 12(2) of Directive 2004/80 as regards victims residing in that Member State, in the territory of which the violent intentional crime was committed. By its second question, the referring court asks whether the fixed amount of €4,800 granted to victims of sexual violence under the national scheme for compensation to victims of violent intentional crime is to be classified as 'fair and appropriate' within the meaning of Article 12(2) of the directive.

The Grand Chamber of the Court first recalls that, in order to engage the non-contractual liability of a Member State for damage caused by breaches of EU law, this law must be intended to confer rights on individuals, the breach of that law must be sufficiently serious, and there must be a direct causal link between the breach and the damage suffered by the individuals concerned. According to the Court, the examination of the first condition requires to determine the personal scope of Article 12(2) of Directive 2004/80. In other words, the Court must assess whether this provision confers on all victims of violent intentional crime, including those that reside in the territory of the Member State concerned, the right to obtain a fair and appropriate compensation.

Taking into account the wording, context and objectives of Directive 2004/80, the Court considers that Article 12(2) imposes the obligation on each Member State to provide for a scheme of compensation covering all victims of violent intentional crime committed on their territory and not only those victims that are in a cross-border situation.

With regard to the second question, the Court held that, in the absence of any indication in Directive

2004/80 as to the amount of compensation deemed to correspond to 'fair and appropriate' compensation, the Member States have discretion in that regard. The Court still precises that compensation does not necessarily need to ensure the complete reparation of material and non-material loss suffered by the victims of violent intentional crime. However, it must not be purely symbolic or manifestly insufficient having regard to the gravity of the consequences, for those victims, of the crime committed. Consequently, while Article 12(2) of Directive 2004/80 cannot be interpreted as meaning that it precludes a fixed rate of compensation to victims of violent intentional crime, which varies according to the nature of that crime, a fixed rate of €4,800 for the compensation of a victim of sexual violence does not appear, at first sight, to correspond to 'fair and appropriate compensation', within the meaning of this provision.

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Case C-195/20 PPU, XC, Judgment of 24 September 2020 (Fourth Chamber)

On 24 September 2020, the Fourth Chamber of the Court delivered its judgment in Case C-195/20 PPU, which concerns the interpretation of Article 27(2) and (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"). The request for an urgent preliminary ruling was issued by the Bundesgerichtshof (Federal Court of Germany), which had doubts concerning the validity of the arrest warrant, issued by the German authorities to conduct a criminal investigation, relying on the specialty rule laid down in EAW FD.

XC was prosecuted in Germany in three separate sets of criminal proceedings. First, on 6 October 2011, he was sentenced by the Amtsgericht Niebüll (German local Court of Niebüll) for drugs trafficking. That sentence was suspended on probation.

Second, in 2016, criminal proceedings were instituted in Germany for sexual assault committed in Portugal. The Staatsanwaltschaft Hannover (Public Prosecutor Office of Hannover) issued a EAW in order to prosecute XC for that offence (the first EAW). The Portuguese executing authority authorized XC's surrender to the German judicial authority and XC was convicted to a custodial sentence. During the execution of that sentence, the suspension on probation of the sentence imposed in 2011 was revoked. On 22 august 2018, the Staatsanwaltschaft Flensburg (Public Prosecutor Office of Flensburg) asked the Portuguese executing authority to renounce the application of the specialty rule and consent to the execution of the sentence imposed in 2011. On 31 August 2018, in the absence of response from Portuguese executing authority, XC was released. On 18 September 2018, he went to Italy. The day after, the Staatsanwaltschaft Flensburg issued a new EAW against XC to executing the judgement of 6 October 2011 (the second EAW). On 27 September 2018, XC was arrested in Italy on the basis of that new EAW: the Italian executing authority agreed to surrender him to the German authorities.

Third, on 5 November 2018, the Amtsgericht Braunschweig (local Court of Braunschweig) issued an arrest warrant to conduct a criminal investigation into a third case involving XC relating to an offence committed in Portugal in 2005. In December 2018, the Staatsanwaltschaft Braunschweig (Public Prosecutor Office of Braunschweig) asked Italian executing authority to give consent for XC to be prosecuted for that offence. The Italian judicial authority granted the request. XC was remanded in custody in Germany from 23 July 2019 to 11 February 2020. By the judgment of 16 December 2019, XC was convicted of the offence committed in Portugal in 2005 and

received a combined sentence taking into the judgment of 6 October 2011.

XC brought an appeal against the judgment of 16 December 2019 before the Bundesgerichtshof relying on the specialty rule laid down in EAW FD. He claims that in so far as the Portuguese executing judicial authority did not consent to his prosecution for the offence committed in Portugal, the German authorities were not entitled to prosecute him. In view of that, the referring court was uncertain whether the arrest warrant issued on 5 November 2018 can be maintained or must be annulled.

The Fourth Chamber of the Court observed that the requirement that consent be given by both the executing judicial authority of the first EAW and the executing judicial authority of the second EAW would hinder the effectiveness of the surrender procedure, thereby undermining the purpose pursued by EAW FD: simplifying and accelerating surrenders between the judicial authorities of the Member States. Therefore, XC's departure from Germany was voluntary after he served his sentence, he is no longer entitled to rely on the specialty rule relating to the first EAW. In so far as the only surrender relevant to the assessment of compliance with the specialty rule is the one carried out on the basis of the second EAW, the consent required in Article 27(3)(g) of EAW FD must be given only by the executing judicial authority of the Member State which surrendered the prosecuted person on the basis of that EAW. In that regard, the Court concluded that a measure involving deprivation of liberty taken against a person referred to in a first EAW on the basis of a prior offence different from the one which justified his surrender under a second EAW is not contrary to the Article 27(2) and (3) of EAW FD if that person's departure from the Member State that issued the first EAW was voluntary : in that context, consent must be given by the executing authority of the Member State which surrendered the prosecuted person on the basis of the second EAW.

