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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

The Reception of European Legislation and Case Law in the Member States
La réception de la législation et de la jurisprudence européennes dans les États membres
Die Rezeption der europäischen Gesetzgebung und Rechtsprechung in den Mitgliedsstaaten

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The Associations for European Criminal Law and the Protection of Financial Interests of the EU is a network of academics and practitioners. The aim of this cooperation is to develop a European criminal law which both respects civil liberties and at the same time protects European citizens and the European institutions effectively. Joint seminars, joint research projects and annual meetings of the associations' presidents are organised to achieve this aim.

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The Reception of European Legislation and Case Law in the Member States

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Guest Editorial

Dear Readers,

The development of European law shows a constant proliferation of legal sources and a rising phenomenon of reciprocal assimilation between sets of norms of various origins (Union law and law from conventional sources, e.g. the Council of Europe) – especially in recent years. Their mutual "interference" and interdependence have contributed to the extension of the catalogue of fundamental rights and their protection requirements. This implies for the judge to apply national law not only in compliance with European Union legislation but also in the light of the case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

The (legitimacy) control exercised by the highest national courts itself moves towards the search for the common features of a uniform European interpretation of the law. The role of the aforementioned courts is that of identifying the relevant rule, with regard not only to the framework of domestic constitutional principles but also to the forms and mechanisms of fundamental rights protection that emerge from supranational norms as interpreted in the case law of the two European courts.

This is a delicate and complex task, based on the awareness of cultural change that makes every national judge a European judge, called on to develop a common culture of fundamental rights protection in the light of procedural fairness and, above all, to coordinate the structural relations between the domestic legal systems and the impulses coming from the various "external" legal provisions, even those of conventional origin (ECHR). To do so, the national judge may use the instruments of conforming interpretation (where possible) or the preliminary ruling procedure under Art. 267 TFEU. For the purpose of interpretation of an ECHR provision (relevant to the decision in a specific case), the national judge can (now) also resort to a preliminary ruling procedure that, following the entry into force of Protocol 16 of the ECHR, may be submitted to the Strasbourg Court in order to obtain a non-binding advisory opinion. In this way, the legitimacy control that can be exercised by national supreme courts extends its remit beyond national legislation to European legislation, with the aim of uniformly defining the effects that can be derived– albeit in different ways and forms – from the enforcement of the judgments of the two European Courts.

Gaetano De Amicis

In accordance with the ECJ ruling in the "*Pupino*" case, the Italian Supreme Court *(Corte di Cassazione)*, in its judgment no. 4614 of 30 January 2007, referring to the domestic legislation implementing Framework Decision 2002/584/JHA on the European Arrest Warrant, reiterated the need to respect the rule of conforming interpretation, the only limit to this rule being the impossibility of a *contra legem* interpretation of domestic law if incompatibility between domestic law and secondary law provisions in the Framework Decision is arises.

Moreover, the transfer into national systems of principles established in ECJ case law appears increasingly incisive, for example with regard to the fundamental guarantees of the rule of law and the identification of conditions for the application of the *ne bis in idem* principle. Examples can also be found in the areas of mutual recognition with regard to judicial cooperation in criminal matters and immigration / asylum. The progressive assimilation of these principles resulted from the fruitful mediation efforts that emerged from the (increasingly) close interaction between national supreme courts and the ECJ. These efforts enabled the development of new perspectives aimed at maximizing fundamental rights protection, as embodied in the safeguards contained in Art. 53 CFR and in the ECHR, while at the same time strengthening (the perception of) the role that European case law can assume in the development of case law of the supreme courts.

The control over the degree of protection afforded to fundamental rights *in concreto* is therefore a task reserved to the national courts, none less than to the two European Courts, in an effort to ensure a uniform interpretation of rights throughout Europe. Within this scope, the activation of so-called constitutional "counter-limits" inevitably represents a last resort and, as such, must be restricted to exceptional circumstances,

which see an insurmountable contrast between an EU provision and a domestic fundamental constitutional principle.

If the goals of mutual cooperation and willingness to engage in dialogue between the different European jurisdictional actors are not constantly pursued, both at the institutional level and on the parallel level of concrete enforcement practices, this would inevitably jeopardize not only the remedies necessary to ensure the effectiveness of judicial protection in the areas governed by EU law (Arts. 19 TEU, 47 of the Charter, and Art. 6 ECHR), consistency among the respective systems, and the proper exercise of the competences of the European Court of Justice (judgment of 24 June 2019, *Commission v. Poland,* C-619/18) but also the robustness of the entire European system of protection of fundamental rights and freedoms.

The broad discretion that the interpretation and application of these rights currently enjoy, however, risks giving rise to problems concerning the relationship with constitutional principles and the fundamental features of each of the national systems. As far as the Italian system and its relationship with the ECHR is concerned, it is worth recalling the problem of the admissibility of confiscation foreseen for the crime of illegal allotment, which is acknowledged by the Italian Corte di Cassazione even in the case of an expired statute of limitation (provided that all elements of crime have been ascertained). Regarding the relationship to the provisions of the EU Treaties (Arts. 325 para. 1 and 2 TFEU) and the Charter of Fundamental Rights, we can highlight the different interpretative meaning that the principle of legality (referred to in criminal law) assumes in Art. 49 of the Charter and in Art. 25 para. 2 of the Italian Constitution. There, the principle of legal certainty tends to prevail (according to the numerous rulings that have recently emerged in the course of the well-known *Taricco* case).

In both above-mentioned cases, the intervention of the Italian Constitutional Court proved decisive for the affirmation of two guarantees that are fundamental for the domestic system: in the first case, the protection of the public interest regarding orderly land development (judgment no. 49 of 2015); in the second case, the right resulting from necessary respect for the corollaries of the principle of legality in criminal law, that is to say predictability, certainty, and non-retroactivity (judgment no. 115 of 2018). With regard to each of these situations, in fact, the European Courts have modified the initially adopted interpretations, reaching conclusions that could hardly have been reached without robust intervention on the part of the constitutional judge. The conclusions aimed at achieving a "systemic" and not a "fragmented" integration of the different levels of protection originating from the combination of rules that are not well coordinated and that are in potential conflict.

At the same time, however, it is worth mentioning the forward-looking and cautious balancing exercise of the ECJ in the *Taricco* case (judgment of the Grand Chamber of 5 December 2017 in case C-42/17, *M.A. S. and M. B.*). Here, the Court recalled the importance of common constitutional traditions and the need for an interpretation capable of accommodating the founding principles of the constitutional identity of a Member State in the wider area of these traditions – traditions that contribute to shaping Union law and to decisively inspiring its development in a productive give-and-take with the national identities of individual Member States.

Ultimately, each jurisdiction, whether domestic or European, is required to respect its role within a harmonious and cognizant multilevel system, following conscious and distinct plans and avoiding the narrow confines of its operational ambit. At the same time, jurisdictions should strive to eradicate any ambitions smacking of "supremacy" and to activate good practices of dialogue and constructive confrontation through the development of forms of cooperation capable of encouraging the formation of uniform European interpretation.

This effort must also be pursued in terms of cultural development and of strengthening the current tools for professional training of all legal practitioners, e.g., by enhancing those forms of exchange of information and mutual communication of measures, concrete experiences, and decision-making techniques that are the basis of the 2015 Memoranda of Understanding (MoU) between the National High Courts, the ECtHR, and the ECJ within the framework of an increasingly closer cooperation. On the one hand, the MoU aimed at fostering a deeper knowledge of the specificities of each national legal system, also as part of the parallel initiative aimed at creating a true "network" of European Supreme Courts. On the other hand, the MoU aimed to foster the increased participation of national courts in the process of developing a supranational "living" law, as an integral and constitutive part of a common European legal heritage.

Gaetano De Amicis,
Consigliere, Suprema Corte di Cassazione, Italy

News

Actualités / Kurzmeldungen*

European Union

Reported by Thomas Wahl (TW) and Cornelia Riehle (CR)

Foundations

Fundamental Rights

EP Concerned about Deteriorated Fundamental Rights Situation in EU

The European Parliament expressed a number of concerns in its report on the situation of fundamental rights in the EU for the years 2018–2019. The underlying EP resolution of 26 November 2020 was adopted with 330 votes in favour of it, 298 against it, and 65 abstentions.

In the field of PIF and criminal law, the EP highlights the link between corruption and fundamental rights violations in several areas, e.g., the independence of the judiciary, media freedom and freedom of expression of journalists and whistle-blowers, detention facilities, access to social rights, and trafficking of human beings. EU institutions and the Member States are called on to resolutely fight corruption, and to devise effective instruments for preventing, combating and sanctioning corruption, and fighting fraud, as well as to regularly monitor the use of public funds. MEPs also emphasise that the European Public Prosecutor's Office (EPPO) should soon be operable, thus strengthening the fight against fraud in the European Union.

The resolution highlights the importance of the rule of law as a cornerstone of democracy and as a precondition for citizens to enjoy their fundamental rights and freedoms. The EP strongly condemns the efforts of the governments of some Member States to weaken the separation of powers and the independence of the judiciary. It expresses its deep concern, in particular, about decisions that call into question the primacy of European law. In this context, the EP reiterates its demand for an EU mechanism on democracy, the rule of law, and fundamental rights, which was tabled in October 2020 with precise recommendations (→related link).

In addition, the EP regrets the lack of progress in the ongoing Article 7 proceedings (against Poland and Hungary) in the Council, despite reports and statements by the Commission, the UN, the OSCE, and the Council of Europe indicating that the situation in the deviant Member States has deteriorated (→regular eucrim reports on the rule-of-law situation in these EU countries).

As far as criminal law is concerned, another issue raised is the substandard prison conditions in certain Member States, which MEPs find alarming. Member States are called on to comply with the rules on detention stemming from the instruments of international law and Council of Europe standards. The resolution also reiterates that pre-trial detention is intended to be an exceptional measure; it regrets the continued overuse of pre-trial detention instead of alternative measures that do not involve the deprivation of liberty. Other key issues raised in the fundamental rights report are the following:

- *Economic and social rights*: Politics must do more to protect disadvantaged groups, particularly women, people with disabilities, the elderly, children, migrants, Roma, and LGBTI+ people;
- *Right to equal treatment*: MEPs condemn the "organised backlash" against gender equality and women's rights, including sexual and reproductive health and rights; it also voices concern over hate speech and different forms of racism that are becoming increasingly normal.
- *Freedoms*: MEPs are concerned about measures aimed at silencing critical media and undermining media freedom and pluralism. Member States are called on to refrain from adopting laws that restrict the freedom of assembly and to put an end to disproportionate and

* Unless stated otherwise, the news items in the following sections (both EU and CoE) cover the period 16 November – 31 December 2020. Have also a look at the eucrim homepage (https://eucrim.eu) where all news items have been published beforehand.

eucrim – Common abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AML	Anti-Money Laundering
CBRN	Chemical, Biological, Radiological, and Nuclear
CCBE	Council of Bars and Law Societies of Europe
CCJE	Consultative Council of European Judges
CDPC	European Committee on Crime Problems
CEPEJ	European Commission on the Efficiency of Justice
CEPOL	European Police College
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COSI	Standing Committee on Operational Cooperation on Internal Security
COREPER	Committee of Permanent Representatives
CTF	Counter-Terrorism Financing
DG	Directorate General
EAW	European Arrest Warrant
ECA	European Court of Auditors
ECB	European Central Bank
ECBA	European Criminal Bar Association
ECHR	European Convention on Human Rights
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EES	Entry-Exit System
EIO	European Investigation Order
EJN	European Judicial Network
ENISA	European Network and Information Security Agency
(M)EP	(Members of the) European Parliament
EPO	European Protection Order
EPPO	European Public Prosecutor's Office
EU	European Union
FCC	(German) Federal Constitutional Court
FD	Framework Decision
FT	Financing of Terrorism
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
ICTY	International Criminal Tribunal for the former Yugoslavia
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs
MoU	Memorandum of Understanding
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
ML	Money Laundering
OJ	Official Journal
OLAF	Office Européen de Lutte Anti-Fraude (European Anti-Fraud Office)
PNR	Passenger Name Record
SIS	Schengen Information System
SitCen	Joint Situation Centre
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

violent interventions on the part of law enforcement authorities.

- *Fundamental rights of migrants, asylum seekers, and refugees:* Parliament expresses grave concern over reports that asylum seekers are facing violent pushbacks. It is also concerned about the humanitarian situation in hotspots. Intimidation, arrests, and criminal proceedings against organisations and individuals for providing humanitarian assistance must end.

The report additionally raises the issue of new technologies, especially Artificial Intelligences systems and their potential danger to fundamental freedoms and security. Biased outputs must be avoided, in particular when the systems are used by law enforcement authorities. Further safeguards are needed to ensure privacy and data protection in light of the development of new technologies.

Regarding terrorism and security threats in the European Union, the EU must find an effective EU response by means of strengthened security cooperation. It must also take appropriate measures to avoid subsequent victimisation. (TW)

EP Calls for EU Values to be Upheld in State of Emergency

In a resolution of 13 November 2020, the European Parliament assessed the impact of COVID-19 measures on democracy, the rule of law, and fundamental rights. The EP makes three central demands:

- Emergency powers must be necessary, proportional, time-limited, and subject to democratic scrutiny;
- Bans on demonstrations should not be used to pass controversial measures;
- The rights of all people, including vulnerable groups, e.g., women, LGBTI persons, refugees, and prisoners, must be safeguarded.

The resolution stresses that emergency measures pose a "risk of abuse of power" and calls on the Commission to step up its efforts by taking legal action where necessary. Several precise

requests have been addressed to the EU countries. These include:

- End their "state of emergency," or at least clearly define the delegation of powers to their executives, and ensure appropriate parliamentary and judicial checks and balances;
- Exercise utmost restraint in restricting the freedom of movement, especially in relation to the right to family life;
- Maintain the rules of the Schengen Borders Code and the Free Movement Directive;
- Make sure that all new surveillance or tracking measures respect EU data protection rules, in particular the principles of purpose limitation and proportionality;
- Guarantee the rights of defendants, including their unfettered access to a lawyer, and evaluate the possibility of online hearings as a solution and alternative to hearings in court or to the transfer of suspects to other EU Member States under the European Arrest Warrant;
- Safeguard the rights and health of prisoners, in particular their rights to medical assistance, visitors, time in the fresh air, and educational, professional, and leisure activities;
- Target the elimination of hate speech and discrimination.

The resolution was adopted with 496 to 138 votes and 49 abstentions. It was forwarded not only to the Commission, the Council, and the governments/parliaments of the EU Member States but also to the Council of Europe, the OSCE, and the United Nations. (TW)

Poland: Overview of Recent Rule-of-Law Developments

This news item continues an overview of recent developments on the rule-of-law situation in Poland as far as their relationship with European law is concerned (→previous eucrim issues):

- 1 December 2020: The oral hearing in infringement case C-791/19 against Poland takes place at the CJEU. It addresses doubts about the powers, independence, and impartiality of the Disciplinary Chamber of the Supreme Court. The case was brought to the CJEU by the Commission on 10 October 2019 (→eucrim 3/2019, 157–158). The Polish government defends its reform of the judicial system, since it ensures that judges do not place themselves above the law; thus, the reform even increases judges' independence and impartiality. When the judges in Luxembourg asked about the lifted immunity of reform critic Judge *Igor Tuleya* (→related link) by the said Disciplinary Chamber, the Polish government could not respond satisfactorily, citing the need to address obvious and blatant breaches of judicial law. In this particular infringement case, the CJEU had ruled on 8 April 2020 that the Polish Disciplinary Chamber must suspend its work for the time being and had granted the EU Commission's request for interim measures (C-791/19 R; →eucrim 2/2020, 4). The Polish government disregarded the ruling and allowed the Disciplinary Chamber of the Polish Supreme Court to make further decisions, such as lifting the immunity of judges with a view to prosecuting them if necessary. A decision by the CJEU in case C-791/19 is expected in the first half of 2021.
- 3 December 2020: Since the Polish government has allowed the contentious Disciplinary Chamber of the Supreme Court to further continue to decide on matters of Polish judges, which may affect their status and restrict their judicial activities, the European Commission adds this point to the recently launched infringement proceedings on 29 April 2020 (→eucrim 1/2020, 4). These infringement proceedings take action against the so-called Polish muzzle law that entered into force in February 2020 (→eucrim 1/2020, 3). The Commission considers the independence and impartiality of the Disciplinary Chamber not to be guaranteed and its powers and ongoing activity not in line with Art. 19 TEU / Art. 47 CFR. The Polish government has one month to react to this new grievance.
- 17 December 2020: Advocate General *Tanchev* proposes that the CJEU decide that Polish law violates EU law by excluding legal review of the National Council of the Judiciary's assessment of judicial candidates to the Polish Supreme Court. The opinion refers to a reference for a preliminary ruling by the Polish Supreme Administrative Court in the context of legal proceedings against the appointment procedure of candidates for the National Council of the Judiciary (Case C-824/18, *A.B. and Others*). The AG also harshly condemns recent Polish legislation that denies the referring court both the possibility to successfully initiate preliminary ruling proceedings before the CJEU and the right to wait for a ruling from the CJEU. This undermines the EU principle of sincere cooperation. In addition, the AG clarifies that the referring court can directly apply Art. 19(1), second subparagraph TEU in order to disapply those national provisions that exclude legal review and to declare itself competent to rule on those cases in the legal framework to which Art. 19(1) was applicable before adoption of the contested law. Polish courts must maintain the appearance of independence of the judges appointed in the procedures at issue. (TW)

Hungary: Overview of Recent Rule-of-Law Developments

- 3 December 2020: In the Opinion in Case C-650/18 on the European Parliament's decision to initiate Article 7 TEU proceedings against Hungary, Advocate General *Bobek* advises the CJEU to dismiss the Hungarian application for annulment as unfounded. Hungary had challenged the Parliament's vote on the resolution that triggered the procedure for determining the existence of a clear risk of a serious breach by Hungary of the EU's fundamental values. Hungary argued that the vote result did not take into account the abstentions, which is why the required two-third majority was not reached. According to the Advocate General, the relevant provisions of the

TFEU and the EP Rules of Procedure exclude abstentions from the count. Furthermore, MEPs were duly informed before the vote that abstentions would not count as vote cast; therefore, they were able to exercise their right to vote in the light of these rules. A decision in this case by the CJEU is expected in the first half of 2021.

■ 17 December 2020: The CJEU, sitting in for the Grand Chamber, states that Hungary failed to fulfil its obligations under EU law in the area of procedures for granting international protection of and returning illegally staying third-country nationals (Case C-808/18). In particular, the following constitute infringements of EU law: restricting access to the international protection procedure, unlawfully detaining applicants from that protection in transit zones, moving illegally staying third-country nationals to a border area, and not observing the guarantees surrounding a return procedure. The CJEU rejects Hungary's arguments that the migration crisis justified derogating from certain EU rules with a view to maintaining public order and preserving internal security. The CJEU maintains the greater part of an infringement proceeding initiated by the Commission against Hungary. (TW)

New EU Sanctioning Regime for Human Rights Violations around the World

On 7 December 2020 – three days prior to International Human Rights Day – the General Affairs Council adopted the EU Global Human Rights Sanctions Regime (EUGHRSR). It is seen as a landmark initiative that underscores the EU's determination to enhance its role in addressing serious human rights violations and abuses worldwide. The regime consists of a Council Decision ((CFSP) 2020/1999) and a Council Regulation (1998/2020).

It enables the EU to list individuals and entities responsible for or involved in serious human rights violations or abuses as well as any individuals and entities associated with them. It can target state and non-state actors. Consequently, perpetrators and their associates can be banned from entering the EU, their assets in the EU frozen, and EU persons prohibited from making any funds and economic resources available to them.

The EU already has human rights sanctioning mechanisms in place; however, they are geographically limited in scope to individual countries. The EUGHRSR no longer needs a separate legal framework and Council decision for each country in order to add new persons or entities to an EU sanctions list.

More concretely, the EUGHRSR covers the following acts of human rights abuses:

- Genocide;
- Crimes against humanity;
- Torture and other cruel, inhuman, or degrading treatment or punishment;
- Slavery;
- Extrajudicial, summary, or arbitrary executions and killings;
- Enforced disappearance of persons, arbitrary arrests or detentions.

It also covers other acts, in so far as those violations or abuses are widespread, systematic or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Art. 21 TEU. These can include the following:

- Trafficking in human beings;
- Abuses of human rights by migrant smugglers;
- Sexual violence and gender-based violence;
- Violations or abuses of freedom of peaceful assembly and of association;
- Violations or abuses of freedom of opinion and expression;
- Violations or abuses of freedom of religion or belief.

The regulation does not mention corruption as a criterion for sanctions, although it was requested by the European Parliament and established in similar US legislation.

The High Representative of the European Union for Foreign Affairs and Security Policy and EU Member States can put forward proposals for listings. It is then for the Council to decide on these listings.