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Case C-603/19, TG and UF, Judgment of 1 October 2020 (Third Chamber)

On 1 October 2020, the Third Chamber of the Court of Justice delivered its judgment in case C-603/19, regarding the interpretation of Article 2(1) of Directive 2012/29/EU on minimum standards on the rights, support and protection of victims of crime, as well as Article 325 TFEU on combating fraud within the EU. Article 2(1) of Directive 2012/29/EU defines, *inter alia*, the scope of the concept of "victim", and consequently the scope of the standards established in the Directive.

The request for a preliminary ruling was issued by the Špecializovaný trestný súd (Special Criminal Court, Slovakia), asking essentially, whether national legislation and case-law prohibiting the State to claim damages in criminal proceedings has to be precluded to enable an effective fight against fraud against the financial interests of the EU. The case before the referring court concerned criminal proceedings brought against TG and UF for acts liable to constitute subsidy fraud funded in part from the budget of the EU.

In 2005 and 2006, TG and UF set up a number of commercial companies of which nine received subsidies from the Slovakian Central Office for Labour, Social Affairs and Family for supporting job creation in micro-enterprises, including 279 272.18€ from the budget of the EU. The companies ceased trading after the subsidies were payed, assets were moved from the companies' premises and, according to experts, the work of the employees in these companies was fictitious. The district offices for Labour, Social Affairs and Family sought damages from the accused persons as injured parties in the criminal proceedings, although national law and jurisprudence do not

permit State bodies to claim compensation in criminal proceedings.

According to the national law, administrative proceedings aiming at recovering stolen subsidies can only be directed against the beneficiary, in this case the commercial companies that no longer hold any assets. The referring court notes therefore that, in the current case, only the action for damages in the framework of the criminal proceedings brought against the accused persons would enable the recovery of the wrongly paid subsidies. The Slovakian court asks, in essence, whether Article 2(1) of Directive 2012/29 must be interpreted as also including legal persons among the victims to whom the instrument applies and, secondly, whether Article 325 TFEU must be interpreted as precluding national law and jurisprudence from not allowing the state to claim compensation in criminal proceedings for damages stemming from fraud affecting the budget of the EU.

Concerning the first question, the Court refers to the clear wording of the definition of "victim" provided for in Article 2(1) of Directive 2012/29/EU, which refers to natural persons. The Court therefore dismisses the referring court's question, stating that the directive does not apply to legal persons or to the State, even if national law allows them to assume the status of injured party in criminal proceedings.

With regard to the second question, the Court observes that, although Member States are required to take effective measures to recover wrongly paid subsidies, they are under no constraint to ensure a successful outcome. On the contrary, Member States have some leeway in implementing effective measures to recover wrongly paid subsidies, including through the coexistence of different legal remedies. Coexisting remedies in administrative, civil or criminal law should, however, not hinder the effectiveness of the fight against fraud affecting financial interests of the EU. In this context, the fact that a State has no right to compensation as an injured party in criminal proceedings does not violate Article 325 TFEU. However, the latter provision requires the existence of an effective remedy, whether in criminal, administrative or civil proceedings.

In the case at hand, the Court notes that State has the option to resort to administrative as well as civil proceedings. In particular, the latter can enable compensation from the natural person after his or her conviction in the course of the criminal proceedings.

Therefore, the Court concludes that Article 325 TFEU must be interpreted as not precluding national law or case-law under which the State may not claim compensation in criminal proceedings for damages caused by fraud affecting the budget of the European Union, on condition that the national legislation provides for other effective procedures for the recovery of these funds.

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Case C-510/19, AZ, Judgment of 24 November 2020 (Grand Chamber)

On 24 November 2020, the Grand Chamber of the Court of Justice delivered its judgment in case C-510/19, concerning the interpretation of Article 6(2) and Articles 14, 19 and 27 of Framework Decision 2002/584 on the European arrest warrant. The request for a preliminary ruling was made by a Belgian court in the course of criminal proceedings initiated in Belgium against AZ, a Belgian national, accused of forgery of documents, use of forged documents and fraud and surrendered by the Netherlands authorities in execution of a European arrest warrant (EAW).

AZ was arrested in December 2017 and surrendered to Belgium, following a decision of the District Court of Amsterdam. In January 2018, the Belgian authorities issued an additional EAW concerning other conducts of AZ and requested the competent Netherlands authorities to disapply the rule of speciality provided for in Article 27(2), 27(3)(g) and 27(4) of the EAW Framework

Decision. According to this rule, a person surrendered in execution of a EAW cannot be prosecuted, sentenced or deprived of his or her liberty for a different offence committed prior to the surrender, unless the executing judicial authority gives its consent. In February 2018, a public prosecutor from the Amsterdam Public Prosecutor's Office agreed to broaden the scope of the AZ's prosecution in Belgium, which led to an overall sentence to a three-year prison term.

AZ appealed the conviction before the Court of Appeal of Brussels. The applicant raised the issue of whether the Public Prosecutor for the Amsterdam District may be considered an "executing judicial authority" according to Article 6(2) of the Framework Decision on the EAW, and therefore whether that authority had the power to give the consent to extend the scope of the Belgian criminal proceedings. It is in this context that the Court of Appeal filed a reference for a preliminary ruling to the Court of Justice of the EU, asking for an interpretation of the concept of "executing judicial authority", in the light of the possibility for the Netherlands Minister of Justice to issue instructions in specific cases to Dutch prosecutors.