The EUGHRSR is an important EU policy tool for strengthening human rights and democracy in the EU's external actions, as set out in the EU Action Plan on Human Rights and Democracy 2020–2024 of 25 March 2020 (→eucrim 1/2020, 6–7). The EUGHRSR is also dubbed the "European Magnitsky Act." *Sergey* Magnitsky was a Russian whistleblower who uncovered massive fraud involving corrupt officials. Following his death in prison in 2012 due to ill treatment by officials, the USA, as a forerunner, and other countries, e.g. Canada, the UK and Baltic states, adopted legislation that envisages the sanctioning of persons responsible for serious human rights violations and corruption all over the word. The US legislation, which served as a model for other countries, was called the "Global Magnitsky Act." It should be noted that the new EU legislation supplements but does not replace other sanctioning possibilities already in place, such as country-specific ones (see above). (TW)

European Democracy Action Plan

On 3 December 2020, the Commission presented its Action Plan for Democracy, which complements the Action Plan on Human Rights and Democracy 2020–2024 of March 2020 (→eucrim 1/2020, 6–7). The Action Plan proposes measures to:

- Promote free and fair elections;
- Strengthen media freedom;
- Counter disinformation.

In concrete terms, the Action Plan provides for the establishment of a joint, operational mechanism for the protection of elections against threats such as cyber-attacks, in order to be able to ensure free and fair elections, especially during the COVID-19 pandemic. Hate crime and incitement, including online incitement, should also be included in the list of "EU criminal offences" in Art. 83(1)

TFEU. In addition, the establishment of an expert group and the presentation of an initiative to protect journalists and civil society through so-called SLAPP lawsuits (i.e., to avoid lawsuit abuse in strategic lawsuits against public participation) is planned for 2021. The fight against disinformation, especially in the digital sphere, is to be further intensified with guidelines for an improved code of conduct to combat disinformation in the spring of this year.

A public consultation of citizens, civil society, and stakeholders conducted by the Commission between July and September 2020 revealed support for further EU action in all three areas. A review of progress and possible further steps will take place in 2023. The tabled European Democracy Action Plan is considered one element of a broader endeavour at EU level to strengthen democracy, equality, and respect for human rights. (TW)

New Commission Strategy on Application of Charter

spot light

On 2 December 2020, the Commission presented its new strategy to strengthen the application of the EU Charter of Fundamental Rights (CFR/"Charter") over the next ten years. Although the CFR led to greater promotion and protection of citizens' fundamental rights in the EU during the past two decades, the Commission states that the CFR has also faced many challenges, for instance in the areas of migration and security, and, most recently, in the context of the COVID-19 crisis. Therefore, the Commission calls for renewing the EU's commitment to ensuring that the EU institutions and Member States apply the Charter to its full potential. The new strategy is built upon the following four pillars and includes a number of measures in each of them.

(1) Ensuring the effective application of the Charter by the Member States

The Commission will:

- Strengthen its partnership with Member States to ensure effective application of the Charter;
- Support best practice sharing between local authorities on use and awareness of the Charter;

The Commission invites Member States to:

- Nominate a Charter focal point to ease coordination and cooperation;
- Use impact assessments and legislative scrutiny procedures to ensure that initiatives implementing EU law comply with the Charter;
- Develop guidance and training for national and local administrations;
- Share best practices on use and awareness of the Charter on the European e-Justice Portal.

From 2021 on, the Commission will present *annual reports*, which will look into how the Member States apply the Charter in selected policy areas. The 2021 report, for instance, will focus on fundamental rights in the digital age. The EP and the Council are to organise substantive discussions on the follow-up to these annual reports. The Commission also proposes a variety of measures to ensure compliance of EU-funded projects with the Charter.

(2) Empowering civil society organisations, rights defenders, and justice practitioners

The Commission will:

- Take action against measures that breach EU law, including the Charter, which affect civil society organisations;
- Support an enabling environment for civil society organisations, in particular by means of the new Union values strand of the Citizens, Equality, Rights and Values programme.

Member States are invited to establish national human rights institutions and to ensure that they have the means to work fully independently. Other measures concern capacity building and support in the justice sector. In this context, the Commission will:

- Support capacity building on the Charter, for rights defenders and civil society organisations (particularly under the Justice programme), in order to make access to justice easier for all;
- Use EU funds to promote Charter-related training activities and material on the new "European training platform" within the European e-Justice Portal (→separate news item under "Area of Freedom, Security and Justice", p. 272).

(3) Fostering the use of the Charter as a compass for EU institutions

The Commission will, *inter alia*, boost its internal capacity for Charter compliance, e.g., through e-learning, updated guidance for staff, and training plans. The Commission will also support "Charter mainstreaming" throughout the European legislative process.

(4) Strengthening people's awareness of their rights under the Charter

Against the background of a recent Eurobarometer survey, indicating that only 42% of respondents have ever heard about the Charter and only 12% really know what it is, the Commission will:

- Launch an information campaign to raise people's awareness of their Charter rights and how to use them, giving specific examples and cooperating with actors on the ground;
- Develop young people's awareness of their Charter rights through the Erasmus+ programme;
- Member States are also encouraged to develop their own initiatives to promote awareness.

Background of the new strategy: The Commission highlights that the Charter – proclaimed 20 years ago on 7 December 2000 and legally binding since December 2009 – has enabled the EU legal order to develop into a "beacon of fundamental rights protection." It has become the embodiment of what EU rights and values mean and is therefore a strong symbol of European identity. It has also led to a more coherent and comprehensive interpretation of fundamental rights across the EU.

The new strategy on successful application of the CFR in the coming years takes up calls from the European Parlia-

ment for stronger monitoring of application of the Charter in the Member States (→"Šimečka report" and EP resolution of October 2020, →eucrim 3/2020, 160). It also heeds calls from the Council to set out ways to improve application of the Charter (→eucrim 3/2019, 154).

In preparation of the new strategy, the Commission carried out a Eurobarometer survey on awareness of the CFR in the EU as well as a public consultation. The results of this consultation, reflecting the public's input to the new strategy, were analysed by the Fundamental Rights Agency in June 2020.

The strategy complements other recent overarching initiatives on the part of the Commission that aim at promoting and protecting the fundamental values on which the EU is founded. These mainly concern the European Democracy Action Plan (presented on 3 December 2020 →separate news item) and the Commission's first rule-of-law report of 30 September 2020 (→related link). The strategy also complements targeted efforts to make EU rights and values more tangible in specific areas:

- Victims' rights and access to justice (*inter alia* the EU strategy on victims' rights, COM(2020)258 (→eucrim 2/2020, 104);
- The Communication on access to justice in environmental matters, COM(2020) 643;
- Economic rights (an investment protection and facilitation framework is planned for 2021);
- Rights of EU citizens;
- Rights of the child (strategies on rights of children and the European child guarantee are planned for 2021).

The, new strategy tabled on application of the CFR aims to spark inter-institutional discussions. The Commission invites the Council, in particular, to prepare follow-up conclusions. A report on implementation of the strategy is envisaged for 2025. In 2030, the Commission will launch a stocktaking exercise in cooperation with the key actors in the Charter's enforcement in order to evaluate progress in awareness and use of the Charter. (TW)

Security Union

EP Resolution on EU Security Union Strategy

spot light

MEPs welcome the new EU Security Union Strategy presented by the European Commission in July 2020 (→eucrim 2/2020, 71–73) but stress that any new legislative proposal must be accompanied by a thorough and comprehensive impact assessment, especially on fundamental rights and risks of discrimination. With 543 votes in favour, 64 votes against, and 82 abstentions, the EP adopted a non-legislative resolution on 17 December 2020, making an important political statement on the EU's future security policy. MEPs call for effective implementation and evaluation of existing EU legislation related to internal security and stress that the Union's security policy must remain grounded in the values upon which the EU was founded. The resolution refers to a number of current security issues, among them:

- The fight against terrorism and organised crime;
- Child abuse;
- Disinformation and hybrid threats;
- Migrant smuggling;
- Illicit drugs and firearms trafficking;
- The impact of new technologies on security;
- The EPPO's contribution to internal security;
- The reform of Europol, police, and judicial cooperation in criminal matters, etc.

As regards the *fight against terrorism*, the resolution welcomes the new Commission counter-terrorism strategy presented on 9 December 2020 (→separate news item, p. 283) and stresses that the terrorist threat in the EU remains high. The Commission is urged to ensure full and swift implementation of Directive (EU) 2017/541 on combating terrorism in all Member States.

MEPs demand a holistic approach to *preventing and countering radicalisation*, which should combine security, education, social, cultural, and anti-discrimination policies, and involve all the relevant stakeholders.

In the field of *organised crime*, MEPs advocate the revision of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime and reiterate the need to establish a common definition of organised crime. Further measures should be taken on freezing and confiscating assets, including on non-conviction-based assets.

The resolution reiterates the EP's call on EU institutions and the Member States to resolutely fight systemic *corruption* and to devise effective instruments for preventing, combating, and sanctioning corruption and the fight against fraud. The use of public funds should be regularly monitored. It renews its call on the Commission to resume its annual anti-corruption monitoring and reporting immediately, which should cover all Member States and EU institutions, agencies, and bodies. EU funding under the new multiannual financial framework and the Recovery Plan must be effectively prevented from being used for corruption and fraud by organised crime groups.

The fight against *child abuse* online and offline must be stepped up. The EP welcomes the Commission's plan to present a legislative proposal in this regard in 2021. It also renewed its call to appoint an EU representative for children's rights, who should serve as a point of reference for all EU matters and policy related to children.

A major part of the resolution deals with *new technologies* and their impact on internal security issues. As regards law enforcement access to encrypted data, MEPs call for a thorough pre-assessment of a regulatory resolution. They stress that end-to-end encryption contributes to citizens' privacy and the security of IT systems and that it is indispensable for investigative journalists and whistle-blowers.

Considering that new and evolving technologies permeate all aspects of security and create novel security challenges and threats, the resolution also highlights that *5G infrastructure* is a strategic component of future European security and a key component of European strategic resilience. The EU needs a plan for building European 5G, including a plan to phase out and replace 5G technology from third countries that do not respect fundamental rights and European values.

As for the proposal to update *Europol's mandate* (→separate news item p. 279), the resolution supports the goal of equipping the agency with all necessary tools for more effective cooperation with its partners; however, it is also emphasized that such changes should be accompanied by enhanced political accountability as well as enhanced judicial control and parliamentary scrutiny.

In the field of *police cooperation*, the resolution takes note of the possible modernisation of the legislative framework of the Prüm decisions. One of the shortcomings identified is the poor data quality provided by Member States. MEPs reiterate, however, that a reform proposal must be accompanied by a thorough impact assessment, covering fundamental rights implications, which should demonstrate whether there would be added value in automatic data exchange and whether any additional categories of biometric data are needed.

Regarding *judicial cooperation*, the resolution acknowledges Eurojust's work in supporting and coordinating investigations/prosecutions of transnational crime but stresses that judicial cooperation in criminal matters is lagging behind in digitalisation. The Commission is called on to carry out an assessment of a potential extension of the EPPO's mandate, in line with Art. 83 TFEU, once the EPPO is fully operational.

Ultimately, the resolution voices concern over several *cross-cutting issues*:

- A systematic lack of full and timely implementation of EU security measures by the Member States requires not only their implementation by keeping to the letter of the law but also in the spirit of the law;
- The effectiveness of the EU's security measures has not yet been proven by publicly available quantitative and qualitative evidence;
- Regular evaluation of current security policies and agreements should include an examination of whether they must be brought in line with CJEU case law (e.g., the PNR agreements with the USA and Australia);
- Outsourcing of a number of activities from law enforcement agencies to the private sector is a matter of concern, particularly since there are deficiencies in oversight over any private-public cooperation in the field of security and in the transparency of EU funding for private companies establishing security systems or parts thereof.

Furthermore, MEPs are deeply concerned by the lack of resources allocated to some EU agencies acting in the field of justice and home affairs (JHA) to comply fully with their mandate. They therefore call for proper funding and staffing of the JHA agencies in order for the EU to deliver on the Security Union Strategy. (TW)

Council Conclusions on Internal Security and European Police Partnership

On 14 December 2020, the Council adopted conclusions on internal security and European Police Partnership. They are designed to give further political guidance on improvements in the field of law enforcement cooperation, future reactions to security challenges, and use of the potential of evolving new technologies for law enforcement purposes. For the establishment of an effective European partnership for internal security, the key part of the conclusions defines milestones that are to be achieved up to 2025:

- Enhancing the principle of availability of information;
- Implementing technical solutions for a secure and confidential communication between law enforcement authorities;
- Making full use of the instruments for EU-wide alerts on criminal acts;
- Better linking of the information already available, in particular by implementing the interoperability of EU information systems;
- Reviewing and updating the Prüm framework;
- Modernising the *acquis* of cross-border police cooperation, e.g., cross-border surveillance and hot pursuit;
- Enabling law enforcement authorities to use artificial intelligence in their daily work, subject to clear safeguards;
- Improving the capacity of law enforcement authorities in the Member States and at Europol to work with third countries and public and private partners worldwide, thus ensuring access to the information necessary to counter serious crime.

The conclusions also pave the way forward in a number of areas:

- Law enforcement cooperation;
- Keeping pace with technological progress;

Snapshots on Projects Funded in the Areas of Home Affairs

In November 2020, the Commission published two new e-books presenting a selection of projects implemented by the Member States of the EU and the Schengen area under the Asylum, Migration and Integration Fund (AMIF) and the Internal Security Fund (ISF). Both funds form a central part of the EU's home affairs funding instruments. They are designed to address common and/or individual challenges faced by the EU in migration, security, and protection of the Schengen area.

The two e-books include a description of each project (in the local Member State's language and English). They also provide relevant links to detailed information about the project and the funding managed by the Member States. (TW)

- Global cooperation;
- Fighting transnational organised crime;
- Preventing and combatting terrorism/violent extremism.

A separate set of conclusions, included as Annex I, set out measures for stepping up cross-border law enforcement cooperation (→separate news item under "Law Enforcement Cooperation" p. 295). (TW)

Area of Freedom, Security and Justice

Commission Plans to Speed Up Digitalisation of Justice Systems

spot light

According to its Communication of 2 December 2020, the Commission wishes to bring the digitalisation of justice in the EU up to full speed. The Commission provides evidence that the use of Information and Communication Technologies (ICT) tools in the EU Member States' judicial systems is very uneven. In addition, the COVID-19 pandemic has highlighted the need to speed up efforts to digitalise judicial institutions' handling of cases, to enable exchange of information documents between parties and lawyers in electronic form, and to strengthen easy access to justice for all.

The objective of the Communication is twofold: First, at the national level, it aims to help Member States move their national justice systems into the digital era. Second, it aims at further improving cross-border judicial cooperation between competent authorities at the European level. The latter would especially concern promoting the use of secure and high-quality distance communication technology (videoconferencing), facilitating the interconnection of national databases and registers, and promoting the use of secure electronic transmission channels between competent authorities.

After having outlined the challenges for justice systems in the digital age, the Communication proposes a toolbox for the digitalisation of justice. The toolbox comprises binding and non-binding measures and entails financial support to Member States from the EU, legislative initiatives, IT tools, and the promotion of national coordinating and monitoring instruments. The Commission stresses that any actions in relation to the digitalisation of justice must be implemented in full compliance with fundamental rights, notably rights to the protection of personal data, to a fair trial and to an effective remedy, and the principles of proportionality and subsidiarity.

Next to an explanation of the toolbox items, the Communication includes an outline of the actions that are to be proposed in 2021 and the years after:

- *Financial support for Member States*: Under the next Multiannual Financial Framework, the Commission will continue to financially support the digitalisation of justice, *inter alia* via the 2021–2027 cohesion policy instruments, the Recovery and Resilience Facility, the Digital Europe Programme, and the Justice Programme.
- *Digitalisation of cross-border cooperation*: The Commission announces that it will present a legislative proposal in the fourth quarter of 2021 that will make judicial cooperation instruments both in civil/commercial and criminal matters (e.g., the European Arrest Warrant) fit for the digital age. Digital communication between the competent authorities should become the default option. Interoperability of and between the national systems will be promoted.
- *Artificial Intelligence (AI)*: The Commission reiterates its assessment with regard to the benefits and opportunities offered by AI-based applications, balanced against their inherent risks (→previous eucrim issues). From 2021 on, the Commission will promote a number of targeted measures. These include quarterly expert webinars in which EU institutions, JHA agencies and bodies, legal professional organisations, etc. can exchange best practices and lessons learned on the use of innovative technologies in the field of justice. In 2021, together with Member States, the Commission will also start exploring ways to increase the availability of relevant machine-readable data produced by the judiciary in order to establish trustworthy machine-learning AI solutions for use by interested stakeholders.
- *Interconnection*: The Commission will take further action in order to improve the interconnection of registers and to enhance digital access to information. Member States should pursue the establishment of electronic registers and databases as a priority. Furthermore, Member States are encouraged to foster the use of videoconferencing (whenever possible) by developing the facilities in accordance with national law and in close coordination with one another.
- *Secure cross-border cooperation*: e-CODEX (e-Justice Communication via Online Data Exchange) – the main tool for secure cooperation in civil, commercial, and criminal law proceedings across borders – is to become the gold standard for secure digital communication in all Member States. To this end, the Commission presented a proposal on a Regulation for the EU-wide e-CODEX system. The regulation shall lay down the definition and composition of the system. It entrusts the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) with the management, further development, and maintenance of the e-CODEX system as of July 2023. By 2024, the Commission aims to expand the scope of another IT tool: eEDES (the e-evidence digital exchange system), by means of which Member State authorities can securely exchange European investigation orders, mutual legal assistance requests, and associated evidence in digital formats. eEDES should be developed further, integrated into the framework of the new e-evidence Regulation (→eucrim 1–2018, 35–36), and made available to all EU Member States.

■ *Digital criminal justice at the EU level*: The Commission plans a series of measures to equip the EPPO, Eurojust, and Europol with the necessary tools to better cooperate with each other: Eurojust's Case Management System, which allows the Agency to cross-check different cases in order to coordinate the EU-wide fight against serious cross-border crime (including terrorism), will be modernised. In addition, amendments to the Europol mandate will introduce a hit/no-hit link between the EPPO and Europol. Thanks to these "hit/no-hit connections" between their case management systems, Eurojust, Europol, and the EPPO will become aware of ongoing investigations and prosecutions. For this purpose, the Commission will create a task force in the first quarter of 2021, bringing together the EPPO, Eurojust, Europol, and OLAF. In 2021, the Commission will also present legislative initiatives for digital information exchange on cross-border terrorism cases and on the establishment of a Joint Investigation Teams Collaboration Platform.

■ *"My e-justice space":* The Commission plans to create a personal electronic space (as part of the e-justice portal), in which a user (or his/her legal representative) can consult or obtain judicial documents; however, judicial documents concerning a person's criminal proceedings are to be excluded.

■ *Cooperation, coordination, and monitoring:* The Commission proposes several measures to ensure that progress in the digitalisation of justice is adequately monitored. In addition, new initiatives and tools are to advance cooperation. The EU justice scoreboard (→eucrim 2/2020, 74–75) will monitor progress at the national level. A dedicated section in the e-Justice portal will be set up, so that Member States can share national initiatives on the digitalisation of justice. In 2021, the Commission will also organise an online Digital Justice Ministerial Forum, featuring high-level participation by EU institutions and key stakeholders.

Lastly, the Communication explores ways in which the EU can be equipped for future evolution in the digital sphere. During the second quarter of 2021, the Commission will develop a monitoring, analysis, and foresight programme on justice-relevant digital technology within its Joint Research Center. In parallel, the Commission plans to create a mechanism on the e-Justice portal for regular reporting, analysis, feedback, and exchange of best practices on justice-relevant IT.

The Communication presented on digitalisation of justice in the EU is accompanied by a Staff Working Document (SWD(2020) 540). The SWD serves to provide evidence-based background information. It maps the level of digitalisation of Member States' justice systems. It also contains a synopsis of the public feedback received on the Roadmap to this initiative, which took place from 30 July –24 September 2020.

Next steps: The Commission intends to reach a prompt follow-up on its plans. Therefore, the Commission will discuss the digitalisation of justice with the relevant entities, e.g., public administrations, the judiciary, legal professional organisations, etc.

Background: The Commission initiative on the digitalisation of justice can be considered a response to the Council conclusions on this matter adopted on 13 October 2020 (→eucrim 3/2020, 164). The conclusions, *inter alia*, call on the Commission to develop a comprehensive EU strategy on the digitalisation of justice by the end of 2020. In addition, the Communication contributes to the priorities of the current Commission under *Ursula von der Leyen*, who plans to make Europe fit for the digital age during her presidency. (TW)

JHA Agencies Stepping Up Digitalisation

On 20 November 2020, the heads of the EU's Justice and Home Affairs (JHA) Agencies met virtually to exchange ideas on Artificial Intelligence and digital capacity building as well as training tools and innovative learning. As a next step, the JHA agencies agreed to draw up a list of upcoming challenges and opportunities for joint initiatives in the field of digitalisation. The meeting was chaired by Eurojust. (CR)

Legal Practitioner Training in 2019

The number of justice professionals trained in EU law or the law of another Member State remains remarkably high. In 2019, over 182,000 justice professionals (judges, prosecutors, court staff, lawyers, bailiffs, and notaries) were trained accordingly. Although this is a slight decrease compared to 2018 (190,000 →eucrim 4/2019, 229–230), the participation rate continues to remain high. Figures and charts on European judicial training in 2019 are provided in the annual report that the Commission presented on 2 December 2020.