The Court refers in its reasoning to its recent case law on the concept of "issuing judicial authority" according to the EAW Framework Decision, whose principles the Grand Chamber applied to the case at hand. As first, the Court states that the concept of "executing judicial authority" is an autonomous concept not restricted to judges or courts, as it covers all judicial authorities participating in the administration of criminal justice, including prosecutors. However, this authority, like the "issuing judicial authority", must act independently, in particular in relation to the executive, and must follow procedures that comply with the requirements of an effective judicial protection. The application of the same criteria applied to the concept of "issuing judicial authorities" is justified by the same status and nature of these two judicial authorities, despite their separate functions. Among other arguments, the Court finds that both the execution and issue of an EAW can prejudice the liberty of the requested person as they aim at his or her arrest and following surrender. In addition, the Court stresses that, unlike the issue of an EAW, the procedure for the execution of an EAW does not have a dual level of protection of fundamental rights, but the decision of the executing judicial authority is the sole occasion to ensure a protection of the requested person's fundamental rights.

Then, the Court specifies that it is not relevant whether the judicial authority giving its consent on the disapplication of the rule of speciality is the same as that which executed the EAW. However, that consent cannot be given by the public prosecutor of a Member State whose decision-making power may be subject to an instruction in a specific case from the executive, as such an authority does not satisfy the necessary conditions to be considered as an "executing judicial authority". The Court stresses the fact that, although the person has already been surrendered to the issuing Member State, the consent to broaden the scope of the criminal proceedings may prejudice the liberty of the person concerned, as it may lead to a heavier sentence.

The Court observes that, whereas the decision to execute an EAW is taken by a court, under the Netherlands law the consent to additional prosecution is given exclusively by a public prosecutor. Since Dutch prosecutors may receive instructions in specific cases from the Minister of Justice, the Court concludes that they cannot constitute an "executing judicial authority" according to Article 6(2) of the EAW Framework Decision.

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Case C-584/19, A. e.a., Judgment of 8 December 2020 (Grand Chamber)

On 8 December 2020, the Grand Chamber of the EU Court of Justice delivered its judgment in case C-584/19, concerning the interpretation of Article

1(1) and Article 2(c) of Directive 2014/41 on the European Investigation Order (EIO Directive). In particular, the judgment interprets the concepts of "judicial authority" and "issuing authority" within the meaning of the EIO Directive and clarifies whether they include public prosecutors of a Member State even when they may be directly or indirectly subject to orders or individual instructions from the executive when adopting an EIO.

The case concerned criminal investigations initiated by the Hamburg Public Prosecutor's Office against A and other unidentified persons for an alleged fraudulent scheme involving an Austrian bank. In May 2019, the Hamburg prosecutors forwarded an EIO to the Vienna Public Prosecutor's Office, requesting to send copies of the relevant bank statements. According to Austrian law, before executing the order the Vienna prosecutors requested the Regional Court in Criminal Matters of Vienna to authorize the investigative measure. On the basis of the recent case law of the CJEU concerning the "issuing judicial authority" for EAW (see, *inter alia*, joined cases C-508/18 and C-82/19 PPU), the Austrian Court had doubts on the necessary requirements to comply with the concepts of "judicial authority" and "issuing authority" within the meaning of the EIO Directive. Therefore, it sent a preliminary ruling request asking whether the public prosecutor's office of a Member State may be regarded as a "judicial authority" having competence to issue a European investigation order, according to the EIO Directive, although it is exposed to a risk of being subject to individual instructions or orders from the executive when adopting such an order.

As a first point, the Court notes that, whereas the Framework Decision regulating the European Arrest Warrant does not specify the authorities covered by the concept of "issuing judicial authority", Article 2(c)(i) of the EIO Directive expressly includes public prosecutors among the authorities that are understood as an "issuing authority". Moreover, prosecutors are also among the "judicial authorities" that, according to Article 2(c)(ii) of the EIO Directive, entrusted with the validation of a EIO before its issue, whenever such an order has been issued by an authority other than a judge, court, investigating judge or public prosecutor. In the EIO Directive, therefore, the classification of prosecutors as an "issuing authority" or "judicial authority" is not affected by their possible legal subordination to the executive.

Then, the Court stresses that the procedure and the guarantees required for issuing or validating an EIO are different from those governing EAWs. In particular, according to the EIO Directive, prosecutors issuing or validating an EIO must take into account proportionality and the concerned person's fundamental rights. Further, the order must be capable of being subject to effective legal remedies, at least equivalent to those available in similar domestic cases. This leads the Court to conclude that at the stage of the issue or validation of an EIO, as well as in the phase of its execution, the EIO Directive contains a set of safeguards that ensure both proportionality and the protection of fundamental rights.

As a last point, the Court highlights that the aim of the European Arrest Warrant and that of the European Investigation Order differ. While the former seeks the arrest and surrender of individuals, the latter is a request for specific investigative measures that, although they might be intrusive, do not interfere with the primary right to liberty.

Based on the above, the Court determines that concepts of "judicial authority" and "issuing authority", referred to in Article 1(1) and Article 2(c) of the EIO Directive, differ from those mentioned in the EAW Framework Decision. Therefore, they must be interpreted as including the public prosecutor or, in general, the public prosecutor's office of a Member State, in spite of the fact that they might be subject to the risk of receiving direct or indirect orders or individual

instructions from the executive when issuing a European Investigation Order.

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Case C-416/20 PPU, TR, Judgement of 17 December 2020 (fourth Chamber)

On 17 December 2020, the Fourth Chamber of the Court of justice delivered its judgment in Case C-416/20, which concerns the interpretation of Article 4a(1) of Framework Decision 2002/584/JHA on the European arrest warrant (EAW) in relation to 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. By its request for a preliminary ruling, the referring regional Court of Hamburg asks, in essence, whether the lawfulness of an extradition based on a European arrest warrant for the purpose of executing a custodial sentence rendered *in absentia* depends on the fulfilment by the requesting State of the conditions laid down in the Directive 2016/343.