Commissioner for Justice, *Didier Reynders*, emphasized that the findings of the 2019 report confirm the success of the strategy on European judicial training adopted in 2011. As reported previously, the Commission already reached the strategy's goal to train half (800,000) of all justice professionals in the EU by 2020 in 2017, two years ahead of schedule. Other results of the ninth report on European judicial training include the following:

■ The decrease in total numbers, in comparison to 2018, is mainly due to a decrease in the EU legal training of lawyers;

■ Lawyer training figures dropped significantly, by almost 40% in comparison with 2018, due to less reported participants in several large Member States;

■ Between 2011 and 2019, close to 1.19 million justice professionals received training in EU law and the law of another EU Member State;

■ Regarding the proportion of practitioners by profession, judges (62.14%) and prosecutors (40.46%) remain the professional legal groups that receive the most continuous training on EU law

ECA Journal 3/2020 with Focus on Realising European Added Value

In the European Court of Auditors' journal no 3/2020, various authors provide contributions on how European added value can be realised and which challenges are faced in this regard. The journal unites contributions ranging from institutional leaders, e.g. EU Commissioner *Elisa Ferreira*, ECA President *Klaus-Heiner Lehne* and EP Committee on Budgets Chair, *Johan Van Overtveldt*, to a number of experts. *Gaston Moonen* writes in his editorial that all underline that the EU's greatest impact is created through its legislation, its regulatory role. He quotes the American historian and journalist *Anne Applebaum* who puts it: "The EU is a superpower when it comes to regulation." *Moonen* highlights that she has her hopes for the EU when it comes to anti-trust action and the protection of citizens' privacy, where for instance the General Data Protection Regulation (GDPR) has set an example of regulation far beyond the European continent. The topic of European added value is dealt with through different angles and not only reflected through the lens of the EU budget. (TW)

by far; these figures confirm the results of the past annual reports;

- 2.98% of all EU justice professionals' training was (co)-funded by the EU in 2019.

As found in past annual reports, considerable differences remain in the level of training participation across Member States and across the various legal professions. The Commission concludes that there are still challenges, notably for lawyers', court staff, and bailiffs' training. Challenges (also in view of the trend towards the digitalisation of justice) will be tackled by the new European judicial training strategy 2021–2024 and the launch of the European Training Platform. Both initiatives were presented, together with the annual report on European judicial training, on 2 December 2020 (→following news items). (TW)

New Strategy on European Judicial Training for 2021–2024

On 2 December 2020, the Commission presented its new strategy on European judicial training for 2021–2024. It follows-up the strategy that was adopted in 2011 and covered the period until 2020. The Commission stresses that judicial training remains high on the EU agenda and needs further be strengthened. It addresses challenges detected (→annual reports on European judicial training, e.g. eucrim 4/2019, 229–230 for the 2018 report; eucrim 1/2019, 10 for the 2017 report) and new developments, such as the exponential digitalisation of societies or the deterioration of fundamental rights in some EU countries. Based on a thorough evaluation of the 2011–2020 strategy and a public consultation conducted in 2018, the Commission sets out its vision for the coming years. It also includes calls on actions addressed to the training providers, e.g. European Judicial Training Network, the Academy of European Law (ERA), and the European Institute of Public Administration (EIPA-Luxembourg). The new strategy is build upon four strands:

- Training substance addressing broad areas of EU law, providing a flexible response to existing and emerging EU law training needs;
- Training audience addressing a broad range of justice professionals enlarging geographical coverage and boosting judicial training for young practitioners;
- Training methodology using modern and digital training methods to guarantee high-quality and effectiveness;
- Shared responsibility for judicial training between Member States, training providers, national and European justice professions' organisations, and the EU.

The new strategy sets ambitious targets both in terms of quantity and quality. Overall, more justice professionals should attend training on EU law and training providers should improve the EU law training on offer. Objectives in terms of quantity are however more targeted to the professional groups. By 2024, continuous training on EU law should reach each year:

- 65% of judges and prosecutors;
- 15% of court and prosecution office staff who need EU law competence;
- 15% of lawyers;
- 30% of notaries;
- 20% of bailiffs.

The main qualitative objectives are:

- Making sure that European acquis on the rule of law and fundamental rights is not only a standard component of basic judicial training but also part of the continuous trainings;
- Embedding "judgecraft", non-legal knowledge and skills in the national continuous training programmes;
- Making sure that every future or newly appointed judge and prosecutor takes part in a cross-border exchange during the initial training.
- Organising cross-border training activities every year for at least 5% of all judges and prosecutors;
- Assuring training providers offer tailored e-learning, which is interactive, practical and accessible to all learners;
- Encouraging training providers to follow more closely the recommendations in the Advice for training providers and the EJTN Handbook on judicial training methodology in Europe;
- Promoting e-training to address justice professionals' immediate needs in the context of a concrete case;
- Exploiting the full potential of e-learning methodologies;
- Evaluating every training activity more uniformly.

The new strategy confirms that judges and prosecutors remain the main target group for training on EU law. The strategy also supports justice professionals in the Western Balkans and in other EU partner countries, in Africa and

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Brexit:
EU–UK Trade and Cooperation Agreement – Impacts on PIF and JHA in a Nutshell

On 24 December 2020, EU and UK negotiators reached agreement on the text of a new Trade and Cooperation Agreement (TCA). It regulates a close relationship between the EU and UK for the period immediately after the UK finally left the EU on 1 January 2021, 00.00h, when the transition period (agreed in the Withdrawal Agreement) also ended. Since the negotiations were finalised at a very late stage before expiry of the transition period, and in light of the exceptional circumstances, the Council and the Commission agreed to apply the TCA on a provisional basis, namely for a limited period of time until 28 February 2021. This transition period has been designed to enable the EU to finalise its internal ratification procedures, especially for the European Parliament to exercise democratic scrutiny. After consent by the EP, the agreement must be formally adopted by the Council. Meanwhile, the Commission and the Council requested an extension of the transition period till 30 April 2020. The UK agreed to this proposal. Now the decision lies with the EP. The UK itself has already finalised its ratification process: the UK Parliament ratified the TCA on 30 December 2020. The bill implementing the TCA received royal assent on 31 December 2020 and became the European Union (Future Relationship) Act.

The TCA was published in the EU's Official Journal L 444 of 31 December 2020, pp. 14 et seq. It is important to note that the numbering of articles in the TCA is provisional and subject to further amendments after final adoption of the act.

The EU conducted negotiations with the following aims:

- Ensuring respect for rights of businesses, consumers, and individuals;
- Establishing fair competition while recognizing each Party's regulatory autonomy, e.g., in the field of granting subsidies;
- Implementing the main negotiating principles set by the European Council, i.e., protection of the integrity of the Single Market, indivisibility of the four freedoms, and integrity of the EU's legal order;
- Striking a balance between the specific status of the UK as a close EU partner (as regards both economic and security issues) and the fact that a non-EU country cannot enjoy the same benefits as what EU membership offers.

Against this background, the TCA attempts to cover areas of economic partnership as comprehensively as possible and to be an agreement unprecedented in scope. However, in some areas – including law enforcement cooperation – damage control prevails over security gains. A number of areas, such as foreign policy, security and defence are not covered by the agreement. This means, for instance, that there will be no joint responses or coordination if it comes to the imposition of smart sanctions on third-country nationals or economic entities. As regards cooperation in the enforcement of judicial decisions, for example, which is also not covered by the TCA, international agreements apply to which both the UK and the individual EU Member State are party. The latter mainly means that the UK "falls back" on the standard of the Council of Europe.

In substance, the TCA regulates three pillars:

- Free trade arrangements in a number of areas of EU interest, in particular trade in goods and services, but also investment, digital trade, intellectual property, public procurement, energy, tax transparency, etc.;
- Arrangements for a security partnership establishing a framework for law enforcement and judicial cooperation in criminal matters;
- A horizontal framework for governance, clarifying how the TCA will be operated and controlled (including the establishment of a Joint Partnership Council and binding enforcement and dispute settlement mechanisms).

These pillars, which are regulated in Parts Two, Three, and Six of the TCA, are flanked by:

- Common and institutional provisions (Part One);
- Provisions on thematic cooperation in the fields of health and cyber security (Part Four);
- The participation of the UK in Union programmes, sound financial management, and financial provisions (Part Five);
- Final provisions (Part Seven).

The provisions on economic, societal, and security policy areas are further supplemented by several annexes, eight of which deal with law enforcement and judicial cooperation. The following three protocols with annexes round out the TCA:

- Protocol on administrative cooperation and combating fraud in the field of value added tax and on mutual assistance for the recovery of claims relating to taxes and duties;
- Protocol on mutual administrative assistance in customs matters;
- Protocol on social security coordination.

The main content and principles of EU–UK cooperation in the fields of protection of the EU's financial interests (PIF) and justice and home affairs are outlined in the following.

➤ *Protection of Financial Interests – Customs*

- The EU and the UK (hereinafter also "the Parties") agreed on the establishment of a free trade zone with zero tariffs and zero quotas on all goods that comply with the appropriate rules of origin.
- The Parties are obliged to cooperate in preventing, detecting, and com-

bating breaches or circumventions of customs legislation, in accordance with the chapter providing the rules of origin and the Protocol on mutual administrative assistance in customs matters. Each Party will take appropriate and comparable measures to protect its own and the other Party's financial interests regarding the levying of duties on goods entering the customs territories of the UK or the Union (principle of equivalence – cf. Part Two, Title I, Chapter 1, Art. GOODS.19).

■ The Parties agreed on a series of measures for customs cooperation in order to ensure compliance with the customs and trade facilitations; the TCA stresses that the measures will also ensure the proper protection of security and safety of citizens and the effective fight against fraud (Part Two, Title I, Chapter 5, Arts. CUSTMS.1 and .2).

■ A protocol stipulates the legal framework for cooperation between the Parties' customs authorities, so that correct application of customs legislation is ensured. Cooperation will particularly include preventing, investigating, and combating operations in breach of that legislation.

■ This protocol is a comprehensive, self-standing agreement that can be directly applied. It regulates not only the rules and procedure for information exchange following requests but also spontaneous and automatic information exchanges.

➤ *Protection of Financial Interests – EU Programmes*

■ Part Five of the TCA lays down the conditions that will enable the UK to participate in Union programmes, activities and services thereunder. The Union programmes in which the UK may participate will be specifically listed in protocols.

■ Chapter 2 of Title Five provides several provisions on financial management. Art. UNPRO.4.2 regulates the cooperation between UK authorities and the European Commission/OLAF as well as the powers of OLAF to investigate irregularities, fraud, and other criminal offences affecting the EU's financial interests in the UK.

■ The European Commission and OLAF are authorised to carry out administrative investigations, including on-the-spot checks and inspections, in the territory of the UK. OLAF's powers include:

- Carrying out on-the-spot checks and inspections on the premises of any natural person residing in or legal entity established in the UK and receiving Union funding under a funding agreement or a contract, as well as on the premises of any third party involved in the implementation of such Union funding residing or established in the UK;
- Accessing all relevant information and documentation (in electronic or paper versions, or both), which are required for the proper conduct of on-the-spot checks and inspections (in particular, OLAF agents may copy relevant documents);
- Requesting assistance from UK authorities to carry out the necessary measures if the person/entity under investigation resists.

■ The European Commission may impose administrative measures and penalties on legal or natural persons participating in the implementation of a programme or activity in accordance with Union legislation.

■ Cooperation between OLAF and the UK authorities mainly includes:

- Obligation for UK authorities to inform about facts or suspicion of irregularities, fraud, or any illegal activity affecting the EU's financial interests "within a reasonable period";
- Close collaboration in the preparation and conduct of on-the-spot checks and inspections;
- Obligation for OLAF to inform the competent UK authorities of the results of on-the-spot checks and inspections;
- Regular exchange of information on implementation of the anti-fraud measures;
- Designation of a contact point in the UK responsible for effective cooperation and information exchange with OLAF.

■ Art. UNPRO.4.4 ensures that Commission decisions imposing a pecuniary obligation on legal or natural persons are enforceable in the UK. The competent UK authority is to recognize such decisions and issue an enforcement order without any formality other than verification of the authenticity of the decision. The same applies to judgments/orders rendered by the CJEU in application of an arbitration clause.

➤ *VAT Fraud – Administrative Cooperation*

■ The TCA includes a protocol that establishes the framework for administrative cooperation in VAT-related matters. Like the Protocol on administrative cooperation in customs matters, it is a self-standing, directly applicable agreement. It pursues the aim of enabling EU Member State and UK authorities to assist each other in order to ensure compliance with VAT legislation, protect VAT revenue, and recover claims relating to taxes and duties.

■ Rules and procedures govern, *inter alia:*

- The exchange of information that may help effect a correct VAT assessment, monitor the correct application of VAT, and combat VAT fraud;
- The recovery of claims relating to VAT, customs, and excise duties (levied by or on behalf of a State or on behalf of the Union);
- Administrative penalties, fines, fees, and surcharges relating to said claims.

➤ *Data protection*

■ In general, both the EU and the UK affirm their "longstanding" commitment towards ensuring a high level of protection of personal data in the realm of law enforcement and judicial cooperation in criminal matters.

■ The TCA sets out a range of data protection principles that the Parties' respective data protection regimes must ensure, e.g.:

- The principles of lawful and fair data processing and of data minimisation, purpose limitation, accuracy, and storage limitation;
- The guarantee of data subjects' enforceable rights regarding access, rectification, and erasure;
- The data subjects' rights to effective administrative and judicial redress in the event of violation of data protection safeguards;
- Notification of data breaches;
- Onward transfers to third countries only under the condition that the level of protection is not undermined;
- Supervision of compliance with data protection safeguards and the enforcement of data protection safeguards by independent authorities (Part Three, Title I, Art. LAW.GEN.4).

■ Cooperation between the UK and the EU on data protection issues is loosely agreed in Art. COMPROV.10 (Part Six, Title II).

■ In principle, the Party transferring personal data shall respect its rules on international transfers of personal data.

■ For a transition period, the UK will not be considered a third country, so that smooth transmission of personal data can continue, provided that the UK upholds its current data protection standard incorporating EU legislation (cf. Part Seven, Art. FINPROV.10A – bridging clause). During this transition period, the Commission is called on to adopt adequacy decisions as required by the Law Enforcement Data Protection Directive 2016/680 and the General Data Protection Regulation. These will then form the legal basis for transmissions of personal data after the end of the transition period when the UK must be regarded as a "third country".

■ These general rules on data protection are topped up with specific rules in the relevant chapters on law enforcement cooperation.

➤ *Law Enforcement Cooperation – Prüm*

■ Title II of Part Three (Arts. LAW.PRUM.5 et seq.) ensures that the UK can continue to participate in the exchange of information as regards DNA profiles, dactyloscopic data (fingerprints), and vehicle registration data (VRD), which are at the heart of the so-called Prüm cooperation regime set out in Council Decisions 2008/615/JHA and 2008/616/JHA. In essence, Title II copies the relevant provisions from said Council decisions. Annex Law-1 lays down administrative and technical details for the implementation of Title II.

■ To ensure a high standard of data protection, the TCA maintains the hit/no-hit procedure, i.e., retrieval is only carried out with anonymised index files. Accordingly, the querying police officer is only informed as to whether data on the searched profile is also available in the other contracting state's databank. In order to obtain further information, e.g., on the identity of the person, the police service must take up contact with the contracting state or initiate a request for mutual legal assistance.

■ The UK must undergo an "ex ante evaluation" procedure (Art. LAW.PRUM.18). The meaning of this provision is unclear, however, considering that the UK became successfully connected to the exchange procedure in the areas of DNA and fingerprints after a lengthy evaluation procedure that started before the Brexit. Art. 18 is probably to be read such that the UK and EU Member States can only carry out exchanges on the basis of the Prüm regime (automated searching and comparison of DNA profiles, automated searching for dactyloscopic data, and supply of additional personal data) for nine months after entry into force of the TCA. The Specialised Committee on Law Enforcement and Judicial Cooperation can extend this time limit by another nine months. The ex ante evaluation will then take place after expiry of the 9/18 months. In any event, a pre-evaluation must take place for the exchange of VRD, because the UK has not yet implemented the cooperation system for this data category.

■ Keeping in mind that the Prüm legislation will be substantially revised ("next generation Prüm", →eucrim 3/2020, 189–190), the TCA has foreseen a consultation mechanism by means of which the UK may participate in the future Prüm agreement. If agreement is not reached, Prüm cooperation between the UK and the EU can be suspended (Art. LAW.PRUM.19).

➤ *Law Enforcement Cooperation – PNR*

■ Title III of Part Three (Arts. LAW.PNR.18 et seq.) sets up a cooperation agreement between the EU and the UK that ensures the transfer of passenger name records (PNR) to the UK by air carriers. It includes detailed rules for police and judicial cooperation on PNR data between the EU Member States, Europol, and Eurojust, on the one hand, and UK law enforcement authorities, on the other.

■ The provisions on PNR cooperation are quite unique, because the EU has, for the first time, taken into account the findings of the CJEU's opinion of 26 July 2017 that stopped the EU-Canada PNR deal (→eucrim 3/2017, 114–115). Therefore, the EU casted the CJEU's demands into an international PNR agreement (the TCA). This concerns mainly the following issues:

- Purpose limitation;
- Scope of PNR data;
- Non-discrimination and sensitive data;
- Transparency and passenger rights;
- Automated processing of PNR data;
- Data retention;
- Conditions for the use of PNR data other than border and security checks, disclosure to other UK government authorities, and disclosure to other third-country authorities.

■ If either Party considers the continued operation to be "no longer" appropriate, the cooperation on PNR may be suspended (Art. LAW.PNR.38).

➤ *Law Enforcement Cooperation – Information Exchange*

■ Title IV of Part Three establishes a framework that will allow the efficient exchange of information between police, customs, and other authorities active in the field of the prevention, investigation, detection, and prosecution of criminal offences.

■ The Title, consisting of a single provision (Art. LAW.OPCO.1), is a slimmed-down version of the EU's Framework Decision on simplifying the exchange of information and intelligence between EU countries' law enforcement authorities (FD 2006/960/JHA, also known as the "Swedish Initiative").

■ The TCA enables the sharing of information that a competent authority in an EU country or in the UK holds. The purposes of the exchange have been broadly formulated. Mutual assistance through the provision of relevant information can be performed for the purposes of:

- Preventing, investigating, detecting, and prosecuting criminal offences;
- Executing criminal penalties;
- Safeguarding against and preventing threats to public safety;
- Preventing and combating money laundering and the financing of terrorism.

■ The provision can also be considered compensation for the UK's terminated access to the Schengen Information System after Brexit. Therefore, Art. LAW.OPCO.1 clarifies that information on wanted and missing persons and on objects can also be requested by a competent authority from the UK or from a Member State.

■ Information can be exchanged either upon request or spontaneously. Explicit grounds for refusal are not stipulated; however, the provision of information is made subject to the conditions of the domestic law that applies to the providing competent authority and within the scope of its powers.

■ Like the FD 2006/960, Art. LAW.OPCO.1 clarifies that information cannot be used as evidence before a judicial authority without the consent of the country that provided it (this can be already indicated in the reply).

➤ *Cooperation with Europol*

■ Title V of Part Three ensures the smooth transition of the UK from being a former EU Member State to being a non-EU country. However, the aim is that the UK remains a privileged partner to Europol. Brexit mainly means that the UK no longer has direct access to the Europol Information System and loses some other Member State privileges.

■ The section on Europol establishes a framework for cooperative relations between Europol and the competent UK authorities in order to maintain mutual police cooperation when preventing and combating serious crime, terrorism, and forms of crime that affect a common interest covered by Union policy.

■ The provisions regulate, inter alia, the scope of cooperation, liaison officers, information exchanges, and personal data flows.

■ In addition to the exchange of personal data (under the conditions laid down in Title V and in accordance with the tasks of Europol outlined in Europol Regulation 2016/794), cooperation may include:

■ The exchange of information such as specialist knowledge;

■ General situation reports;

■ Results of strategic analysis;

■ Information on criminal investigation procedures;

■ Information on crime prevention methods;

■ Participation in training activities;

■ Advice and support in individual criminal investigations and operational cooperation.

■ Title V clarifies that certain provisions and details of cooperation must be implemented by Working and Administrative Arrangements that will be concluded between Europol and the competent UK authorities (on the basis of Art. 23(5) and Art. 25(1) of the Europol Regulation).