On 7 October 2019 and on 4 February 2020, Romanian courts issued two EAWs against TR, a Romanian citizen, for the purpose of executing custodial sentences for which the defendant was convicted *in absentia*. According to information provided by the referring Court, TR travelled to Germany in 2018 in order to avoid the prosecutions initiated against him which have resulted in the aforementioned convictions in his absence.

After seeking additional information concerning the circumstances surrounding the conviction *in absentia* of TR, the German referring court found that the conditions for his extradition were met pursuant to the German law implementing Framework decision 2002/584. On the basis of the information provided by the Romanian authorities, the German referring court considered in particular that TR had fled to Germany and thereby prevented the possibility to summon him in person. The referring court further considered that TR was represented by a counsel in both proceedings and that he was aware of the proceedings initiated against him. After the German Court granted his surrender by decision of 28 May 2020, TR argued that his extradition in the absence of a guarantee that he would be granted a reopening of the proceedings would be unlawful pursuant to Articles 8 and 9 of Directive 2016/343, which respectively protect the right to be present at the trial and the right to a new trial for the accused person. The referring court thus expressed doubt over the lawfulness of the extradition and required the Court of justice to clarify the interplay between Article 4a(1) of Framework decision 2002/584 which provides grounds for optional non-execution of the EAW in case of convictions rendered *in absentia* and Articles 8 and 9 of Directive 2016/343.

First, on the basis of its judgment in *Tupikas*, the Court clarifies the conditions under which the optional grounds for non-execution as laid down in Article 4a(1) of Framework decision 2002/584 may apply. Pursuant to this provision introduced by the amending Framework Decision 2009/299, the executing judicial authority may refuse to execute an EAW if the person in question did not appear in person at the trial resulting in the decision, unless one of several exceptions apply. In other words, if any of the four conditions listed exhaustively in subparagraphs (a) to (d) of that provision are satisfied, execution of the surrender is mandatory and not optional, even if the person in question did not appear in person at the trial. This is particularly the case when the person concerned was informed of the scheduled trial or had given a mandate to a legal counsellor who was either appointed by the person concerned or by the State to defend him or her at the trial, as in the present case.

The Court underlines that the grounds for non-execution as laid down in Article 4a(1) of Framework decision 2002/584 are optional. It follows that, even if the executing judicial authority comes to the conclusion that none of the situations referred to in Article 4a(1)(a),(b),(c) or (d) are verified, meaning that nothing prevent the executing judicial authority to refuse the execution of the EAW, the executing authority may take into account other circumstances to ensure the surrender of the person concerned.

Second, the Court, contends that the failure of the national legislation of the issuing Member State to comply with Directive 2016/343 does not justify refusing the execution of an EAW as it would circumvent the system established under Framework decision 2002/584. This interpretation espouses the view expressed by the AG who recalled in this respect that limitations on the principle of mutual trust must be interpreted strictly. However, the Court underlines that this does not affect the obligation of the issuing Member State to comply with EU law. Consequently, in case of a failure to transpose Directive 2016/343, the person surrendered who face a breach of his or her rights will be able to invoke its provisions which have direct effect before the jurisdiction of the requesting Member State.

In the light of those considerations, the Court concludes that Article 4a(1) of Framework decision 2002/584 must be interpreted as not permitting the executing judicial authority to refuse the execution of the EAW issued for the purpose of executing a custodial sentence, when the person concerned has fled to the executing Member State, has failed to appear at the trial while he or she was aware of it, to ensure that his or her right to a retrial as protected under Directive 2016/343 would be respected.

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Joined cases C-354/20 PPU and C-412/20 PPU, L. and P., Judgment of 17 December 2020 (Grand Chamber)

On 17 December 2020, the Grand Chamber of the CJEU delivered its judgment in Joined Cases C-354/20 PPU and C-412/20 PPU. The opinion concerns the interpretation of Article 6(1) and Article 1(3) of Framework Decision 2002/584 on the European Arrest Warrant (EAW Framework Decision) and the possibility to refuse the execution of an EAW in case of generalised deficiencies of the issuing Member State's legal system. The case at hand follows up on *Minister for Justice and Equality* (Case C-327/18 PPU), which stated that the execution of an EAW may also be exceptionally suspended where there is evidence showing a concrete risk that the fundamental right to a fair trial will be breached. However, this refusal to execute an EAW must be preceded by a check on whether in the issuing State there are systemic and generalised deficiencies affecting the independence of the judiciary and that there are substantial grounds to believe that the requested person, if surrendered, will suffer a breach of Article 47 of the Charter.

The preliminary ruling request was sent by the Amsterdam District Court and concerned two EAWs, one issued for the purposes of conducting a criminal prosecution for drug trafficking-related offences, the other aiming at executing a custodial sentence. The referring court asks whether, considering the worsening of the generalized deficiencies in the Polish justice system, it is allowed to refuse the surrender without having to ascertain in detail the specific circumstances pertaining to the EAW. In the context of the urgent preliminary ruling procedure (PPU), the Court, sitting as the Grand Chamber, answers in the negative, thus confirming its case-law established in *Minister for Justice and Equality*.

In the first place, the Court observes that the deficiencies concerning the independence of the Polish justice system do not affect necessarily every

decision of all Polish courts. Denying the status of "issuing judicial authority", as defined in Article 6(3) of the EAW Framework Decision, to all courts whenever a Member State presents such deficiencies would lead to the disapplication of the principles of mutual trust and mutual recognition with regard to EAWs issued by national authorities. This would also have the consequence, *inter alia*, to exclude the courts of that Member State from submitting references to the Court for preliminary rulings. Moreover, the Court specifies that its recent case-law on the concept of "issuing judicial authority" and the subordination of the prosecution service to the executive (*Lübeck and Zwickau Public Prosecutor's Offices*, C-508/18 and C-82/19 PPU) does not apply to the case at hand as they did not concern generalized deficiencies of the justice system.

In the second place, the Court states that even an increase in the systemic or generalized deficiencies regarding the independence of courts in a certain Member State does not allow to presume that the person requested through an EAW in that Member State will suffer a breach of his or her right to a fair trial. The Court thus reiterates the requirement of the two-step examination referred to in *Minister for Justice and Equality*, which obliges the executing judicial authority to also assess the risk in question in the specific case. This assessment must take into account the situation of the requested person, the nature of the offence, and the factual context of the EAW, such as any statements by public authorities that might interfere with the handling of the case. The Court points out that an automatic refusal to execute EAWs issued by a Member State is possible only if the European Council formally declares that that Member State has failed to respect the principles on which the Union is based.

Furthermore, the Court adds that the judicial authority executing an EAW issued with the aim to conduct criminal proceedings must take into account systemic or generalised deficiencies concerning the independence of the issuing Member State's judiciary that may have arisen before or after the issue of the EAW. On the contrary, where an EAW is issued with a view to a surrender for the execution of a custodial sentence, the executing judicial authority must only examine whether the deficiencies existed in the issuing Member State at the time of issue and whether they have affected the independence of the court that imposed the specific custodial sentence.

The Court, therefore, rules that Articles 6(1) and 1(3) of the EAW Framework Decision must be interpreted as meaning that, where there is evidence of systemic or generalised deficiencies concerning the independence of the judiciary in a Member State issuing an EAW, the executing judicial authority must carry out a specific and precise verification of the risks of breach of the fundamental right to a fair trial of the requested person, if surrendered. This assessment takes account of, *inter alia*, his or her personal situation, the nature of the offence in question, and the factual context in which that warrant was issued, such as statements by public authorities liable to interfere with the handling of the individual case.

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AG'S OPINIONS

OM (Case C-393/19) – Opinion delivered on 25 June 2020 (AG Campos Sánchez-Bordona)

On 25 June 2020, Advocate General Campos Sanchez-Bordona delivered his Opinion in case C-393/19, which concerns the compatibility of national criminal legislation that provides for a

vehicle used in the commission of a smuggling offence to be confiscated for the benefit of the state with EU law.

OM is a driver of an international freight lorry. He travelled from Turkey to Germany and was arrested in Bulgaria with a hoard of antique coins hidden in the vehicle. He was subsequently charged in Bulgaria and convicted of smuggling. According to the referring court, the firm that owned the unit neither knew nor could or should have known that its employee was committing the offence. That court asks about the impact of the Article 17(1) and the Article 47 of the Charter of Fundamental Rights of the European Union ("The Charter") on the national laws that were applied in the case. In accordance with the indications given by the Court of Justice, the Advocate General shall restrict his analyze to the first question related to the right of property (Article 17(1) of the Charter). The referring court (Court of appeal, Plodive) refers the following question to the Court of Justice for a preliminary ruling : " Is Article 17(1) of the Charter … to be interpreted as meaning that a national provision such as that pursuant to Article 242(8) of the Nakaztelen Kodeks (Criminal Code) of the Republic of Bulgaria, according to which a means of transport used to commit aggravated smuggling which belongs to a third person who neither knew nor could or should have known that is employee was committing the offence must be confiscated for the benefits of the State, is unlawful on the grounds that it undermines the fair balance between the public interest and the need to protect the right to property ?".

According to the Advocate General, as the Charter is addressed to Member States only when they are implementing EU law, the citation of one of its articles on its own is not sufficient grounds for a reference for a preliminary ruling if there is no connection to other provisions of EU law. The order for a reference does, however, refer to recital 33 of the Directive 2014/42/EU establishing minimum rules on the freezing of the instrumentalities of an offence and judicial remedies to protect the rights of parties. However, it is doubtful whether Directive 2014/42 applies in this case in view of the criminal offences covered by the convention. Finally, the Advocate General argues that the Framework Decision 2005/212 on Confiscation of Crime-related Proceeds, Instrumentalities and Property ("FD 2005/212") need to be interpreted in this case in order to resolve the issues raised by the referring court. In spite of FD 2015/12 was partially replaced by Directive 2014/42, although the change did not affect Article 2, 4 and 5 of the decision, which remain in force. In any event, the Court of Justice may provide the referring court with elements of interpretation of EU law to which the latter court has not referred in its order for reference.

Then, the Advocate General argues that the protection, both procedural and substantive, of the rights of *bona fide* third parties was taken into consideration by the EU legislature, as reflected in recital 3 of FD 2005/212 and addressed in Directive 2014/42. The article 6 of the Directive 2014/42 replaces Article 4 of FD 2005/212. Although the latter article is no longer in force, it would in the view of the Advocate General be wrong to deduce that the possibility of confiscating property belonging to third parties under FD 2005/212 has disappeared. There is, therefore, nothing to prevent Article 2(1) of FD 2005/212 being interpreted as allowed the confiscation of property from third parties, other than those acting in good faith. To confirm this statement, The Advocate General refers to judgment of 21 May 2019. In the light of that, The Advocate General considers that, as a general rule, it is not possible to confiscate property that has been used as an instrumentality in an offence where it belongs to *bona fide* third parties. However, exceptions to that general rule could be made on public interest grounds.

Finally, the Advocate General argues that if national law were to opt to impose an absolute

requirement for the confiscation of the means of transport used where the owners have genuinely acted in good faith, it would be taking advantage of an inappropriate legal instrument in order to expropriate the property. And turning confiscations into the compulsory deprivation of property would need to be justified by sufficient grounds and, ultimately, would need to trigger the guarantee of compensation set out in the second sentence of Article 17(1) of the Charter.