➤ *Cooperation with Eurojust*

■ Like cooperation with Europol, the TCA sets up the basic legal framework that ensures continuation of the UK's operational cooperation at Eurojust (Part Three, Title VI).

■ Likewise, the section on Eurojust provides regulations, inter alia, on the scope of cooperation, the UK liaison prosecutor, and the exchange of non-personal and personal data.

■ Brexit mainly affects the switch of the UK National Member at Eurojust to a liaison prosecutor position. His/her tasks, rights, and obligations and those of his/her assistant as well as any costs involved will be regulated in a working arrangement between Eurojust and the UK.

■ In addition, the modalities of cooperation between the Parties as considered "appropriate to implement Title VI" shall be subject to a working arrangement concluded between Eurojust and the competent authorities of the UK (in accordance with Arts. 47 (3) and 56 (3) of Eurojust Regulation 2018/1727).

➤ *Extradition*

■ Title VII of Part Three provides a self-standing chapter with directly applicable regulations on extradition between an EU Member State and the UK. The regulations (Art. Law.SURR.76–Art. Law. SURR.112) are basically modelled on the 2006 surrender agreement between the EU and Iceland and Norway.

■ The Framework Decision on the European Arrest Warrant no longer applies in relation to the UK, except for EAWs issued and executed (i.e., the requested person was arrested) before the transition period.

■ The TCA explicitly establishes the principle of proportionality in relation to surrenders, which mainly mirrors a corresponding provision in the UK's Extradition Act 2003 (cf. Art. LAW. SURR.77).

■ The list of offences known from the FD EAW, for which double criminality checks are no longer carried out, is

applicable if reciprocity is given; this means that giving up the requirement of double criminality is subject to reciprocal notifications on the part of the EU Member State and of the UK;

- In essence, Arts. LAW.SURR.81 and .82 have taken over the mandatory and facultative refusal grounds laid down in Arts. 3, 4, and 4a FD EAW. What is new, however, is an optional refusal ground for arrest warrants that are based on discriminatory prosecution.
- The political offence exception (abandoned in the FD EAW) may be principally applicable and disregarded for terrorism offences only if the UK or the EU (acting on behalf of any of its Member States) provide a corresponding notification.
- Based on reasons rooted in the fundamental principles or practice of the domestic legal order, each EU Member State (or the UK) can declare that it will not surrender its own nationals or can authorize their surrender only under certain specific conditions; in this case, the other Party can apply the principle of reciprocity. If applied, the Member State must consider initiating proceedings against its own national (principle aut dedere aut iudicare).
- Art. LAW.SURR.84 regulates the possibilities to make extradition subject to guarantees, e.g., in case of life imprisonment and surrender of nationals/residents, which resembles Art. 5 FD EAW. Interestingly, the provision additionally implements the CJEU case law (established in Aranyosi/ Căldăraru and "LM") on the respect for fundamental rights in EAW cases: before it decides whether to execute the arrest warrant, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after his/her surrender if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person.
- Art. LAW.SURR.89 sets out the rights of the requested person in the extradition procedure and takes up the relevant provisions laid down in the EU's procedural rights Directives, in particular the right to be informed and the right of access to a lawyer.
- Annex LAW-5 provides a form to be used for surrender requests.
- Since the UK is no longer connected to the SIS, the main channel for transmission will be the red notice procedure via Interpol.
- Notifications that limit surrender – i.e., those on double criminality, the political offence exception, and the nationality exception – are subject to review and evaluation. The notification referring to the nationality exception must be renewed every five years in order to remain applicable (cf. Art. LAW.SURR.110).

➤ *Mutual Legal Assistance in Criminal Matters*

- Unlike the provisions on extradition/ surrender, the TCA does not provide for an own corpus of law as regards mutual assistance in criminal matters. Instead, Arts. LAW.MUTAS.113 – LAW.MUTAS.122 (Title VIII of Part Three) include only provisions that aim to supplement the mutual legal assistance framework of the Council of Europe, i.e., the CoE's "mother" Convention on Mutual Assistance in Criminal Matters of 1959 and its two Additional Protocols of 1978 and 2001. A peculiarity of these supplements is that they include some elements of the Directive on the European Investigation Order, such as the provisions on conditions for an MLA request reflecting the proportionality principle, recourse to a different type of investigative measure, the obligations to inform, the transnational ne bis in idem principle as a refusal ground, and time limits for the execution of an MLA request.
- Unlike the chapter on surrender, there is no agreed form for MLA requests yet. A standard form will be established by the Special Committee on Law Enforcement and Judicial Cooperation.
- If direct transmission channels are provided by the CoE's MLA Convention and its Protocols, MLA requests can also be directly transmitted between the public prosecutor's offices of the UK and EU Member States. In urgent cases and if information needs to be provided spontaneously, the authorities can also resort to the communication channels of Europol and Eurojust.
- EU Member States may invite the UK to participate in Joint Investigation Teams.

➤ *Exchange of Criminal Records*

- As a special form of mutual legal assistance, the exchange of criminal record information is defined in specific rules in Title IX of Part Three. The provisions in this title take precedence over the provisions foreseen for mutual assistance in Title VIII.
- The future exchange of criminal record information is based on the respective provisions of the aforementioned CoE Convention on Mutual Assistance in Criminal Matters and its protocols, which are supplemented by Title IX. The supplements aim to maintain certain elements of the established ECRIS system after Brexit.
- Requests for criminal records can be made to and from a UK designated authority and an EU Member State central authority and must be complied with as soon as possible − in any event, within 20 working days.
- At least once a month, the UK will notify the respective EU Member States of convictions of EU nationals. Conversely, EU Member States have the same obligations to report to the UK any convictions of UK nationals in their jurisdictions.
- Annex LAW-6 lays down technical and procedural specifications, enabling the communication of criminal record information to take place electronically.

➤ *Anti-Money Laundering and Counter-Terrorist Financing*

- By means of Title X of Part Three, the UK and the EU agreed to support and strengthen action to prevent and combat

money laundering and terrorist financing. Measures shall include:

- Support for international efforts in this area;
- Recognition of the need to cooperate;
- Exchange of relevant information (as appropriate and provided the UK system is considered equivalent in terms of data protection);
- Maintenance of a comprehensive regime in the UK and EU and endeavours to regularly enhance it, taking into account FATF Recommendations.

■ Detailed provisions were introduced to ensure the transparency of beneficial ownership. They reinforce that UK–EU cooperation goes beyond FATF standards and reflects the achievements reached at the EU level. The UK and the EU will, for instance, ensure that legal entities maintain adequate, accurate, and up-to-date information about beneficial owners, set up central registers with beneficial ownership, and grant their competent authorities access to such registers without restriction and in a timely manner.

➤ *Freezing and Confiscation*

■ The EU and the UK agreed on a comprehensive set of rules to govern the execution of requests for the purposes of both investigations and proceedings aimed at freezing property, with a view to its subsequent confiscation, as well as investigations and proceedings aimed at confiscating property. Like the provisions on surrender, the rules stipulated in Title XI of Part Three (Arts. LAW.CONFISC.1 – LAW.CONFISC.34) represent a self-standing legal agreement with directly applicable cooperation rules.

■ The section was inspired by the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, (also known as the Strasbourg Convention, CETS 141) and the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, (also known as the Warsaw Convention, CETS 198). This legal framework is rounded off with elements of EU Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders (→eucrim 4/2018, 201–202).

■ Title XI provides a twofold regime: (1) mandatory cooperation for freezing and confiscation of property within the framework of criminal proceedings and (2) cooperation in favour of non-criminal (e.g., civil or administrative) proceedings, where the States are (only) obliged to assist "to the widest extent possible under [their] domestic law".

■ As a rule, cooperation takes place via central authorities. In urgent cases direct communication between the competent judicial authorities of the requesting state and the requested state is possible. The EPPO as Union body is also entitled to participate in the confiscation scheme; it is considered both a competent authority and a central authority.

■ Title XI provides for the different forms of investigative assistance, e.g., identification and tracing of instrumentalities, proceeds, and other property liable to confiscation, information on bank accounts and safe deposit boxes, information on banking transactions, and the monitoring of banking transactions.

■ Rules inspired by the 2018 EU Regulation mainly concern time limits, form (provided in Annex-LAW 8), language regime, and grounds for refusal (for the latter, cf. Art. LAW CONFISC.15).

■ Title XI includes obligations to take provisional measures in relation to confiscation and in relation to the execution of confiscation requests. For both measures, each State ensures that the affected persons have effective remedies to preserve their rights; however, substantive reasons for requested measures can only be challenged before a court of the requesting State.

➤ *Cross-Cutting Issues and Dispute Settlement*

■ Title XII of Part Three deals with several cross-cutting issues affecting all the other parts of the law enforcement and judicial cooperation chapters. Art. LAW.OTHER.134 regulates the modus operandi for notifications to be made, in particular as regards those provided for in the chapter on surrender. The Parties also agreed on a joint review of Part Three five years after the entry into force of the TCA (Art. LAW.OTHER.135).

■ Each Party may terminate Part Three at any moment by written notification through diplomatic channels. Termination can be explicitly justified if the UK or a EU Member State have denounced the European Convention on Human Rights or Protocols 1, 6, or 13 thereto (cf. Art. LAW.OTHER.136).

■ There are two reasons for a suspension of Part III or individual Titles thereof, which can be notified by each Party through diplomatic channels (Art. LAW.OTHER.137):

- An event involving serious and systemic deficiencies within one Party as regards the protection of fundamental rights or the principle of the rule of law;
- An event involving serious and systemic deficiencies within one Party as regards the protection of personal data, including deficiencies leading up to a relevant adequacy decision ceasing to apply.

■ Title XIII of Part Three (Arts. LAW.DS.1 – LAW.DS.7) designed a dedicated dispute resolution mechanism in order to effectively settle disputes that concern law enforcement and judicial cooperation in criminal matters. The provisions are lex specialis to the general provisions on dispute settlement laid down in Part Six (cf. Art. INST.10(2)).

■ The mechanism of Title XIII does not apply to provisions in Part Three that explicitly provide for the termination or suspension of the agreement, including the aforementioned provisions in Title XII and specific suspension provisions in the chapters on PNR and Prüm cooperation (see above).

■ The dispute settlement mechanism is triggered if a Party ("the complaining Party") considers the other Party ("the

responding Party") to have breached an obligation under Part Three of the TCA. The procedure involves consultations aimed at finding amicable solutions within three months.

■ If no amicable solution is found and the complaining Party considers the responding Party to have been in serious breach of its obligations, the complaining Party may suspend the Title(s) concerned. In this case, the responding Party may counteract and suspend all remaining Titles of Part III.

➤ *Cyber Security*

The Parties confirm their "endeavour to establish a regular dialogue in order to exchange information about relevant policy developments, including in relation to international security, security of emerging technologies, internet governance, cybersecurity, cyber defence and cybercrime". In Title II of Part Four, the UK and the EU agreed on a "thematic cooperation" in the field of cyber security. Measures of cooperation may include:

■ Sharing of best practices and joint practical actions aimed at promoting and protecting an open, free, and secure cyberspace;

■ Information exchange on methods/tools, general threats, and vulnerabilities among the computer emergency response teams of the EU and the UK;

■ Subject to invitation, participation of the UK in activities of the EU's Network and Information Security Cooperation Group;

■ Upon invitation, participation of the UK in certain activities carried out by the EU Cybersecurity Agency (ENISA).

➤ *Counter-Terrorism*

■ The framework for cooperation in the fight against terrorism has been laid down in the horizontal provisions of Part Six of the TCA. In Art. COMPROV.9, the EU and UK reaffirm their commitments to "cooperate at the bilateral, regional and international levels to prevent and combat acts of terrorism in all its forms and manifestations in accordance with international law…".

■ A regular dialogue will be established with the aim to promote and facilitate, inter alia:

- The sharing of assessments on the threat of terrorism;
- The exchange of best practices and expertise on counter-terrorism;
- Operational cooperation and information exchange;
- Information exchange on cooperation within the framework of multilateral organisations.

➤ *Governance*

Another peculiarity is that the TCA established a single and clear horizontal institutional governance framework to ensure the proper implementation and operation of the agreement and to control the Parties' commitments. To facilitate overall management of the agreement, the EU and the UK agreed to create a joint body, called the Partnership Council. The Partnership Council is to be co-chaired by a Member of the European Commission and a representative of the UK at the ministerial level. The Partnership Council will meet at least once a year and oversees the attainment of the TCA's objectives. The EU or the UK can refer any issue to the Partnership Council relating to the implementation, application, and interpretation of the TCA. The powers of the Partnership Council are included in Part One, Title III, Art. INST.1(4).

The Partnership Council will be assisted by Specialised Committees, which will address matters regulated in the different parts and titles of the TCA, such as matters of law enforcement and judicial cooperation as well as the UK's participation in EU programmes. The general powers of the Specialised Committees are provided for in Part One, Title III, Art. INST.2(4).

The TCA also enables the European Parliament and the UK Parliament to create a joint parliamentary assembly to exchange views on the Agreement and make recommendations to the Partnership Council. The EU and the UK commit to regularly consulting civil society organisations on implementation of the TCA. This is in keeping with the EU's commitments as is customary in modern international agreements negotiated by the EU.

➤ *Summaries*

The Commission has provided a brochure that gives an overview of the new relationship and the most important changes it entails. Another brochure contains a compilation of the consequences of the UK's choice to leave the EU and the benefits of the TCA. Summaries of the various components of the TCA are given in a Q&A memo.

➤ *First Assessment*

The EU–UK "Christmas deal" offers citizens, businesses, and administrations legal certainty on the rules that need to be followed and the guarantees that need to be provided after 1 January 2021. In the field of justice and home affairs, a number of provisions ensure that the UK is not suddenly cut off from the most important tools in police and judicial cooperation. In particular, the fact that the UK will not be treated as a third country for a transition period will enable the exchange of personal data to continue, in particular in the field of law enforcement. When applying the TCA's JHA chapters, practitioners should keep in mind, however, that the EU and UK have decided on a three-part system:

■ Self-standing cooperation agreements, such as those on PNR, surrender, and confiscation;

■ Arrangements supplementing the Council of Europe cooperation framework, such as those on mutual legal assistance;

■ In some cases, no regulations at all (e.g., for the transfer of prisoners).

In conclusion, the UK has a special status in the relationship with EU Member States. Gaps and uncertainties remain and they must be solved by interpretative efforts in the future. (TW)

Continued from page 264

Latin America. This should contribute to strengthening democracy, human rights and upholding of the rule of law around the word.

The 2021–2024 European judicial training strategy was presented together with the Commission's annual report that assessed the achievements of judicial professional trainings on EU law in 2019 and the launch of the European Training Platform (→separate news items). (TW)

European Training Platform Launched

On 2 December 2020, the Commission launched the test phase of the European Training Platform (ETP). The ETP aims at solving the problem that currently information on judicial training opportunities and training materials is scattered all over the internet. Embedded into the EU's e-justice portal, the ETP is a search tool by means of which justice practitioners can find training courses and self-training resources on a great variety of EU law. During the test phase, the four recognised EU-level judicial training providers (European Judicial Training Network (EJTN), Academy of European Law (ERA), European Institute of Public Administration (EIPA) and European University Institute (EUI)) supply information on their training activities and in different languages. The European Commission contributes to the platform with ready-to-use training materials or handbooks produced notably thanks to EU financial support. Legal professional are able to search according to different search fields (such as topic of the course, venue, date, language and practice area: from civil law, public law, criminal law to fundamental rights, legal language, etc.).

If the test phase is completed, the Commission will explore the possibilities to open the platform to other training providers. The ETP is to be fully operational in the course of 2021. The ETP is closely connected to the Commission's new strategy on European judicial training for 2021–2024 (→aforementioned news item, p. 264), which aims to give a new boost to the trainings of judicial practitioners in the years to come. (TW)

Schengen

Commission Report on the Functioning of the Schengen Area over the Past 5 Years

Ahead of the newly created Schengen Forum (→following news item), the Commission published a report on 25.11.2020 on the implementation of the Schengen acquis rules and the functioning of the Schengen Evaluation and Monitoring Mechanism between 2015 and 2019. The current Schengen Evaluation and Monitoring Mechanism is operational since 2015; as a peer review tool, it aims to ensure an effective, consistent and transparent application of the Schengen rules.

The Commission report includes:

- An outline of the Schengen evaluation process and the actions taken within the First Multiannual Evaluation Programme (2015–2019);
- The main findings and progress made during the First Multiannual Evaluation Programme;
- Specific finding in the various policy fields of the Schengen regulations, e.g. external border management, police cooperation, the Schengen Information System (SIS), and data protection;
- Shortcomings identified when having carried out the multiannual evaluation programme.

The report also proposed a number of operational measures to improve the Schengen evaluation mechanism, *inter alia*:

- Simplifying internal workflows and set benchmarks to reduce the length;
- Developing new trainings in the area of visa policy;
- Updating checklists to focus on the main elements that may affect the Schengen area as a whole;
- Making more strategic use of unannounced evaluations and thematic evaluations;
- Improving synergies and cooperation with EU agencies and national quality control mechanisms;
- Elaborating and up-dating catalogues with best practices;
- Adopting the annual report to facilitate political discussion.

Based on the results of more than 200 evaluations carried out between 2015 and 2019, the report finds that Schengen states implemented the Schengen rules adequately overall, with serious deficiencies identified only in a limited number of countries and promptly corrected. However, recurring deficiencies (e.g. insufficient number of staff, technological and regulatory barriers) and diverging practices remained and could ultimately affect the integrity and functioning of the Schengen area.

According to the Commission, a higher level of harmonisation should be ensured in the coming years. The effectiveness of the evaluation mechanism must be enhanced while some shortcomings could be solved by operational measures, others need legislative changes. The Commission finally stresses that it will establish a more regular and structured political dialogue among the actors involved in the functioning of the Schengen area, which is considered a key factor to make the Schengen area stronger and more resilient.

The tabled report will feed into the discussion of the Schengen Forum which is to discuss the future Schengen Strategy. The Commission has announced that it will present the new strategy for a stronger Schengen area in mid-2021. (TW)

Strengthening the Schengen Area: Schengen Forum Meets for the First Time

35 years ago, on 14 June 1985, France, Germany and the three Benelux States signed the Schengen Agreement that removed internal border controls be-

tween those Member States. Today, the Schengen area encompasses 26 European states with over 400 million citizens. Since several years, the area has become under pressure (e.g. migrant crises, terrorist attacks and the corona pandemic, which all led to the reintroduction of internal border checks). Today, the Schengen model is confronted with a different reality than at the time of the creation of the area. Against this background, the EU takes steps to make the Schengen area stronger and more resilient. On 30 November 2020, the Commission convened the first ever Schengen Forum. A videoconference gathered Members of the European Parliament and Home Affairs Ministers with the aim of fostering cooperation and political dialogue as well as of building up stronger confidence in the Schengen rules.

The main topics of discussion were:
- Improving the mechanism to evaluate the implementation of Schengen rules;
- Finding a way forward on the revision of the Schengen Borders Code;
- Better managing of EU's external borders;
- Enhancing police cooperation and information exchange;
- Strengthening the governance of the Schengen area.

In the field of police cooperation, participants discussed, for instance, better use of new technologies to ensure security within the Schengen area. Police checks were considered as an effective alternative to the reintroduction of border controls. Measures such as joint patrols, joint investigation teams, cross-border hot pursuits or joint threat analysis were discussed as being alternatives to effectively address threats to security.

Ahead of the meeting, the Commission presented a report that outlined the main findings and shortcomings over the past five years in light of the Schengen evaluation programme carried out (→separate news item, p. 272). The Schengen Forum is to support the Commission in drafting its new Schengen Strategy, which the Commission intends to present in mid-2021. The Schengen Forum will continue to meet regularly both at political or technical levels. Targeted consultations at technical level will take place with representatives from the European Parliament and national authorities over the next months. The next meeting at political level will take place in spring 2021. (TW)

Legislation

Commission Proposes New Regulations on Responsibilities of Digital Services

spot light

On 15 December 2020, the Commission tabled two important proposals that will establish horizontal, harmonised rules on governing digital services in the EU. They are part of the European Digital Strategy, Shaping Europe's Digital Future; the package will complement the European Democracy Action Plan aiming at making European democracies more resilient (→separate news item). The legislative initiative consists of:
- The proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC ("DSA");
- Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act – "DMA").

Both proposals pursue common objectives:
- Creating a safer digital space in which the fundamental rights of all users of digital services are protected;
- Establishing a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.

The DSA will establish common rules for intermediary services. "Intermediary services" are defined and categorised as:
- "mere conduit" services which are involved in the transmission of information in a communication network provided by a recipient of the service, or in providing access to a communication network;
- "caching services" which – beyond mere conduit services – are involved in the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;
- "hosting services" that consists of the storage of information provided by, and at the request of, a recipient of the service.