In the light of the above, The Advocate General suggests that the response to the first question referred by the referring court should be as follows: "Article 2(1) of Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, taken in conjunction with Article 17(1) of the Charter on Fundamental Rights of the European Union, must be interpreted as precluding a provision that allows a means of transport used to commit aggravated smuggling to be confiscated for the benefit of the State where that means od transport belongs to a *bona fide* third party who neither knew nor could or should have known that it would be used to commit the offence".

The Court delivered its judgment on 14 January 2021. This decision will be analyzed in the next edition of the ECLAN Newsletter.

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JR (Case C-488/19) – Opinion delivered on 17 September 2020 (AG Kokott)

On 17 September 2020, AG Kokott delivered her opinion on Case C-488/19 relating to the execution of a European arrest warrant (EAW) issued by a Member State for the purpose of the enforcement of a judgment made by a third country. In this case, JR, a Lithuanian national, was arrested and judged in Norway for drug trafficking. In 2015, this judgement was recognized on the basis on a bilateral agreement between the two countries on the recognition and execution of decisions in criminal matters so that it could be executed according to Lithuanian law. In 2016, JR was released from prison on parole. Two years later, a Lithuanian jurisdiction ordered JR to serve the remaining part of his sentence owing to a breach of parole conditions. Since JR had meanwhile fled abroad, the Lithuanian authorities issued, on 24 May 2018, an EAW for the execution of a custodial sentence. Consequently, JR was arrested in Ireland in January 2019. The High Court of Ireland is to rule on the execution of the EAW and therefore referred two questions to the Court of Justice.

First, the referring court asks whether Framework Decision 2002/584/JHA on the European arrest warrant applies to the situation where the requested person was convicted and sentenced in a third State, knowing that the judgment of this third country was recognised in the issuing State and enforced according to the laws of the issuing State on the basis of a bilateral agreement between the two countries.

By its second question, the referring court asks whether an executing judicial authority can refuse to execute the European arrest warrant under Article 4(1) and Article 4(7)(b) of EAW Framework Decision because the offence has been committed in a third State, if the offender carried out preparatory acts in the issuing State.

On the first question, AG Kokott starts to recall that the principle of mutual recognition does not apply to third states. Consequently, the Norwegian judgment could not, *per se*, form the basis of an EAW. However, in the absence of an agreement on extradition between the EU and Norway at the time of the facts of the case, Lithuania could fully apply the bilateral agreement concluded with Norway and recognized the Norwegian judgment for the purpose of its execution. The question is therefore whether an EAW is conditional upon the fact that the custodial sentence to be executed was handed down in a Member State, or whether the

issuing Member State can 'legalise' a custodial sentence of a third State by recognising the conviction. Since the Lithuanian decision recognizing the Norwegian judgment appears to be an enforceable judicial decision, in the meaning of Article 8(1), 1(1) and 2(1) of the EAW Framework Decision, AG Kokott concludes to the application of the latest to such situation. The executing Member State still has to check, following a specific and precise assessment of the individual case, whether there are substantial grounds to believe that the requested person is at risk of suffering a serious breach of his or her fundamental rights. In that regard, AG Kokott stresses the fact that the agreement on the surrender procedure between EU Member States and Iceland and Norway entered into force in November 2019. This agreement shows that the EU has expressed confidence in the Kingdom of Norway which reaches to the mutual confidence between Member States. In the case of this third State, it is therefore to be presumed, subject to rebuttal, that fundamental rights have already been protected hitherto and will also be protected in the future.

When it comes to the analysis of the second question and the application of optional grounds for refusal, AG Kokott quickly rejects the application of Article 4(1) to the present case. Indeed, drug trafficking is punishable by Irish Law and, on the face of it, does not presuppose any double criminality, under Article 2(2) of the FD EAW. By contrast, the interpretation of Article 4(7)(b) of the EAW Framework Decision is relevant to the decision. This ground for refusal depends on two cumulative conditions: the offence to which the EAW relates was committed outside the territory of the issuing Member State (1) and, the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory (2). According to AG Kokott, the concept of "offences committed outside the territory of the issuing Member State" is a concept of EU law which must be interpreted by the Court. This interpretation must be done in the light of the wording of Article 4(7)(b) compared to Article 4(7)(a), the extent to which the concept of an offence includes preparatory acts, and to the subject matter of the conviction. Finally, AG Kokott considers that the executing Member State may not refuse to execute an EAW on the basis of Article 4(7)(b) of the EAW Framework Decision if it has been established that the requested person carried out punishable preparatory acts in the issuing State which are specifically inextricably linked to the offence for which the requested person was convicted.

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WS v Bundesrepublik Deutschland (C-505/19) – Opinion delivered on 19 November 2020 (AG Bobek)

On 19 November 2020, AG Bobek delivered his opinion on Case C-505/19, which concerns the application within the Schengen area of the principle *ne bis in idem* in relation to acts for which the International Criminal Police Organisation (Interpol) has published a red notice at the request of a third State. Interpol red notices are requests issued to law enforcement authorities worldwide, in order to locate and restrict the movements of persons, pending a request for their extradition for prosecution or to serve a sentence.

In 2012, the competent US authorities requested Interpol to issue a red notice concerning the applicant, a German citizen residing in that country. The red notice was based on an arrest warrant for, *inter alia*, charges of corruption, money laundering and fraud. However, the Public Prosecutor's Office in Munich (Germany) had already initiated an investigation procedure against the applicant concerning the same acts as those covered by the red notice. Those proceedings were discontinued in 2009 after the applicant paid a certain sum of money, in accordance with German law. In 2013, upon request of the applicant, the Federal Office of Criminal Police (BKA) requested and obtained the publication of an addendum to

the red notice in question, stating that the BKA considered that the principle *ne bis in idem* was applicable to the charges mentioned in the notice. The German authorities also asked the US authorities, albeit unsuccessfully, to delete the red notice.

In 2017, the applicant brought an action before a German Administrative Court (the referring court) against the Federal Republic of Germany requesting that the German authorities be ordered to take the necessary measures to remove the red notice, as it did not allow the applicant to travel to any State party to the Schengen Agreement without risking arrest. That situation was, according to the applicant, contrary to Article 54 of the Convention Implementing the Schengen Agreement (CISA) and Article 21 TFEU. In addition, the applicant maintained that, in such a situation, the further processing by Member States' authorities, of his personal data contained in the red notice was contrary to the provisions of the EU Directive 2016/680 of 27 April 2016, on the protection of natural persons with regard to the processing of personal data in the context of criminal proceedings. Against this background, the Administrative Court stayed the proceedings and referred six questions to the CJEU on the proper interpretation of the relevant provisions of EU law.

The AG rephrases the questions of the referring court. One set of questions therefore refers to whether EU Member States are authorised to implement an Interpol red notice, and thus restrict the requested person's movements, where another EU Member State has notified Interpol and its members that that notice relates to acts for which the principle *ne bis in idem* may be applicable (Questions 1-3). The other set of questions of the referring court concerns whether EU Member States are allowed, where the principle *ne bis in idem* does apply, to further process the personal data of the requested person contained in the Interpol red notice (Questions 4 and 6). The fifth question, on whether Interpol has an adequate level of data protection for the purposes of Directive 2016/680 is instead considered as manifestly inadmissible for lack of relevance in the facts at hand.

The first set of questions refers to the implementation of Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985, which regulates the application of the *ne bis in idem* principle withing the Schengen Area, in conjunction with Article 50 of the Charter of Fundamental Rights of the European Union, and Article 21(1) TFEU.

As first, the AG clarifies that, according to the consistent case-law of the Court, a decision of a public prosecutor that, after having assessed the case on its merits and with the agreement of the competent court, definitely discontinuing criminal proceedings once the accused has satisfied certain conditions, falls within the scope of Article 54 of the CISA. Then, the AG states that such a decision, that bars any further prosecution for the same act in one Member State, must have the same effects within the whole EU area of freedom, security and justice. This interpretation does not conflict with the principle of precedence of international law over provisions of EU law, with regard to the Agreement on extradition between the European Union and the United States of America, of 25 June 2003. Indeed, the precedence of international law does not extend to the general principles of EU law, meaning that neither the Union nor the Member States can justify a possible breach of fundamental rights by their duty to comply with international instruments.

Concerning the first set of questions, therefore, the AG concludes that a final determination adopted by the competent authority of a Member State as to the actual application of the principle *ne bis in idem* in relation to the specific charges precludes all Member States from implementing a red notice issued by Interpol at a request of a third State and concerning the same charges. Nonetheless, the AG notes that in the case at hand such a final determination on the identity of the facts between

the criminal proceedings in Germany and those in the US was yet to be issued.

Coming to the second set of questions, the AG starts his reasoning by specifying that the processing of personal data contained in an Interpol red notice does fall within the scope of Directive 2016/680, whose Article 4(1) establishes, *inter alia*, that Member States must ensure that personal data are "processed lawfully and fairly". The AG considers that it is the very application of the principle *ne bis in idem* in a specific case that may require further processing of the personal data contained in the red notice. Further processing may be carried out in the interest of the individuals referred to in the notice, in order to remind the applicability of the principle *ne bis in idem* in possible other requests for red notices. However, the further processing must be limited to the one that, according to a case-by-case assessment, may be considered "necessary" for the purposes of Articles 4 and 8(1) of Directive 2016/680.

Concerning the second set of questions, therefore, the AG concludes that Directive 2016/680, read in conjunction with Article 54 of the CISA and Article 50 of the Charter, does not preclude the further processing of personal data contained in a red notice issued by Interpol, even if the principle *ne bis in idem* applies to the charges referred to in the notice, provided that the processing is carried out in accordance with the rules set out in that directive.

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MM (C-414/20 PPU) – Opinion delivered on 9 December (AG de la Tour)

On 9 December 2020, AG de la Tour delivered his opinion in Case C-414/20, giving him the opportunity to clarify the conditions for the validity of the issuance of a "European arrest warrant" as laid down in Article 8(1)(c) of Framework Decision 2002/584/JHA on the European arrest warrant (EAW Framework Decision).

The case originates from a request for a preliminary ruling from a Bulgarian court in the context of a criminal proceeding instituted against several individuals suspected of participating in a criminal organization. Among the persons suspected of the offence in question was MM, who absconded. On 16 January 2020, the Bulgarian prosecutor issued a European arrest warrant against MM indicating that this EAW is based on an investigation order adopted on 9 August 2019 for the purpose of putting the requested person under investigation. On 5 July 2020, MM was arrested in Spain and was surrendered to the Bulgarian judicial authorities on 28 July 2020. He was later placed in pre-trial detention.

The referring judicial authority before which proceeding in the dispute was brought considered the EAW issued against MM illegal as it originated from an authority lacking competence, namely a prosecutor without any intervention of a judicial authority. However, the Bulgarian court expressed doubts over her capacity to declare the EAW at issue unlawful as it would lead to the indirect control of the decision of the prosecutor to issue a EAW in breach of Bulgarian law. Furthermore, the referring court expressed concerns with regard to the consequences of such a decision to declare the EAW unlawful.

The AG replies with a three-step reasoning addressing separately the questions referred by the Bulgarian court.