In other words, the new regulation is addressed to the large number of digital online services, ranging from simple websites to internet infrastructure services and online platforms. These may be, for example, online marketplaces, cloud service providers, messaging providers, social networks, content-sharing platforms, app stores as well as online travel and accommodation platforms. The DSA will set out rules on the obligations of intermediaries and the conditions for liability exemptions. Due diligence obligations are however asymmetric, taking account the different types of intermediaries, the nature of the services, and their size and their impact on society. Certain substantive obligations are limited only to very large online platforms which have a central role in facilitating the public debate and economic transactions. The DSA is to achieve a balance between upholding the benefits for citizens and innovation that digital services have created in Europe and increasing responsibility since they are prone to misuse. Digital services must in future take actions, in order to effectively fight trade in and exchange of illegal goods, services, and content online, curb manipulative algorithmic systems that amplify the spread of disinformation and other harms, and be more transparent as regards advertising. More concretely, the future Regulation will provide for the following:
- Rules for the removal of illegal goods, services or content online:
  - Citizens will be able to notify ("flag") illegal content, including counterfeit and dangerous products in an easy way;

- Platforms are obliged to closely cooperate with "trusted flaggers", i.e. entities that have demonstrated particular expertise and competence in tackling illegal content online, such as associations supporting brand owners;
- Member States can order any platform operating in the EU, irrespective of where they are established, to remove illegal content.

■ Safeguards for users whose content has been erroneously deleted by platforms:

- Redress rights are to ensure that neither under-removal nor over-removal of content on grounds of illegality happens;
- Users and consumers will have the possibility to contest the removal decisions taken by the online platforms.
- Users can complain directly, choose an out-of-court settlement or seek redress by courts.

■ New obligations for very large platforms (i.e. reaching at least 45 million users in the EU representing 10% of the population): they must make risk-based assessments, in order to prevent abuse of their systems; assessments and measures will be subject to an independent audit;

■ New powers to scrutinise how platforms work and how online risks evolve, *inter alia* by facilitating access by researchers to key platform data;

■ New rules on traceability of business users in online market places, to help track down sellers of illegal goods or services;

■ New enforcement mechanism, consisting of national and EU level cooperation:

- An independent "Digital Service Coordinator" (DSC) in each EU Member State will be responsible for supervising the intermediary services established in the Member State and/or for coordinating with specialised sectoral authorities. The DSC can impose penalties (incl. fines) if services do not comply with the EU regulation.
- The Commission is empowered to directly supervise very large platforms. It can impose fines of up to 6% of the global turnover of such service provider.
- DSCs and the Commission will have the power to directly order immediate actions, if necessary, to address very serious harms;
- Courts may – as a last resort – temporarily suspend "rogue services", i.e. platforms that refuse compliance with important obligations, thereby endangering people's life and safety.

■ New cooperation mechanism that brings together DSCs in the "European Board for Digital Services". The board is designed to give support by analyses, reports and recommendations and to coordinate joint investigations by DSCs.

It should be stressed that the Digital Services Act will not replace or amend sector-specific legislation, such as those on copyrights in the digital single market, consumer protection rules, or the (proposed) regulation on preventing the dissemination of terrorist content online (→eucrim 2/2018, 97–98). The DSA will set new horizontal rules covering all services and all types of illegal content, including goods or services. However, the DSA will not define what is illegal. This will remain subject to national and EU laws. The DSA rather harmonises due diligence obligations for online intermediaries.

It builds upon the e-Commerce Directive – the core legal EU framework setting the basic requirements for the functioning of the single market and the supervision of digital services. The DSA will react to the changes and challenges that have emerged since the past 20 years when the e-commerce Directive was established, particularly in relation to online intermediaries. The DSA also reacts to the meanwhile differentiated rules in the EU Member States that were meanwhile established for the protection of consumers against powerful online platforms or social media companies. This legal fragmentation affects both the ability of European service providers to scale in the single market, and on the protection and safety online of EU citizens.

The second piece of proposed legislation, the Digital Markets Act (DMA), will flank the DSA. The DMA lays down rules on so-called "gatekeepers" in the digital sector. They are large companies that function as bottlenecks between business and consumers in the digital world due to their size that impacts the internal market, their ability to control an important digital gateway for business users and their (expected) entrenched and durable position. Gatekeepers could be search engines, social networking services, certain messaging services, operating systems and online intermediation services. The DMA will, *inter alia*:

■ Oblige gatekeepers to take proactive action or refrain from behaviour, so that unfair practices are prevented, e.g. blocking users from un-installing any pre-installed software or apps;

■ Empower the Commission to impose sanctions for non-compliance, which could include fines of up to 10% of the gatekeeper's worldwide turnover;

■ Allow the Commission to carry out targeted market investigations to assess whether new gatekeeper practices and services need to be added to these rules.

The tabled legislative package was preceded by extensive public consultation. During the summer of 2020, the Commission consulted a wide range of stakeholders to seek their support whether specific issues may require an EU-level intervention in the context of the Digital Services Act and the new competition tool.

The open public consultations received more than 3000 replies from the whole spectrum of the digital economy and from all over the world (→Commission's summary report). The Commission provides comprehensive material on the legislative package on its website, including the impact assessments of the two acts, a scheme with answers on frequently asked questions and glossaries. A brochure out-

Report

Transposition of the PIF Directive into National Legislation

Status quo and its consequences on the effectiveness of the EPPO's investigations and prosecutions – Annual Forum on Combating Fraud in the EU

Report of the ERA-Online Conference 25–26 February 2021

Reducing the level of fraud, both within Member States and EU institutions, is by no means a novel issue on the EU's criminal justice agenda. On the contrary, it ranks amongst the priority areas where political and legislative actions are needed. The EU's fragmented regulatory framework leads often to an uneven transposition and poor results in effective implementation of legal instruments.

Already back in 2011, the European Commission announced a set of *initiatives on protecting the licit economy*, including:

- A communication on a comprehensive policy against corruption;
- A proposal of a new legal framework on the confiscation and recovery of criminal assets;
- A communication on the anti-fraud strategy.

Despite the progress made in the last 10 years, the level of protection for the EU's financial interests by criminal law, however still varies considerably across the Union, this state of affairs being generated by a patchy legal and procedural framework. To this extent, the existence of a common legal approach would lead to better cooperation and assistance in cross-border cases.

The online ERA conference "Transposition of the PIF Directive into National Legislation", which took place on 25–26 February 2021 and which was co-financed by OLAF under the Hercule III Programme, presented the initiatives recently put forward by the European Commission to revamp EU's policies on fraud in an integrated manner, an approach made possible by the adoption of Directive (EU) 2017/1371 (the so-called "PIF Directive") in 2017. The PIF Directive aims at strengthening administrative and criminal law procedures to fight fraud against the Union's financial interests. Its objective is to deter fraudsters, to improve the prosecution and sanctioning of crimes against the EU budget and to facilitate the recovery of misused EU funds, thereby increasing the protection of EU taxpayers' money.

All in all, the conference debated ideas on how to improve the EU's fight against fraud by enhancing transnational and multidisciplinary cooperation. After a general introduction: "Fraud types, threats and risks to the EU's financial interests: the key features of the 2017 PIF Directive" done by two OLAF speakers, *Andrea Bordoni* (Deputy Head of Unit, Unit C.1, Anti-corruption, Anti-Fraud Strategy and Analysis at OLAF) and *Stanislav Stoykov* (Seconded National Expert, Legislative Officer, Unit D1 – Legislation and Hercule, OLAF), various national experts from Italy, Belgium, Germany, Spain, Romania and Portugal addressed the implementation of the PIF Directive into the national legislation.

Yves Van Den Berge, European Prosecutor from Belgium at the European Public Prosecutor's Office (EPPO) in Luxemburg presented not only the transposition of the PIF Directive into national legislation from his Belgian experience as national prosecutor and as policy officer for criminal legislation of the Minister of Justice. He also focussed on his recent experience at EPPO, emphasising how the EPPO draws its most important powers from the PIF Directive.

From a perspective of the defence (as well as from a perspective of victims' lawyers), general remarks were made by *Holger Matt*, defence lawyer in Frankfurt a.M., Germany and former Chair of the European Criminal Bar Association (ECBA). As it stands, there are no provisions dealing with the defence and their interactions with the EPPO, in particular not in the internal rules of procedure adopted in October 2020. According to *Holger Matt,* this is regrettable as it shows that the internal rules are not aimed at providing any interaction with defence and victims' lawyers, although there are, of course, procedural necessities for such interaction.

The international and European legal frameworks (with a special emphasis on the role of OLAF) were presented by the speakers and discussed with the audience, which consisted mainly of EU lawyers, prosecutors and anti-fraud investigators. The holistic approach of this conference, encompassing legal professionals from throughout the EU, along with various Presidents and members of the European Associations for the protection of the EU's financial interests and European criminal law ensured a good mix of practitioners to discuss cooperation in trans-border cases of fraud.

Laviero Buono, ERA, Trier

lines how online platforms shape the EU citizens' life and businesses. It also illustrates the benefits and risks arising from the platform economy and the European Union's regulatory response as well as facts and figures about online platforms.

It is now up to the Council and European Parliament to discuss the proposal and to adopt the laws in the ordinary legislative procedure. (TW)

Institutions

Council

Last Justice Council under German Presidency Focused on Justice Aspects of Countering Terrorism

At the videoconference of the Ministers of Justice of the EU Member States on 2 December 2020 – the last Justice Council meeting that was chaired by the German Presidency – participants above all discussed justice-related aspects in the fight against terrorism and the development of the rule of law in the field of justice. The state of play of the European Public Prosecutor's Office (EPPO) was also on the agenda. The conference reached, *inter alia*, the following outcome:

- *Hate speech*: binding EU rules are

needed on how online platforms deal with hate speech. Voluntary commitments are not sufficient. Incitement of violence must be prosecuted more robustly and at an earlier stage throughout Europe. EU rules may not only regulate the deletion of hatred content online, but also include the obligation for online platforms to report criminal offences related to hate crime and hate speech to the competent authority if they become aware of them.

- *Digital cooperation*: ministers discussed ways to strengthen the digitalisation of cross-border judicial cooperation, based on the studies on cross-border digital criminal justice presented by the Commission in September 2020 (→eucrim 3/2020, 165; see also the new Commission Communication "Digitalisation of justice in the European Union – A toolbox of opportunities" that was released on 2 December 2020 →news item under "Area of Freedom, Security and Justice").
- *E-evidence*: In the context of digitalisation of cooperation, the Justice ministers stressed the importance of progressing with the legislative proposal on e-evidence (→eucrim 1/2018, 35–36), where, at the time of the conclusions, the European Parliament has still not entered into trilogue negotiations (→eucrim 3/2020, 194). They stressed that the regulation on an EU production and preservation order should be subject to mandatory judicial review, not least because of the recent CJEU case law on the independence of public prosecution services.
- *Victims of terrorism*: the Presidency presented a comprehensive report on the matter. Support of persons who felt victim of terrorism is advancing, however coordination in cases with cross-border implications must be improved.
- *European Arrest Warrant*: ministers endorsed Council conclusions on the way forward of the instrument (→separate news item, p. 290).
- Cumulative prosecution of foreign terrorist fighters: ministers considered a respective report by Eurojust and the Genocide Network. The report concluded that better justice for victims could be done if the prosecution of terrorism offences committed by the ISIS is combined with the prosecution of acts of war crimes and other core international crimes.

As far as rule of law developments are concerned, the conference followed up the Commission's annual rule of law report of September 2020 (→eucrim 3/2020, 158–159), thereby targeting justice-specific matters. Ministers shared views on key elements of judicial independence, efficiency and the fight against corruption. They broadly support the creation of a discussion forum for judges with the aim to reinforce common ground in terms of legal culture.

The Commission informed the Justice ministers of the state of play of the recent progresses on the implementation of the EPPO Regulation. The German Presidency informed that it prepared a comprehensive guidance report on EPPO's relations with third countries and with the Member States not participating in the enhanced cooperation (not public yet). (TW)

European Court of Justice (ECJ)

Reform Reports Published

On 21 December 2020, the Court of Justice followed its obligation to monitor implementation of the reform it started in 2016 and sent two reports to the European Parliament, the Council, and the Commission. The reports assess the effects of measures taken to increase the number of judges at the General Court, to increase its efficiency and the consistency of its case law.

In sum, the reports find it too early to draw definite conclusions as to whether these reforms have had the expected impact on the General Court's efficiency. Some positive trends can be observed, however, e.g., a reduction in the length of proceedings, intensified investigation of cases, and more frequent referrals of cases to extended chamber formations. (CR)

OLAF

OLAF's New Amended Legal Framework

spot light

The European Parliament and the Council adopted Regulation 2020/2223 amending so-called OLAF Regulation (EU, Euratom) No 883/2013. It was published in the Official Journal L 437 of 28 December 2020, pp. 49–73. The respective legislative proposal was presented by the Commission in May 2018 (→eucrim 1/2018, 5–6). The new legislation pursues a threefold objective:

- Adapting the operation of OLAF to the establishment of the EPPO;
- Enhancing the effectiveness of OLAF's investigations;
- Clarifying and simplifying certain provisions of Regulation 883/2013.

The new Arts. 12c–12g regulate the cooperation between OLAF and the EPPO, which includes the following:

- OLAF's obligations to report criminal conduct to the EPPO;
- Possibilities for OLAF to conduct preliminary evaluations of allegations and their effects on EPPO investigations;
- Discontinuance of ongoing OLAF investigations where the EPPO is conducting an investigation into the same acts;
- The EPPO's obligation to provide relevant information to OLAF with a view to taking appropriate administrative action if the EPPO has decided not to conduct an investigation or has dismissed a case;
- Clear rules on how OLAF supports the EPPO in accordance with Art. 101(3) of Regulation 2017/1939;
- A framework enabling OLAF to conduct complementary investigations;

OLAF and the EPPO are also to agree on formal working arrangements, mainly setting out the exchange of information. Both the EPPO Regulation and the new OLAF Regulation provide

possibilities for the two bodies to consult their case management systems on a hit/no-hit basis, so that non-duplication of investigations and a smooth flow of information can be ensured. Lastly, the new rules foresee an annual high-level meeting between the Director-General of OLAF and the European Chief Prosecutor to discuss matters of common interest.

As regards *external investigations*, Regulation 2020/2223 codifies CJEU case law by clarifying that Union law alone governs on-the-spot checks and investigations carried out by OLAF if the economic operator does not resist. It also introduces a duty on the part of economic operators to cooperate with OLAF, and OLAF will be able to require economic operators to supply relevant information if they may have been involved in the matter under investigation or may hold such information. The Regulation strengthens the rights of economic operators, however, e.g., by establishing the right to be assisted by a person of their choice, including external legal counsel, during on-the-spot checks and inspections.

As regards *internal investigations*, it has been clarified that OLAF has access to any relevant information held by institutions, bodies, offices, and agencies (IBOAs) and that such access is possible irrespective of the type of medium on which this information or data are stored. In the course of internal investigations, OLAF will be able to request access to information held on privately owned devices used for work purposes in situations in which the Office has reasonable grounds to suspect that their content might be relevant for an investigation. OLAF is also empowered to inspect the accounts of IBOAs and, if necessary, assume custody of relevant documents or data in this context.

Other provisions aiming to increase the effectiveness of investigations are as follows:

- OLAF will have access to bank account information under the same conditions that apply to competent national authorities;
- The anti-fraud coordination services in each EU Member State will have a more important role, enabling them to support OLAF, for instance, in external and internal investigations as well as in coordination cases;
- The evidentiary value of OLAF reports will be strengthened: in all proceedings before the CJEU, in proceedings of a non-criminal nature before national courts, and in national administrative proceedings, OLAF reports and the evidence attached to them shall constitute admissible evidence. In criminal proceedings, the current rule remains, i.e., OLAF reports are admissible in the same way as the reports of national administrative inspectors are;
- OLAF will have the possibility to set time limits in the recommendations accompanying its final reports. Within these limits, the competent authorities of the Member States concerned, and, if applicable, the IBOAs must reply on the actions taken. Member States are also obliged to send to OLAF the final decision of national courts on cases submitted by the Office.

Alongside the strengthened rules on OLAF investigations, the new Regulation entails improvements in individuals' procedural safeguards. Accordingly, an independent "controller of procedural guarantees" will be established. He/she will be administratively attached to the OLAF Supervisory Committee and appointed by the Commission after consultation with the European Parliament and the Council. The controller will be tasked with reviewing complaints lodged by persons concerned regarding OLAF's compliance with procedural guarantees and rules applicable to investigations, in particular infringements of procedural requirements and fundamental rights. The new regulation details the complaints mechanism in Art. 9b.

Next to the new guarantees established in the context of external investigations (see above), the person affected by an investigation will, under certain conditions, have access to the conclusions of OLAF's investigations in cases in which the Office issues judicial recommendations.

The way forward: the new OLAF Regulation requires the Commission to evaluate the new rules no later than five years from the date of commencement of the operational activities of the EPPO. On the basis of this evaluation report, the Commission must consider further reform of the OLAF Regulation, including additional or more detailed rules on the setting up of the Office, its functions, or the procedures applicable to its activities. (TW)

Operation between EU and UK Reveals Excise Duty Fraud with Cigarettes

On 21 December 2020, OLAF and Europol reported on a successful European-wide joint operation against fraudulent trade in cigarettes. The operation took place in November 2020 and involved 15 EU Member States and the UK. Europol and OLAF facilitated the operation with intelligence analyses, providing secure channels for information exchange and giving operational expertise. Law enforcement authorities were able to detect a fraud scheme of excise duty evasion. A network of fraudsters diverted cigarettes declared for export or intra-EU delivery into the black market. Under VAT and excise suspension, the cigarettes were distributed illegally without payment of the taxes and duties. The operation resulted in the arrest of 17 suspects and the seizure of 67 million cigarettes and 2.6 tonnes of tobacco worth €35.82 million. The most significant seizures were made in Lithuania (28.75 million) and the UK (9 million). In total, the potential tax loss was estimated at €30 million. (TW)

Long-Term Operation Dismantles Illegal Cigarette Trade Scheme

On 21 December 2020, OLAF reported that the final phase of a long-term trans-European operation against illegal cigarette smuggling and production

ended with raids in Romania, Hungary, and Italy. The operation dubbed "Kharon" started three years ago by targeting the carriers of the precursors for illegal cigarette production and their movements across the EU. During the entire operation, coordinated by OLAF, over 200 persons were arrested or reported to judicial authorities; the loss of approximately €80 million in duties and taxes in five EU countries was prevented, nine illicit factories were dismantled, and 95 million illegal cigarettes and 300 tonnes of tobacco were seized.

The action that took place in Romania on 17 December 2020 was carried out by more than 160 officers and targeted 50 individuals suspected of being part of a criminal organisation involved in cigarette smuggling and fiscal fraud. Searches were conducted in parallel in Hungary and Italy. Ten EU Member States (including the UK) were involved throughout the course of the operation. OLAF supported the operation by not only coordinating cross-border investigations but also by providing intelligence and analysing shipment movements. (TW)

OLAF Hub for Seizure of Contaminated Hand Sanitisers

Thanks to OLAF, information about contaminated hand sanitisers from a manufacturer in Turkey could be spread among EU law enforcement authorities and their shipment dismantled. In August 2020, Danish authorities first detected the contaminated sanitisers and reported the contamination to OLAF. The EU's anti-fraud office immediately informed other national authorities and was able to uncover the business scheme of the Turkish manufacturer who also produced the contaminated goods on behalf of other manufacturers. Following intervention by OLAF, Irish authorities were able to seize shipments and consignments of the illicit product. According to OLAF on 15 December 2020, almost 140,000 litres of hand sanitiser have meanwhile been seized in the EU. The manufacturer produced the hand sanitisers with unacceptably high levels of methanol, which can cause headaches, blurred vision, nausea and vomiting, loss of coordination, and decreased levels of consciousness. OLAF Director-General *Ville Itälä* remarked that trade in illicit medicine products in relation to the COVID-19 pandemic is growing considerably, which is why effective teamwork between all law enforcement authorities at the EU and national levels is crucial. (TW)

Joint Strike against Medicine Trafficking

On 10 December 2020, the public was informed about Operation "Shield" carried out between March and September 2020. The operation resulted in the seizure of medicine and doping substances all over Europe worth €73 million. Nearly 700 persons were arrested, 25 organised criminal groups dismantled, 10 clandestine laboratories seized, and over 450 websites shut down. The operation was led by Finland, France, Greece, and Italy and it was coordinated by Europol at the EU level. OLAF contributed by leading a targeted action against counterfeit and substandard oncological medicines and hormonal substances. The action uncovered 58 cases of various illegal activities.

Operation Shield also detected COVID-19-related fakes, such as medical devices (face masks, tests, diagnosis kits), chemicals and hygiene sanitisers. Europol confirmed that the operation revealed new trends in trafficking of counterfeit and misused medicines. It was a unified law enforcement response towards ensuring public health involving 19 EU Member States and eight non-EU countries. Operation Shield followed up other, previously successful actions against trafficking in counterfeit medicines and doping substances. Fraud and counterfeiting in relation to COVID-19 (including fraud of vaccines) is currently one of the major priorities of OLAF's work. (TW)

Successful Seizure of Illegal Cigarettes in Spain

On 3 December 2020, the Spanish customs authority was able to seize more than 260,000 packs of contraband tobacco, worth more than €1 million, in Barcelona. The cigarettes were smuggled into the EU in containers from China declared as containing LED lights. Two smugglers were arrested. OLAF supported the operation by submitting targeted information to the Spanish officials. (TW)

Joint Action Day "Arktos 2"

Between 16 and 25 November 2020, law enforcement authorities in the EU were able to seize, among others, 37 million illegal cigarettes, over 1.8 tonnes of tobacco, and more than 3.5 thousand litres of illegal fuel. The seizures were carried out within the framework of the Joint Action Day "Arktos 2," which was coordinated by Frontex and the Finnish and Latvian authorities at selected border crossing points at the EU's eastern land borders. The operation targeted excise fraud, in particular tobacco smuggling, document fraud, and migrant smuggling. It was supported by OLAF, Eurojust, Europol, and Interpol and involved border guards and police and customs authorities from six EU Member States. OLAF supported the operation by facilitating the exchange of information between the customs authorities involved and by lending investigative expertise. The operation was also designed to test cooperation between the different authorities involved in the fight against transnational crime under the EU's EMPACT platform. (TW)

OLAF Supports Seizure of Dangerous Machine Components

On 23 November 2020, OLAF and the Italian Customs and Monopolies Agency (ADM) made public a successful blow against counterfeit mechanical components (370kg of bearings), which originated from China. Bearings are important machine elements ensuring that

machineries, e.g. motor engines or electric fans, are moving properly. OLAF stressed that the seizure of the counterfeit components had not only prevented financial losses to the national and EU budget, but also secured the safety of citizens since counterfeit bearings entail considerable security risks. In addition, the seizure detected intellectual property infringements since the trademarks of well-known manufacturers had been falsified. OLAF supported the Italian authority by sharing intelligence. (TW)

Europol

Commission Proposes Europol Reform

spot light

On 9 December 2020, the European Commission published a proposal for a Regulation 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. Against the background of evolving and increasingly complex cross-border security threats – with blurring boundaries between the physical and digital world as well as the residual high threat of terrorism in Europe –, the European Commission proposes strengthening Europol's capacities, capabilities, and tools to support Member States effectively in countering serious crime and terrorism. The proposal suggests addressing the key issues as follows:

- Enable Europol to cooperate effectively with private parties;
- Enable Europol to support Member States with the analysis of large and complex datasets (big data);
- Allow Europol to request the competent authorities of a Member State to initiate, conduct, or coordinate the investigation of a crime that affects a common interest covered by a Union policy, regardless of the cross-border dimension of the crime.

Moreover, the Commission sees a need to strengthen Europol's cooperation with the European Public Prosecutor's Office (EPPO) as well as third states. Europol's role on research and innovation, its data protection framework, and its parliamentary oversight will also be bolstered.

As regards enhanced cooperation with private parties, the proposal sets out rules for Europol to exchange personal data with private parties (in order for the agency to be able to receive personal data from them), to inform them about missing information, and to ask Member States to request other private parties to share additional information. The rules also introduce the possibility for Europol to act as a technical channel for exchanges between Member States and private parties. In order to improve crisis response, other rules will govern support to Member States in preventing the large-scale dissemination of terrorist content via online platforms (related to ongoing or recent events depicting harm to life or physical integrity or calling for imminent harm to life or physical integrity). To be able to process large and complex datasets, the Commission intends to introduce the possibility to carry out pre-analysis of personal data, with the sole purpose of determining whether such data fall into the various categories of data subjects.

To effectively support criminal investigations in Member States or by the EPPO, in certain cases, Europol would be rendered able to process data that national authorities or the EPPO obtained in the context of criminal investigations – in accordance with procedural requirements and safeguards applicable under national criminal law. To this end, Europol will be able to process (and store upon request) all data contained in an investigative case file provided by the Member State or the EPPO for the duration of the agency's support for that specific criminal investigation. Ultimately, looking at budgetary implications, the proposal estimates that an additional budget of approximately €180 million and approximately 160 additional positions would be needed for the 2021–2027 period of the Multiannual Financial Framework.

The proposal for revising the current Europol Regulation comes around one and a half years before the planned, thorough evaluation of the Agency's impact, effectiveness, and efficiency and its working practices (Art. 68 of Regulation 2016/794). An adaptation of the schedule concerning review of the Europol Regulation was pushed by the Council (JHA Council conclusions of December 2019) and other stakeholders, who saw a pressing social need to enhance Europol's capabilities to fight serious crime, in particular cybercrime and terrorism.

A commissioned consultant study on the exchange of personal data between Europol and private parties (→eucrim 3/2020, 170), a public consultation on the "inception impact assessment" of the early revision launched in May 2020, and a targeted stakeholder consultation served the Commission in preparing its proposal. (CR)

Report on Malicious Uses and Abuses of Artificial Intelligence

On 19 November 2020, Europol, the United Nations Interregional Crime and Justice Research Institute (UNICRI), and Trend Micro (an IT company providing cybersecurity solutions) published a joint report on "Malicious Uses and Abuses of Artificial Intelligence (AI)". Looking at the present state and possible future scenarios of malicious uses and abuses of AI, the report identifies a strong need to harness the potential of AI technology as a crime-fighting tool in order to future-proof the cybersecurity industry and cybersecurity policing. Furthermore, it recommends further research in order to stimulate the development of defensive technology and to promote and develop secure AI design frameworks. Politically loaded rhetoric on the use of AI for cybersecurity purposes should be de-escalated. Lastly,

public-private partnerships should be leveraged and multidisciplinary expert groups established. (CR)

Eurojust

Interparliamentary Committee Evaluation of Eurojust

On 1 December 2020 – for the first time since the Eurojust Regulation became applicable in December 2019 –, Members of the European Parliament and national parliaments of the EU Member States convened (in a virtual meeting) to evaluate the Eurojust's activities. In order to increase the transparency and democratic oversight of the agency, Eurojust Regulation 2018/1727 of 14 November 2018 established a joint evaluation mechanism to assess Eurojust's activities within the framework of an inter-parliamentary committee meeting. For the purpose of this first inter-parliamentary committee meeting, Eurojust President *Ladislav Hamran*, Vice-President *Klaus Meyer-Cabri*, and the Liaison Prosecutor for the United States of America *Rachel Miller Yasser* explained Eurojust's work and its current activities to the committee. Issues discussed included the following;

- The outcome of Eurojust's Annual Report 2019;
- Eurojust's reaction to the Covid-19 pandemic crisis;
- The need for digitalisation;
- Cooperation with the EPPO;
- The added value of Eurojust's international network in cross-border investigations. (CR)

Further Cooperation between Eurojust and Third States

On 19 November 2020, the European Commission issued a Recommendation for a Council Decision to authorise the opening of negotiations for Agreements between the EU and ten third States, in order to foster judicial cooperation with Eurojust. The States include Algeria, Armenia, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia, and Turkey. Such negotiations would pave the way for the conclusion of Cooperation Agreements between Eurojust and the competent authorities for judicial cooperation in criminal matters in these third States. (CR)

New National Member for Spain

At the end of November 2020, *José de la Mata Amaya* took up position as new National Member for Spain at Eurojust. Before joining Eurojust, Mr *de la Mata Amaya* served as judge of the Central Investigative Court No 5 of the Spanish National Court. Furthermore, he was contact point for Spain in the Network of National Experts on Joint Investigation Teams (JITs).Mr *de la Mata Amaya* succeeds *Francisco Jiménez-Villarejo* who had headed the Desk since December 2012. (CR)

Vice-President Elected

On 17 November 2020, the College of Eurojust elected *Boštjan Škrlec* as its Vice-President for the next four years. Mr Škrlec has been National Member for Slovenia at Eurojust since 2017. (CR)

New National Member for Cyprus

On 16 November 2020, *Eleni Kouzoupi* took up her position as National Member for Cyprus at Eurojust. Before joining Eurojust, Ms *Kouzoupi* served as Counsellor on Justice and Home Affairs matters at the Cypriot Permanent Representation in Brussels. She succeeds *Katerina Loizou* who held the position since 2005. (CR)

Frontex

Second International Conference on Biometrics for Borders

On 1–3 December 2020, Frontex held its second International Conference on Biometrics for Borders (ICBB), focussing on the implementation of the Entry/Exit System (EES) that will start at the EU's external border in February 2022. The virtual conference brought together experts from border guard authorities who are responsible for border management in the EU and worldwide, EU policy-makers and agencies, and research and industry representatives. (CR)

Euro-Arab Technical Round Table

On 1 December 2020, Frontex and the General Secretariat of the Arab Interior Ministers' Council co-organised the first Euro-Arab Technical Roundtable on Border Management and Security. The round table brought together representatives from 18 EU states and 14 Arab states. Issues discussed at the virtual meeting included common challenges, such as health at the borders, cross-border crime (including migrant smuggling and trafficking in human beings), and other multi-dimensional threats. (CR)

Specific Areas of Crime / Substantive Criminal Law

Money Laundering

EDPB Statement on EU's Recent AML/CFT Action Plan

On 15 December 2020, the European Data Protection Board (EDPB) called on the European legislator to review the relationship between anti-money laundering measures and the rights to privacy and data protection when it prepares a new legal framework in the area of money laundering and terrorist financing. The adopted statement comes in response to the European Commission's Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing and the launch of a public consultation in May 2020 (→eucrim 2/2020, 87).

As its predecessor, the Article 29 Working Party, the EDPB reiterates that currently applicable AML legislation, with its very broad and far-reaching due diligence and monitoring obligations on financial services providers and its long

data retention periods, poses manifold challenges for privacy and data protection. The relevance and accuracy of the data collected play a paramount role for any future legislation, and a closer articulation between the two sets of rules is needed. The EDPB calls on the Commission to be consulted about any new AML legislation at the earliest stage possible. (TW)

Tax Evasion

Tax Justice: Report Documents Global Tax Losses

On 20 November 2020, the Tax Justice Network published the State of Tax Justice 2020 report. The report is the first of its kind on tax evasion that comprehensively identifies the amount of tax revenue each nation loses every year to corporate and private tax abuse. The report also analyses what the loss in taxes means for public health spending, in particular in times of COVID-19. In addition, it provides an annual "snapshot" of country-by-country rankings on the Tax Justice Network's Corporate Tax Haven Index and Financial Secrecy Index. The countries' vulnerability to illicit financial flows is tracked by the Tax Justice Network's vulnerability tracker.

The report revealed that countries are losing a total of over $427 billion in tax revenue annually due to international, corporate tax abuse and private tax evasion. This is the equivalent of nearly 34 million nurses' annual salaries every year – or one nurse's annual salary every second. Other key findings of the report include:

- Of the $427 billion, nearly $245 billion is lost because multinational corporations shift profits into tax havens;
- The remaining $182 billion is lost because wealthy individuals hide undeclared assets and incomes offshore, beyond the reach of the law;
- On average, the world's nations lose the equivalent of 9.2% of their health budgets to tax havens every year;
- Higher-income countries lose a lot more tax than lower-income countries, but the impact is far greater on the latter – in comparison to the amount of tax they typically collect and to health expenditure, they lose more proportionally: whereas tax losses in higher-income countries are equal to 8% of their public health budgets, tax losses in lower-income countries are equal to over half their public health budgets (52%);
- A regional comparison of tax losses reveals the same pattern, i.e., less tax revenue is lost in North America and Europe, on the one side, whereas considerable tax revenue is lost in Latin America and Africa, on the other;
- The biggest tax losers are: (1) the United States, (2) the United Kingdom, (3) Germany, (4) France, and (5) Brazil;
- Higher-income countries are responsible for facilitating nearly all global tax losses (98%), while lower-income countries are responsible for less than 2% of all global tax losses;
- Over one third of lost tax revenue is enabled by jurisdictions that fall under the UK's network of Overseas Territories and Crown Dependencies, such as the Cayman Islands (this network, which facilitates corporate and private tax abuse and has the City of London at its centre, is also called the UK's spider's web);
- Over half of global corporate tax abuse is enabled by the UK (with its Overseas Territories and Crown Dependencies), the Netherlands, Luxembourg and Switzerland – labelled as the "axis of tax avoidance";
- EU-blacklisted jurisdictions cause only 1.72% of global tax losses (costing countries over $7 billion in lost tax revenue annually), while EU Member States cause 36% (costing countries over $154 billion in lost tax revenue annually).

The Tax Justice Network highlights that "(a)lmost every person in almost every country in the world foots the bill incurred by tax abusers. People suffer needlessly poor public services, needlessly deep inequalities, needlessly high rates of death, needlessly weak and corrupt governments and public administrations. Only tax abusers and the very wealthy in tax havens win, at the cost of everyone else." Against this background, the authors of the report make three key recommendations to governments:

- Introduce an excess profits tax on large multinational corporations, e.g., for digital tech giants, that is designed to cut through profit-shifting abuse;
- Introduce a wealth tax to fund the Covid-19 response, with punitive rates for opaquely owned offshore assets;
- Establishing an UN tax convention that sets international standards for corporate taxation and for the necessary tax cooperation between governments in a transparent and democratic way.

The global community is called on to get involved in a fundamental reprogramming of the global tax system, which requires comprehensive rewriting of international tax rules and tax transparency measures.

The "State of Tax Justice 2020" report is based on OECD data, which aggregated country-by-country reports on multinational corporations' profits and tax revenues (published in July 2020). The report analyses these data in a systematic way for the first time. Unlike previous studies, it focuses on direct losses and singles out indirect losses from global corporate tax abuse, which allows a clearer picture of tax loss estimates to be painted.

Alongside the report, the Tax Justice Network launched a publicly available online data portal that contains additional data, detailed estimates of lost tax revenue on a country-by-country basis, data comparisons by regions, and a range of other issues discussed in the published report.

The report immediately triggered reactions from the European Parliament. In a press release dated 20 November 2020, the chair of the EP's subcommittee on tax matters, *Paul Tang* (S&D, NL), said that the EP shares many of the concerns in the report regarding the

EU's record on tax avoidance. He added that "some of the countries that seem responsible for most of global tax losses are not on the blacklist of the European Union." He called on the Council to justify its removal of the Cayman Islands during the last update in October 2020. He also announced an EP resolution on the process of listing non-cooperative jurisdictions for tax purposes (→following news item).

German MEP *Sven Giegold* (Greens/EFA) voiced his disappointment over the fact that Germany and the UK had refused to make public tax data on multinational companies. He demanded that large companies be obliged to disclose their profits per country as well as the taxes paid on them. In a second step, a minimum tax rate for corporations must be established. (TW)

MEPs Call for Reform of EU List on Tax Havens

On 10 December 2020, the Economic and Monetary Affairs Committee adopted a resolution demanding reform of the EU's blacklisting of tax havens (43 votes in favour, 6 against, and 5 abstentions). MEPs call the current system "confusing and ineffective."

The criterion for judging whether a country's tax system is fair or not needs to be widened to include more practices and not just preferential tax rates. Jurisdictions with a 0% corporate tax rate or with no taxes on companies' profits should automatically be placed on the "list of non-cooperative jurisdictions for tax purposes." Requirements for possible removals must be more stringent; removals following minimal changes or weak enforcement measures must be avoided.

All third countries must be treated and screened fairly and equally on the basis of the same criteria, which does not seem to be the case at the moment. EU Member States should also be screened to see whether they display any characteristics of a tax haven, and those falling foul should be regarded as tax havens, too.

Ultimately, the resolution proposes that the listing process be formalised by means of a legally binding instrument. The EP should have an observer role in the Council's Code of Conduct Group, which currently decides on the blacklisting behind closed doors. Changes must ensure the impartiality, objectivity, and accountability of the listing process.

The resolution reacts to a recent report on global tax justice (→previous news item) revealing, *inter alia*, that the jurisdictions on the EU list of tax havens only account for less than 2% of global tax losses whereas 36% of EU Member States do. Furthermore, the removal of the Cayman Islands from the list by the Council in October 2020 was met with incomprehension by MEPs, considering that the Cayman Islands are presumed to be one of the jurisdictions most responsible for other countries' tax losses, according to the above-mentioned tax justice report. Therefore, the EP's subcommittee on tax matters (FISC) pushed ahead preparation of the motion for a resolution on reform of the EU's list of tax havens. (TW)

VAT Fraud Dismantled

At the end of November 2020, Hungarian authorities, supported by law enforcement authorities from Austria, the Czech Republic, the Slovak Republic, and by Eurojust, dismantled an Organised Crime Group (OCG) involving large-scale VAT fraud. The OCG had been operating a multi-level company network that managed to re-export items several times and to defraud Hungarian tax authorities by means of false documents. The OCG also used bogus company managers and straw men pretending to run businesses for perfumes and food supplements in order to hide its real operations. The OCG succeeded in avoiding the value added tax it owed the Hungarian state, which amounted to approximately EUR 8.5 million. The joint action resulted in the arrests of seven Hungarian suspects. (CR)

Cybercrime

Commission Presents Cybersecurity Package

On 16 December 2020, the Commission published a cybersecurity package consisting of:

- A new EU cybersecurity strategy;
- A proposal for revision of the Directive on ensuring a high level of security of network and information systems (so-called NIS Directive);
- A proposal for a new Directive on the resilience of critical entities.

The package is a further act implementing the EU Security Union Strategy presented in July 2020 (→eucrim 2/2020, 71–72) and the Commission's objective to reach a digital transition as outlined in the Communication "Shaping Europe's Digital Future" submitted in February 2020. The new EU cybersecurity strategy includes numerous individual proposals for regulations, investments, and policy initiatives in three areas of action:

- Promoting resilience, technological sovereignty, and leadership;
- Building operational capacities for prevention, deterrence, and response;
- Advancing a global open cyberspace through increased cooperation.

More concretely, a cybersecurity shield with the ability to detect early signals of impending cyberattacks is to be built up through an EU-wide network of so-called "Security Operation Centres." The Commission is also working on establishing a Joint Cyber Unit to strengthen cooperation between EU bodies and Member State authorities responsible for preventing, deterring, and responding to cyberattacks, including civilian, law enforcement, diplomatic, and cyber defence communities.

The EU will make efforts to advance the security and stability of cyberspace at the international level while promoting its core values. It will further strengthen its EU Cyber Diplomacy Toolbox and increase cyber capacity-building efforts towards third countries.

The cybersecurity strategy also reinforces the EU's support for the envisaged digital transition with an unprecedented level of investment. This includes a high proportion of EU funding, which has been allocated to projects in the next long-term EU budget (2021–2027), such as the Digital Europe Programme and Horizon Europe as well as the Recovery Plan for Europe. Member States are encouraged to make full use of the EU Recovery and Resilience Facility to boost cybersecurity and match EU-level investment. (TW)

Terrorism

Commission: Counter-Terrorism Agenda

spot light

On 9 December 2020, the European Commission published a Communication on the Counter-Terrorism Agenda of the EU. It sets out a four-pillar strategy to anticipate, prevent, protect, and respond to terrorist threats.

(1) *Anticipation of terrorist threats*

The strategy underlines the importance of the following:

- Strategic intelligence;
- Threat assessment;
- Targeted risk assessments;
- Early detection capacities;
- Modern detection technologies and AI solutions;
- Structural integration of foresight in the development of counter-terrorism policies.

To achieve these aims the Commission sets out various key actions to develop and finance measures. Furthermore, Member States are urged to provide the EU Intelligence Analysis Centre (EU INTCEN) with the necessary resources and high-quality input.

(2) *Prevention*

There is a strong need to act in the following areas:

- Countering extremist ideologies online;
- Supporting local actors to build more resilient communities;
- Countering radicalisation in prisons;
- Improving rehabilitation and reintegration of radicalised inmates and terrorist offenders;
- Consolidating knowledge and support as regards radicalisation, victims of terrorism, lone actors, etc.

The Commission plans various measures to this end, such as a proposal on a Digital Service Act and setting up an EU Knowledge Hub for the prevention of radicalisation. Member States shall be provided with guidance on best practices, including guidance on foreign terrorist fighters and their family members. In addition, the Commission urges the European Parliament and Council to adopt the pending Regulation addressing the dissemination of terrorist content online.

(3) *Protection*

The Commission outlines the following priorities:

- Protecting the public in public spaces;
- Supporting cities in their efforts to provide urban security;
- Improving the resilience of critical infrastructure;
- Developing measures to reinforce border security;
- Denying terrorists the means to attack.

To achieve these aims, the Commission sets out, *inter alia*, the following key actions:

- Proposal for a Schengen Strategy in 2021;
- Proposal for an EU Pledge on Urban Security and Resilience in order to prevent and counter radicalisation and to reduce vulnerabilities in public spaces;
- Proposal for measures to enhance the resilience of critical infrastructure;
- Proposal for the revision of the Advance Passenger Information Directive ("API Directive").