First, regarding the question concerning the validity of the EAW the AG starts by recalling that the EAW system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a EAW is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision. It

follows that, where the law of the issuing Member State confers the competence to issue a EAW on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, as in the present case, the national decision on which the EAW is based must meet the requirements inherent in effective judicial protection. Recalling the opinion of AG Bot in *Bob-Dogi*, AG de la Tour notes that this implies in particular that the EAW must be based on a distinct national warrant ordering the arrest of the accused person in the territory of the issuing Member State. In the AG's view, this requirement is not satisfied in the present case since the EAW at issue cannot be regarded as being based on a '[national] arrest warrant or […] any other enforceable judicial decision having the same effect' as required by Article 8(1)(c) of the Framework Decision 2002/584 in order for the EAW to be valid. According to the AG, while the investigation order delivered on 9 August 2019 by the Bulgarian prosecution authority may be considered as a judicial decision within the meaning of Article 8(1)(c), it cannot be regarded as producing equivalent effects to those of a national arrest warrant as required by the same provision. In the light of the foregoing, the AG suggests that Article 8(1)(c) of the Framework Decision 2002/584 must be interpreted as meaning that an EAW should be considered invalid since it is not based on '[national] arrest warrant or […] any other enforceable judicial decision having the same effect' within the meaning of this provision. He considers that such notions cover national measures adopted by a judicial authority for the purpose of searching and arresting the concerned person with a view to bringing him or her before a judge.

Second, the AG moves on to the question as to whether the referring court is competent to control the validity of the decision to issue a EAW insofar as Bulgarian procedural law does not provide for a judicial review of such a decision. He considers that in order to fulfill the requirements of providing effective judicial protection as required by EU law, the examination of the conditions necessary for the valid issuance of the EAW can take place in incidental proceedings which main purpose is different, as in the present case. In his view, when the national law of the issuing Member State does not provide for a judicial review of the conditions necessary to issue the EAW, notably to assess the proportionality of such a decision, neither before or simultaneously to its adoption, nor subsequently, a jurisdiction asked to intervene after the surrender of the person concerned should be enabled to assess, even incidentally, the conditions for the issuance of the EAW.

Third, regarding the consequences of the invalidity of the EAW on the pre-trial detention of MM, AG de la Tour underlines that there is no harmonization of procedural rules concerning pre-trial detention at EU level. While estimating that EU law still applies in the proceeding brought before the referring court, he considers that neither Framework Decision 2002/584, nor Article 47 of the Charter require the referring court to release the person subject to pre-trial detention in case the EAW concerning that person is considered invalid. According to the AG, the consequences on the pre-trial detention of the person concerned resulting from the invalidity of an EAW must be determined according to the national law of the issuing Member State. However, AG notes that those consequences should not undermine EU law and in particular the efficiency of the mechanism put in place by Framework Decision 2002/584. Hence, the AG suggests that in case where the invalidity of the EAW lead to the release of the person concerned, adequate measures should be adopted in order to prevent flight risk insofar as it would contravene the objectives pursued under Framework Decision 2002/584.

The Court delivered its judgment on 13 January 2021. This decision will be analyzed in the next edition of the ECLAN Newsletter.

ACADEMIC ACTIVITIES

PUBLICATIONS

Books

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, 459p.

M. Kettunen, *Legitimizing European Criminal Law. Justification and Restrictions*, Springer, 2020, 244p.

M. Ventrella, *The Control of People Smuggling and Trafficking in the EU. Experiences from the UK and Italy*, Routledge, 2020, 288p.

R. Pereira and S. Miettinen (eds), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order*, Edgard Elgar, 2020, 296p.

L. Marin and S. Montaldo (eds), *The Fight against Impunity in EU Law*, Hart Publishing, 2020, 392p.

G.-L. Gatta, V. Mitsilegas, S. Zirulia (eds.), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on "Crimmigration"*, Hart Publishing, 2021 (forthcoming), 272p.

A. Weyembergh and C. Chevallier-Govers (dir.), *La création du parquet européen : simple évolution ou révolution au sein de l'espace judiciaire européen* ?, Larcier, 2021 (forthcoming).

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

V. Mitsilegas and N. Vavoula, *Surveillance and Privacy in the Digital Age: European, Transatlantic and Global Perspectives*, Hart Publishing, 2021 (forthcoming), 384p.

C. Arangüena Fanego, M. de Hoyos Sancho and A. Hernández López, *Procedural Safeguards for Suspects and Accused Persons in Criminal Proceedings. Good Practices Throughout the European Union*, Springer, 2021 (forthcoming), 84p.

UPCOMING EVENTS

PhD Seminar (online), *The significance of EU Criminal Law in the 21st Century: The Need for Further Harmonisation or New Criminal Policy?*, ECLAN, University of Vilnius, 28-29 January 2021 → Link

Conference (online), *Post-Brexit Cooperation in Criminal Justice and Law Enforcement*, ERA, 28-29 January 2021 → Link

Conference (online), *Applying Procedural Rights under the Case Law of the CJEU*, ERA, 1-2 February 2021 → Link

Conference (online), *Applying the Charter of Fundamental Rights of the European Union*, ERA, 11-12 February → Link

Conference (online), *Transposition of the PIF Directive into National Legislation*, ERA, 25-26 February 2021 → Link

Conference (online), *Obtaining e-Evidence When Investigating and Prosecuting Crimes*, ERA, 8-9 March 2021 → Link

Conference (online), *Annual Conference on White-Collar Crime in the EU 2021*, ERA, 17-19 March 2021 → Link

Conference (online), *The EAW, Pre-Trial Detention, Mutual Trust and Legal Assistance*, ERA, 24-26 March 2021 → Link

Conference (online), *Procedural Rights in the Context of Evidence-Gathering*, ERA, 25-26 March 2021 → Link

Conference, *Assessing the EU's Capacity to Act*, EUIA, Brussels, Belgium, 26-28 May 2021 → Link

Conference, *Conference on Extradition and Surrender*, Netherlands, Leiden University, 24-25 June 2021 →Link

Summer School, *The EU Area of Criminal Justice,* ECLAN, 28 June – 2 July 2021, Brussels (TBC) →Link.