Additionally, EU Member States are urged to take action as follows:

- Swiftly address gaps and shortcomings in the implementation of relevant legislation;
- Ensure systematic checks of all travellers against relevant databases at the external borders;
- Issue alerts in the Schengen Information System (SIS) on suspected foreign terrorist fighters;
- Roll out the fingerprint search functionality in the SIS Automated Fingerprint Identification System;
- Swiftly implement the Entry-Exit System (EES), the European Travel Information Authorisation System (ETIAS), and the European Criminal Records Information System for Third Country Nationals (ECRIS-TCN) and allow for the interoperability of these large-scale IT systems;
- Strengthen chemical and bio-security.

(4) *Response to terrorist attacks*

The Commission sees a key role for Europol and its European Counter-Terrorism Centre (ECTC); therefore, the Communication was accompanied by a proposal on the revision of Europol's mandate (→separate news item under "Europol", p. 279). The Commission further stresses the need to strengthen law enforcement cooperation and information exchange. Improved support for investigations and prosecutions as well as victims of terrorism must be achieved. Hence, the Commission plans various measures, e.g.:

- Revision of the Prüm Decisions;
- Creation of a network of counter-terrorism financial investigators to improve cross-border financial investigations;
- Support for Member States to use battlefield information in order to identify, detect, and prosecute returning foreign terrorists fighters;
- Proposal for a mandate to negotiate a cooperation agreement between the EU and Interpol;
- Enhanced support for victims of terrorism, including through the EU Centre of Expertise for Victims of Terrorism.

The European Parliament and Council are urged to adopt the e-evidence proposals to ensure speedy and reliable access to e-evidence for authorities.

Lastly, the Counter-Terrorism Agenda sets out measures to reinforce inter-

national cooperation across all of these four pillars by further strengthening the EU's external counter-terrorism engagement. The focus is on the Western Balkans, North Africa and the Middle East, the Sahel region, the Horn of Africa, other African countries where terrorist activities are increasing, and on key Asian regions. The Commission and the High Representative of the Union for Foreign Affairs and Security Policy envisage various measures to step up international counter-terrorism cooperation, such as:

- Enhanced cooperation with Western Balkan partners in the area of firearms;
- Negotiation of international agreements with Southern Neighbourhood countries in order to exchange personal data with Europol;
- Reinforced engagement with international organisations;
- Enhanced strategic and operational cooperation with the above-mentioned regions in Africa and Asia.

The European Parliament and Council are urged to authorise the opening of negotiations with Southern Neighbourhood countries to allow cooperation with Eurojust.

To pursue the implementation of the Counter-Terrorism Agenda, the Commission will appoint its own Counter-Terrorism Coordinator. He/she will be mandated with coordination of the various aspects of EU policy and funding in the area of counter-terrorism within the Commission, including cooperation and coordination with the Member States. This coordinator shall collaborate intensively with the Council's EU Counter-Terrorism Coordinator, with the relevant EU agencies, and with the European Parliament.

The new Counter-Terrorism Agenda was announced as part of the EU's Security Union Strategy, which was presented by the Commission in July 2020 (→eucrim 2/2020, 71–72). It brings together existing and new strands of work in a combined approach towards combatting terrorism.

Several NGOs voiced concerns over the new plans (→Statewatch website). They criticised that the proposed actions would provoke discrimination, a marginalisation of fundamental rights, and an expansion of surveillance. (CR)

2019 Counter-Terrorism Report by Eurojust

On 9 December 2020, Eurojust published its 2019 Report on Counter-Terrorism presenting the Agency's activities in the area of counter-terrorism in the year 2019. The report gives an overview of Eurojust's casework on counter-terrorism and presents the main concepts/principles of the newly developed European Judicial Counter-Terrorism Register, which was launched on 1 September 2019 (→eucrim 3/2019, 167).

In 2019, Eurojust coordinated 222 terrorism cases; the agency registered 94 new coordination requests, which is an increase of 16% compared to the previous year. 24 specific coordination meetings were held and eight Joint Investigation Teams conducted, of which two were newly established in 2019. Legal and practical challenges identified concerned the execution of requests based on mutual recognition instruments, mutual legal assistance (MLA) requests, and establishment of the (best-placed) jurisdiction to prosecute.

Ultimately, the report sets out the following priority areas to enhance Eurojust's counter-terrorism work:

- Improving the efficient and timely coordination of counter-terrorism investigations and prosecutions;
- Continuing the implementation of the European Judicial Counter-Terrorism Register;
- Enhancing timely information sharing concerning judicial counter-terrorism proceedings;
- Coordinating judicial cooperation to provide support to victims of terrorism and guarantee their rights;
- Sharing experience and providing input to discussions at the EU level.

(CR)

Racism and Xenophobia

Council and EP Reach Political Agreement on Binding Rules to Fight Terrorist Content Online

On 10 December 2020, the German Council Presidency and the negotiators of the European Parliament reached political agreement on an EU Regulation on preventing the dissemination of terrorist content online. The Regulation had been proposed by the Commission on 12 September 2018, following calls by EU leaders and the European Parliament (→eucrim 3/2018, 97–98; for a detailed analysis of the proposal →*G. Robinson*, eucrim 4/2018, 234–240). The new legislation will introduce a number of measures to prevent misuse of Internet hosting services in the EU for the dissemination of texts, images, sound recordings, and videos that incite, solicit, or contribute to terrorist offences. Already existing voluntary cooperation with these companies will continue, but the EU Regulation is designed to establish binding, uniform rules that will, above all, ensure the swift removal of terrorist content online. The main points of the deal include:

- Clear, uniform definition of terrorist content online, in line with EU fundamental rights protection;
- Material disseminated for educational, journalistic, artistic, or research purposes or intended to prevent or counter terrorism will not be considered terrorist content – this also includes content expressing polemic or controversial views in a public debate;
- Service providers must remove terrorist content or disable access to it in all EU Member States as soon as possible and in any event within one hour after they have received a removal order from a competent authority of an EU Member State;
- The competent authorities in the Member State in which the service provider has its main establishment have the right to scrutinise the removal order and block its execution if they consider it violates fundamental rights;

- Points of contact will facilitate the handling of removal orders;
- Hosting service providers exposed to terrorist content must take specific measures to address misuse of their services and to protect their services against the dissemination of terrorist content;
- The choice of measures is up to the companies; they will not be obliged to monitor or filter content;
- Service providers must also publish annual transparency reports on action taken against the dissemination of terrorist content;
- The Regulation will ensure that the rights of ordinary users and businesses will be respected; this includes effective remedies for users whose content has been removed and for service providers to submit a complaint.

The agreement will now be finalised at the technical level. Both the EP and the Council then have to adopt it formally.

Member States have been applying renewed pressure on the EP to finalise the rules swiftly, following terrorist attacks in Paris and Austria in 2020. Alongside the proposal on e-evidence, the Regulation on terrorist content online remains one of the most controversially discussed legislative initiatives in the area of internal security. Numerous NGOs had previously called for changes to the text in order to protect individual rights. (TW)

Procedural Criminal Law

Data Protection

Council Conclusions on Encryption

On 14 December 2020, the Council agreed on a common position on the way forward regarding the encryption of communication and access to electronic evidence for law enforcement purposes. The Council resolution on encryption highlights the need for security through encryption and security despite encryption. It underlines the importance of encryption for the purpose of protecting individuals, civil society, critical infrastructure, the media and journalists, industry, and governments. At the same time, it stresses that law enforcement needs access to encrypted data in order for authorities to be able to exercise their lawful power to investigate crime and bring to justice criminals who exploit the digital means. Access to electronic evidence can be essential, not only to be able to conduct successful investigations but also to protect victims and help ensure security.

As a possible way out of the dilemma described above, the Council advocates an active discussion with members of the technology industry, including the close involvement of representatives from research, academia, industry, and civil society. A balance should be sought between ensuring the continued use of strong encryption technology. At the same time, future work must guarantee the powers for law enforcement and the judiciary to operate on the same terms digitally as in the offline world. Potential technical solutions for gaining access to encrypted data must comply with the principles of legality, transparency, necessity, and proportionality, including the protection of personal data by design and by default.

Further assessment could be devoted to a common regulatory framework for the EU that would allow law enforcement authorities to carry out their task effectively while protecting privacy and fundamental rights. (TW)

Council Conclusions on Cybersecurity of Connected Devices

On 2 December 2020, the Council approved conclusions on the cybersecurity of connected devices. The Council highlights that connected devices, including the machines, sensors, and networks that make up the Internet of Things (IoT), will continue to play a key role in shaping Europe's digital future. This also entails numerous security issues. The conclusions set out priorities when addressing risks related to privacy, information security and cybersecurity. They also aim to boost the global competitiveness of the EU's IoT industry by ensuring the highest standards of resilience, safety, and security. They, *inter alia*, highlight the importance of reinforcing resilient and secure infrastructure, products, and services for building trust in the Digital Single Market and within European society. The EU's core values must be preserved, in particular privacy, security, equality, human dignity, rule of law, and open internet. Priorities in the area of cybersecurity for connected devices should be as follows:

- Assess the need for horizontal legislation that addresses all cybersecurity aspects and that will also serve as the basis for product placement on the market;
- Elaborate additional certification schemes for connected devices, which will also require the setting of cybersecurity norms, standards, and technical specifications;
- Support small and medium-sized enterprises (SMEs), which should be an essential building block of the European cybersecurity ecosystem, in particular if standardisations are developed.

The cybersecurity policy comes in the wake of the EU's efforts to the digital transformation. It is one of the key policy priorities of Commission President *Ursula van der Leyen* and is also backed by the EU leaders. At the Special European Council Meeting on 1–2 October 2020, the heads of state and government confirmed their aspiration to accelerate digital transition and agreed that at least 20% of funds under the Recovery and Resilience Facility would be made available to achieve objectives such as:

- Fostering European development of the next generation of digital technologies, including supercomputers, quantum computing, blockchain and human-centric artificial intelligence;
- Accelerating the deployment of very high-capacity and secure network infrastructures (e.g., 5G) all over the EU;

- Enhancing the EU's ability to protect itself against cyber threats. (TW)

EDPB Recommendations on Follow-Up to Schrems II Judgment

On 10 November 2020, the European Data Protection Board (EDPB) adopted recommendation 01/2020, which is designed to help controllers and processers who export data from EU private entities or public authorities to third countries comply with the CJEU's Schrems II judgment (→eucrim 2/2020, 98–99).

Above all, the CJEU stated that it is up to the data exporters in the EU to verify, on a case-by-case basis and, where appropriate, in collaboration with the importer of the data, whether the law of the third country of destination ensures an essentially equivalent level of protection, under EU law, of personal data transferred pursuant to standard data protection clauses, by providing, where necessary, supplementary measures to those offered by those clauses. The CJEU did not, however, further define how the assessment should be carried out and which supplementary measures are to be identified.

The EDPB recommendation includes a roadmap of the steps data exporters must take to determine whether they need to put in place supplementary measures in order to be able to transfer data outside the EEA in accordance with EU law. In addition, it provides examples of supplementary measures and some of the conditions they would require to be effective as well as the sources of information by which to assess a third country. The roadmap includes the following steps:

- Knowledge of transfer, which means that all transfers of personal data to third countries should be mapped;
- Verification of transfer tools pursuant to Arts. 45, 46, 49 GDPR;
- Assessment of whether there is anything in the law or practice of the third country that may impinge on the effectiveness of the appropriate safeguards of the transfer tools that data exporters are relying on, in the context of the specific data transfer;
- Identification and adoption of the supplementary measures necessary to bring the level of protection of the data transferred up to the EU standard of essential equivalence;
- Taking of any formal procedural steps that the adoption of supplementary measures may require;
- Re-evaluation of the level of protection afforded to the data transferred to third countries at appropriate intervals.

The EDPB stresses that the data protection supervisory authorities can be consulted for support on the implementation of supplementary measures. They will also monitor whether data transfers to third countries are permitted and ensure continued consistency with EU data protection law in light of the Schrems II judgment. The recommendations may be further developed following a public consultation that ended on 21 December 2020. As for transfers of personal data carried out between public bodies, the EDPB refers to its specific guidance in the Guidelines 2/2020 "on Articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies," adopted in February 2020. To support assessment of the level of interference when it comes to surveillance measures by third countries' security and law enforcement authorities, the EDPB issued Recommendation 02/2020 (also adopted on 10 November 2020 →following news item).

In the aftermath of the Schrems II judgment of 16 July 2020, NGOs and public bodies worked on several guidelines to ensure compliance with the CJEU's lines of argument (→eucrim 3/2020, 187). This work includes a compliance strategy paper for EU institutions issued by the EDPS, who also supported the preparation of the EDPB guidelines. The challenges and consequences of the Schrems II judgment were also at the centre of the 48th meeting between the EDPS and the network of data protection officers (DPOs) of the 68 EU institutions and bodies on 11 December 2020. Discussions dealt, for example, with practical consequences for existing and new contracts, the ways to conduct Transfer Impact Assessments (TIAs), and the margin of manoeuvre with regard to the use of derogations or supplementary measures. EDPS *Wojciech Wiewiórowski* reiterated that implementation of the Schrems II judgment is a complex task and necessitates joint efforts by all data controllers in EU institutions and bodies. (TW)

EDPB: Update of European Essential Guarantees for Surveillance Measures

On 10 November 2020, the European Data Protection Board (EDPB) adopted Recommendation 02/2020 on the European Essential Guarantees (EEG) for surveillance measures. The Recommendation updates a previous document on the justification of interference with fundamental rights to privacy and data protection through surveillance measures by third countries' national security or law enforcement authorities when transferring personal data. This document was issued by the Article 29 Working Party, the EDPB's predecessor, following the Schrems I judgment of 6 October 2015 (→eucrim 3/2015, 85). The Recommendation takes into account recent CJEU and ECtHR case law on data protection, in particular the CJEU's judgment of 16 July 2020 in Schrems II (→eucrim 2/2020, 98–99).

The EEG help data exporters assess whether third country legislation ensures a level of protection essentially equivalent to that guaranteed within the EU. It should not be confused with the European Commission's adequacy decision in accordance with Art. 45 GDPR, which would generally open the path for data transfer to third countries from the EU. However, the EEG are part of this assessment.

The Recommendation explains the background and details of the four European Essential Guarantees:

- Processing should be based on clear, precise, and accessible rules;
- Necessity and proportionality need to be demonstrated with regard to the legitimate objectives pursued;
- An independent oversight mechanism should exist;
- Effective remedies need to be available to the individual.

Recommendation 02/2020 supplements other guidelines and recommendations by the EDPB, which are to be taken into account when proceeding with any assessment of lawful data transfers to third countries. Assessments depend on the transfer tool to be used and on the necessity of providing appropriate safeguards, including supplementary measures if necessary (→Recommendation 01/2020 analysed in previous news item). (TW)

Ne bis in idem

AG: Union Ne bis in idem Rules Shelter Union Citizens from Extraditions to Third Countries

Advocate General *Bobek* concludes in his Opinion in Case C-505/19 of 19 November 2020 that the fundamental principle of ne bis in idem, in conjunction with the right to free movement, precludes Member States from implementing a red notice issued by Interpol at the request of a third country and from restricting the freedom of movement of a citizen of the Union under Art. 21 TFEU. In the AG's view, the prohibition of double jeopardy enshrined in Art. 50 of the Charter of Fundamental Rights, once a final decision has been issued by a competent authority, precludes any further criminal prosecution by the Member States of the Convention Implementing the Schengen Agreement (CISA). Temporary arrest in another member state for the purpose of possible future extradition is also excluded.

The AG adds, however, that the judicial authorities of the Member State concerned must have adopted a final decision that the ne bis in idem principle in relation to the specific charges in the red notice applies. Mere concerns on the applicability of the ne bis in idem rule voiced by police authorities do not suffice. If there are indications that the ne bis in idem principle is applicable, Member States should apply the procedure foreseen in Art. 57 CISA.

In the present case, a German national has brought an action against the *Bundeskriminalamt* (Federal Criminal Police Office) on the ground that he considers that a request for a search warrant issued by the United States, which has been distributed via the Interpol system to all States affiliated to Interpol, infringes the Union-wide prohibition of double jeopardy. For details of the case and the questions referred to →eucrim 2/2019, 106–107.

In the first place, the AG repeats the settled CJEU case law: a decision by which a public prosecutor definitively discontinues criminal proceedings, having for effect that once the accused has satisfied certain conditions, any further prosecution is precluded under the national law (here: Germany), meets the requirement of "finally disposed of" enshrined in Art. 54 CISA/Art. 50 CFR. In the second place, he finds that the objective pursued by Art. 54 CISA, i.e. to move freely within one singe legal space, must also have consequences on potential extraditions. He mainly argues:

- One legal space means one legal space, internally as well as externally;
- The rationale of Art. 54 CISA given by the CJEU also applies in the present case: persons who, when prosecuted, have their cases finally disposed of have to be left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts *in*, *and not only by*, another Schengen State;
- A person that is subject to arrest or temporary detention, in view of his or her extradition, despite being entitled to benefit from the ne bis in idem principle, is not left undisturbed or able to move freely within the Union.

The AG discards a variety of counter-arguments, e.g. that the present case does not relate to the concept of "prosecution", but rather to "precautionary measures"; the solution found would amount to an "extra-Schengen" application; and expansion of the scope of Art. 54 CISA would create an ad hoc refusal ground in extradition law that is not foreseen in bilateral international extradition treaties.

As regards the second set of questions put forward by the referring Administrative Court of Wiesbaden, the AG concludes that further processing of the person's data contained in a red notice is not precluded by Union law. It does, in principle, not matter that the ne bis in idem principle were to apply to the charges in the red notice. In sum, the application of the ne bis in idem principle does not entail, for the person concerned, the right to request that his personal data be erased.

Lastly, the AG proposes the CJEU not answering the question which doubts the adequacy of Interpol's data protection, because the question would have no bearing on the specific situation of the applicant.

➤ *Put in focus:*

The AG's opinion must be seen in a much wider context. It answers the general question whether the union-wide transnational ne bis in idem guarantee – not to be prosecuted twice for the same act (Art. 54 CISA, Art. 50 CFR) – has extraterritorial effects. The former prevailing opinion was that Art. 54 has only "intra-Community effects", but leaves the relationship between EU Member States and third States, such as the US, untouched. This assumption was in fact shaken by the CJEU's judgment in *Petruhhin,* which found that the right to free movement in Art. 21 TFEU has also effects to extraditions of Union citizens to countries outside the bloc (→eucrim 3/2016, p. 131). In this context, AG *Bobek* emphasises that the Petruhhin logic does not only apply if a Union citizen has made use of his freedom, but also if he/she is

actually and genuinely *seeking* to make use of it (as in the present case).

The AG's opinion is generally in line with the recent decision of the Higher Regional Court of Frankfurt a.M. which denied extradition of a Union citizen to the US who had already been tried for the offence as referred to in the extradition request by the Italian authorities (→eucrim 2/2020, 110). Relying on the concept in Petruhhin, the court in Frankfurt ruled that prosecution of an EU citizen in his home (EU) country must take precedence over prosecutions in third countries. The AG shares this view when he argues: "Once that decision [first decision on the subject matter by an EU Member State] has been taken, and if an extradition request has been refused, a Union citizen will benefit from a certain 'protective umbrella' within the Union, with that EU citizen being allowed to move freely within the Union without the fear of being prosecuted for the same act(s)."

However, AG *Bobek's* opinion is somewhat contradictory to AG *Hogan's* opinion of 24 September 2020 in Case C-398/19 (→eucrim 3/2020, 190–191). AG *Hogan* recommends the CJEU giving up the concept established in Petruhhin. He, *inter alia*, raises the question how far Union law can go in order to influence international treaty obligations (in the case C-398/19: the 1957 European Convention on Extradition). (TW)

Freezing of Assets

Eurojust Note on New Freezing and Confiscation Regulation

On 8 December 2002, Eurojust published a Note on Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders. It applies since 19 December 2020 and replaces Framework Decisions 2003/577/JHA on freezing property and evidence and 2006/783/JHA on confiscation orders (→eucrim 4/2018, 201–202). The Note provides background information on the EU's new legal instrument for judicial cooperation in the field of asset recovery. It explains the key elements of the framework, such as its scope and content, time limits, grounds for refusal, and the introduction of new victims' rights. (CR)

Cooperation

Judicial Cooperation

Follow-up to *Petruhhin* Doctrine: Eurojust and EJN Map Problems

In December 2020, Eurojust and the European Judicial Network in criminal matters released a report on the extradition of EU citizens to third countries. It details practical and legal challenges that arose from the CJEU's landmark judgment in *Petruhhin* (→eucrim 3/2016, 131). In this case – subsequently confirmed by other judgments – the CJEU established that an EU Member State faced with an extradition request from a third country concerning a citizen of another EU Member State is obliged to initiate a consultation procedure with the Member State of nationality of the EU citizen, thus giving the latter the opportunity to prosecute its citizen by means of a European Arrest Warrant. The application of this case law has proven difficult in practice, and in June 2020, the Council invited Eurojust and the EJN to analyse the reasons behind this development. Eurojust and EJN have mapped a number of unclear issues and made recommendations to resolve them, e.g.:

- Uncertainties as to the scope of the CJEU's case law, e.g., lack of clarity as to the extent of the requested Member State's obligations in case of an extradition request for execution of a custodial sentence and possible application of the consultation mechanism in cases that do not fulfil all the conditions of CJEU case law;
- Difficulties concerning the consultation procedure, including:
  - Identification of the competent authorities in the Member State of nationality;
  - Responsibilities for translation of the information and the bearing of translation costs;
  - Different practices relating to the required information to be provided to the Member State of nationality concerning the extradition request;
  - Different practices as regards the time limits given for the prosecution decision of the Member State of nationality;
  - Which judicial cooperation instrument to use, in particular if the thresholds for issuing a national and/or European arrest warrant are not met.
- Tensions between obligations under EU law, on the one hand, and bilateral and multilateral extradition treaties, on the other;
- Questionable results of the consultation procedure, since most cases do not lead to prosecution of the EU citizen concerned in his home country;
- The existence of several parallel channels used to inform and transmit information between the Member States involved, often leading to duplication of effort, uncertainty, and confusion.

One of the main conclusions is that both Eurojust and the EJN play a key role in facilitating and supporting the consultation procedure and in solving the problems raised. The report also states that procedural differences across national legal systems and the specific circumstances of each case call for more clarity and flexibility.

The full, joint Eurojust/EJN report as well as an one-page overview are available in English. The executive summary of the report is available in all EU languages.

Whether the CJEU will stick to its case law remains to be seen. AG *Hogan* recently acknowledged the practical and legal problems of the Petruhhin judgment and recommended that it no longer be followed (→opinion in case C-398/19 (*BY – Generalstaatsanwaltschaft Ber-*

lin concerning extradition to Ukraine; →eucrim 3/2020, 190–191). (TW/CR)

CJEU Maintains *Petruhhin* Doctrine: Extradition of EU Citizens to Third States Only in Agreement with Member State of Nationality

On 17 December 2020, the CJEU rendered a decision in the extradition case of a Ukrainian-Romanian national (Case C-398/19 (*BY – Generalstaatsanwaltschaft Berlin*). The Ukraine sought the extradition from Germany, where the person concerned had moved to in 2012. The case gave the CJEU the opportunity to specify the case law established in the *Petruhhin* judgment (→eucrim 3/2016, 131), in particular as to the conditions under which a Union citizen may be extradited to a third country. In the *Petruhhin* case – subsequently confirmed by other judgments – the CJEU established that an EU Member State faced with an extradition request from a third country concerning a citizen of another EU Member State is obliged to initiate a consultation procedure with the Member State of nationality of the EU citizen, thus giving the latter the opportunity to prosecute its citizen by means of a European Arrest Warrant.

➤ *Background of the case*

The peculiarities of the case at issue were that the defendant (BY) had never resided in Romania and that the Romanian Ministry of Justice did not clearly answer the question by the Berlin General Prosecutor's Office as to whether Romania intend to take over criminal prosecution of the person concerned. The referring court was uncertain on the conclusions to be drawn from the *Petruhhin* judgment in this specific case. It submitted to the Court questions concerning the interpretation of Arts. 18 and 21 TFEU (relating to, respectively, the principle of non-discrimination on grounds of nationality and the right of Union citizens to move and reside freely within the territory of the Member States) and concerning the obligations of Germany, as requested State, in relation to the extradition of the Union citizen. For details on the facts of the case, the referred questions, and the AG's opinion →eucrim 3/2020, 190–191.

➤ *Findings of the CJEU*

The CJEU, sitting in Grand Chamber, first confirmed that Arts. 18 and 21 TFEU also apply in situations such as those in the present case. It is only of relevance whether a national of one EU Member State resides in the territory of another EU Member State and whether he/she is the subject of an extradition request sent to the latter Member State by a third State. The fact that BY moved the centre of his interests to that other Member State (here: Germany) at a time at which he did not have Union citizenship has no effect in this regard.

Second, the CJEU clarified the obligations incumbent to the requested EU Member State as regards the exchanging of information within the consultation procedure as set out in *Petruhhin*. The Member State of nationality (here: Romania) must be in a position to request the surrender of the person concerned by means of an EAW. This means:

- The Member State of nationality must be duly informed of all the elements of fact and law communicated by the third State in the context of the extradition request and of any changes in the situation of the requested person that might be relevant to the possibility of issuing an EAW;
- Under EU law, neither of the EU Member States involved (here: Germany and Romania) are obliged to ask the third State requesting extradition (here: Ukraine) to send to them a copy of the criminal investigation file;
- The requested Member State must impose a reasonable time limit (taking into account all circumstances of the case, in particular the extradition detention of the person and the complexity of the case) upon the Member State of nationality. If the Member State of nationality does not issue an EAW within the time limit, the requested EU Member State can continue the extradition procedure and, if appropriate, carry out the extradition.

Third, the CJEU holds that Arts. 18 and 21 TFEU must be interpreted as meaning that the Member State to which a third State submits an extradition request for the purpose of criminal prosecution of a Union citizen who is a national of another Member State is not obliged to refuse extradition and to conduct a criminal prosecution itself where its national law permits it to do so. Otherwise, the requested EU Member State could no longer exercise its discretion to decide itself on the appropriateness of conducting prosecution – such an obligation would be beyond EU law.

➤ *Put in focus:*

The judges in Luxembourg did not heed the criticism that followed their *Petruhhin* concept. In the case at issue, AG *Hogan* detailed the numerous legal and practical challenges involving the consultation procedure and the preference for criminal prosecution by the Member State of nationality, although the crimes at issue had been regularly committed on the territory of the third country requesting extradition of the perpetrator. This criticism was also voiced by practitioners in the recent joint report by Eurojust and the EJN on extradition of EU citizens to third countries. In this report, Eurojust and the EJN map a number of problems that emerged after the Petruhhin judgment, inter alia as regards difficulties in the application of the consulation procedure and different practices in the Member States handling the required information (→news item at p. 288).

The CJEU stresses, however, that EU law answers (and must answer) the question of "whether the requested (EU) Member State is able to adopt a course of action, with respect to that Union citizen, which would be less prejudicial to the exercise of that citizen's right to free movement and residence by considering that he or she should be surrendered to the Member State of which he or she is a national rather than extradited to the third State that is requesting extradition." (TW)

European Arrest Warrant

Council Conclusions on Current Challenges and Way Forward for European Arrest Warrant

On 1 December 2020, the Council agreed on conclusions how to meet the current challenges and move forward regarding the European Arrest Warrant and extradition procedures. They set out how the effectiveness of the main instrument of judicial cooperation within the EU on the basis of the principle of mutual recognition could be improved. The conclusions deal with five main topics and include, *inter alia*:

(1) *Improving national transposition and practical application of the European Arrest Warrant framework decision:*

- Member States should ensure correct transposition of the Framework Decision (FD) on the EAW, taking due account of CJEU case law and recommendations resulting from the Council's mutual evaluation rounds;
- Member States are encouraged to lay down non-binding guidelines for application of the EAW, in order to facilitate practical work with the instrument;
- The EU should establish a centralised portal that collects and continuously updates all relevant information on use of the EAW (possibly based on an improvement of the existing EJN website).

(2) *Supporting executing authorities when dealing with fundamental rights evaluations:*

- Member States are called on to take the necessary measures to ensure compliance with existing instruments that protect against inhuman and degrading treatment, in particular the European Prison Rules established by the CoE;
- It must be ensured that practitioners have the necessary information to carry out the two-step assessment as set out in the CJEU judgment in *Arranyosi* (→eucrim 1/2016, 16). The Commission may assist the evaluation by creating a template by which to request supplementary information;
- Similar to the approach against inhuman and degrading treatment, Member States are called on to address deficiencies in safeguarding fair trial procedures. They should additionally avoid the risk of politicisation of cooperation in criminal matters. The Commission, in consultation with the FRA, should explore ways to improve practitioners' access to information;
- The executing judicial authority must rely on assurances by the issuing authority that the person concerned will not suffer a violation of his/her fundamental rights if surrendered, barring any specific indications to the contrary.

(3) *Addressing certain aspects of the procedure in the issuing and in the executing Member States:*

- The FRA is invited to continue its studies on the practical effectiveness of procedural rights in EAW proceedings, taking increasing account of the experiences of lawyers acting in surrender proceedings;
- Member States should – to a greater extent – consider accepting translations in one other/more other official EU language/s in order to simplify and accelerate the surrender procedure;
- Plans for an EU legislative instrument on the transfer of proceedings and conflicts of jurisdiction should be followed through;
- Increased use of alternatives to detention or other judicial cooperation measures next to the EAW should be considered.

(4) Handling requests to extradite EU citizens to third countries:

- On the basis of the joint Europol and EJN report on the challenges of the *Petruhhin* judgment (→separate news item under "Judicial Cooperation", p. 288), the Council will further analyse whether any follow-up action should be taken and, if so, in what way;
- The Commission is encouraged to consider actions against unfounded, abusive, and politically motivated search and extradition requests from third countries.

(5) *Strengthening EAW surrender procedures in times of crisis, following experiences so far with the COVID-19 pandemic:*

- A coordinated approach to streamlining the collection and distribution of information is essential. In the future, an electronic platform (still to be created) should provide updated information on judicial cooperation in times of crisis;
- The digitalisation of judicial cooperation must be stepped up, whereby several aspects must be taken into account, e.g., secure electronic communication, the mutual recognition and use of electronic signatures, and the possibilities to transmit large data files.

The conclusions on the EAW had been preceded by several discussions on how judicial cooperation can be further improved within the EU. During the Austrian Presidency in 2018, the Council adopted, for instance, conclusions on mutual recognition in criminal matters (→eucrim 4/2018, 202–203). Impetus came from the Commission's latest implementation report on the FD EAW (→eucrim 2/2020, 110–111), the EP's implementation assessment of the EAW (→eucrim 2/2020, 111 plus the procedure file 2019/2207(INI)), and a virtual expert conference on 24 September 2020 organised by the German Council Presidency. (TW)

CJEU: General Deficiencies of Judicial Independence Do Not Justify EAW Refusal Alone

EU Member States may not impose a general ban on surrender, despite growing doubts about the independence of the Polish judiciary. The CJEU ruled on 17 December 2020 that the execution of a European Arrest Warrant (EAW) may still only be refused if the person concerned runs a real risk of being subjected to an unfair trial (Joined Cases C-354/20 PPU and C-412/20 PPU, *"L and P" / Openbaar Ministerie*). This risk must be examined on a case-by-case basis. In this, the CJEU follows the opinion of Advocate General *Campos Sánchez-*

Bordona. For more background information on the case and the AG's opinion, →eucrim 3/2020, 192–193.

➤ *Background of the case:*

The Luxembourg judges uphold their case law established in "*LM*" (→eucrim 2/2018, 104–105). In this case, they established a two-step test, according to which courts in the executing state may reject EAWs on the grounds of violations of the right to a fair trial in the issuing state. In view of the reforms of the Polish judicial system, the Luxembourg judges made it clear at the time that there was a risk that a requested person would not receive a fair trial in Poland. However, an abstract-general examination was not sufficient: next to the assessment of whether systemic and generalised deficiencies exist concerning the independence of the issuing Member State's judiciary, the respective judicial authority of the executing Member State must determine to what extent such deficiencies are liable to have an actual impact on the situation of the person concerned if he/she is surrendered to the judicial authorities of that issuing state.

On account of recent developments that have raised doubts about the independence of the Polish judiciary, the referring court, the *Rechtbank Amsterdam*, essentially wanted to know from the CJEU whether a case-by-case examination was still required at all – or whether the finding that Poland no longer guarantees the independence of its judiciary is sufficient in itself to justify a refusal to execute an EAW issued by a Polish court.

➤ *Findings of the CJEU:*

The CJEU rejects this approach: the executing court must still be satisfied that there are substantial grounds for believing that, on account of these deficiencies, the person concerned will run a real risk of breach of his/her right to a fair trial once he/she is surrendered to the authorities of the issuing state. The executing court must consider the individual situation of the person concerned, the nature of the offence in question, and the factual context in which the European Arrest Warrant has been issued. With regard to the specific context of the two cases at issue, the CJEU does specify the impact of systemic and generalised deficiencies on the assessment in the second step of the two-step test for both EAWs issued (for the purpose of prosecution and for the purpose of execution of a custodial sentence).

➤ *Arguments of the CJEU:*

The main lines of argument of the judges in Luxembourg, upholding its case law as established in *LM*, can be summarised as follows:

- The concept of systemic or generalised deficiencies affecting the judiciary's independence cannot lead to the automatic conclusion that all courts of the affected Member State or every decision of these courts fail to be independent;
- Denial of the "issuing judicial authority" status to all courts of the Member State in question would lead to a general exclusion of the Member State from the mutual recognition instrument;
- The above would also imply that the courts of the Member State at issue would no longer be able to submit references for preliminary rulings to the CJEU, since the independence of courts and tribunals is inherent in the concept of Art. 267 TFEU;
- Recent CJEU case law on the concept of "issuing judicial authority" in relation to public prosecutor's offices subordinate to the executive in certain Member States cannot be transferred to Member States' courts (→eucrim 1/2019, 31–33 and eucrim 4/2019, 242–245 and the news item on the judgment in Case C-510/19);
- The existence of or increase in systemic and generalised deficiencies concerning the independence of the judiciary in the issuing state is indicative of a real risk of breach of the right to a fair trial and the executing judicial authority can exercise vigilance; however, it cannot dispense a specific and precise assessment of this risk;
- Dispensing such an assessment would amount to a general suspension of the EAW mechanism, which would interfere with the procedure provided for in Art. 7(2) TEU.

➤ *Put in focus:*

It is of note that, in the refusal of EAWs, nearly no argument has been successful to date before a Member State court against the independence of the judiciary in Poland following its justice reforms. An exception is the decision of the Higher Regional Court of Karlsruhe in Germany of 17 February 2020 (→eucrim 1/2020, 27–28). The court applied the two-step procedure as defined in *LM* and concluded a real risk of fair trial infringements in Poland in the specific case. (TW)

CJEU: Execution of an EAW in the Case of Judgments *in Absentia*

On 17 December 2020, the CJEU ruled on the execution of a European Arrest Warrant (EAW) based on a judgment rendered *in absentia* (Case C-416/20 PPU (*TR v Generalstaatsanwaltschaft Hamburg*)). The request for a preliminary ruling was submitted by the Hamburg Higher Regional Court.

➤ *Facts of the case and question referred:*

In the underlying case, *TR*, a Romanian national, was prosecuted in Romania. As he had fled to Germany, the proceedings concerning him, both at first instance and on appeal, took place in his absence. However, he had knowledge of at least one of these proceedings and was represented there by lawyers of his choice in the first instance and by court-appointed lawyers in the appeal. The hearings resulted in sentences of two terms of imprisonment. The Romanian authorities issued EAWs for their execution. *TR* defended himself against surrender by Germany, arguing that he had the right to a new trial (as guaranteed, *inter alia*, by Art. 9 of Directive 343/2016), but Romania did not guarantee this.

The referring court asks, in essence, whether it is entitled to refuse surrender

if the issuing state does not fulfil the requirements of Directive 343/2016 on the defendant's right to be present at trial (in particular, Arts. 8 and 9 of the Directive).

➤ *Findings of the CJEU*

The CJEU clarified that the Hamburg court must decide whether surrender is inadmissible on the basis of the national provisions implementing Art. 4a FD EAW. According to Art. 4a, the executing judicial authority may refuse to execute an EAW issued for the purpose of enforcing a custodial sentence imposed in the absence of the person concerned, unless one of the groups of cases exhaustively listed therein applies.

Art. 4a does not allow the execution of an EAW to be refused solely because the executing authority has not received assurance that the person's right to a new trial will be respected if he/she is surrendered to the issuing State, even though he/she fled to the executing Member State (thus preventing his personal summons and appearance in person at the trial). By contrast, the fact that the person requested has given a mandate to a legal counsel appointed either by himself/herself or by the state, in knowledge of the scheduled hearing and was actually defended by this defence counsel, allows the surrender to be declared admissible in accordance with Art. 4a(1b) FD EAW.

The judges in Luxembourg state that the failure of the issuing Member State to comply with the provisions of Directive 343/2016 guaranteeing the right to a new trial cannot prevent the execution of an EAW; otherwise, the system established by the FD EAW would be circumvented. This is without prejudice, however, to the issuing Member State's obligation to comply with these provisions. Therefore, to the extent that the Member State has not transposed the Directive's provisions within the time limit or has not transposed them properly, the person concerned may rely on the provisions having direct effect in the courts of that Member State in the event of surrender.

Ultimately, the CJEU draws on its case law in *Tupikas* (C-270/17 PPU →eucrim 3/2017/117–118): If the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, the concept of "trial resulting in the decision", within the meaning of Art. 4a(1) FD EAW, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him. Therefore, it is up to the referring court to establish to its satisfaction whether the characteristics set out in Art. 4a FD EAW apply to a trial like the appeal proceedings in the present case.

At the same time, the CJEU stresses that Art. 4a FD EAW is a facultative refusal ground. This means that the executing judicial authority must also take into account the behaviour of the person requested. It is not prevented from giving green light to surrender, although it may conclude that surrender would be inadmissible if appeal proceedings were to be held *in absentia*.

➤ *Put in focus:*

With its judgment in *TR v Generalstaatsanwaltschaft Hamburg*, the judges in Luxembourg reiterate that the grounds on which Member States may refuse to execute an EAW have been exhaustively enumerated and that the executing judicial authority may not make the execution of an EAW subject to other conditions. Art. 4a FD EAW must be considered *lex specialis* in relation to the provisions in Directive 343/2016 on the right to be present. The national court that decided on the execution of a European Arrest Warrant only has a limited right of review of the procedure in another EU Member State concerning questions of a fair trial. If violations of the rights stipulated in the EU's procedural rights directives occur, the defendant must raise his/her hand in the trial state; his/her surrender cannot be prevented. (TW)

CJEU: "Executing Judicial Authority" Follows Same Criteria as "Issuing Judicial Authority"

On 24 November 2020, in its judgment in Case C-510/19, the CJEU further defined the notion "executing judicial authority" pursuant to Art. 6(2) of Framework Decision (FD) 2002/584/JHA on the European Arrest Warrant (EAW). Accordingly, Dutch public prosecutors are not an "executing judicial authority," as they may be subject to individual instructions from the Minister of Justice. The case at issue dealt with the question of whether the Dutch public prosecutor was empowered to consent to an exception to the speciality rule (Art. 27 FD EAW), as a consequence of which a defendant could be prosecuted and convicted for offences other than those for which he had previously been surrendered to Belgium (for the facts of the case C-510/19 (*AZ v Openbaar Ministerie and YU And ZV*) and the opinion of AG *Campos Sánchez-Bordona* →eucrim 2/2020, 112).

The CJEU followed the AG's conclusions. It first states that, like the concept of "issuing judicial authority," the concept of executing judicial authority as defined in Art. 6(2) FD EAW requires an autonomous interpretation of EU law. It is not restricted to designated judges or courts but also covers judicial authorities which participate in the administration of criminal justice in the Member State concerned. This, however, requires that they act independently in the exercise of their responsibilities and carry out their tasks under a procedure that complies withthe requirements of effective judicial protection.

Therefore, the CJEU considers its case law on the concept of "issuing judicial authority" to be transferable. Consequently, the same criteria apply in order to determine the content of the concept of "executing judicial authority." The CJEU justifies its conclusion by stating, *inter alia*, that, just as the issue of an EAW, also the execution is capable of prejudicing the liberty of the requested

person. In addition, there is no dual level of protection of fundamental rights if the executing judicial authority intervenes, unlike the procedure for the issuing of an EAW.

Secondly, the Court holds that, irrespective of whether the judicial authority consenting to disapplying the rule of speciality must be the same as the authority which executed the EAW, this consent cannot be given by the public prosecutor of a Member State. Even though the public prosecutor participates in the administration of justice – in exercising his or her decision-making power – he/she may receive an instruction from the executive in a specific case. In order to give the consent concerned, the intervention of an authority must satisfy the above-mentioned conditions of independence and judicial protection. The CJEU reiterates that the decision is liable to prejudice the liability of the person concerned since he/she may receive a heavier sentence.

Since the Dutch public prosecutor may receive instructions from the Dutch Minister of Justice in specific cases, he/she does not constitute an "executing judicial authority." Therefore, the consent given by the Netherlands to disapply the speciality rule is void.

This leads to the conclusion that the German Public Prosecutor's Office, which is also bound by instructions, is not an executing judicial authority within the meaning of the FD EAW (→Joined Cases C-508/18 (OG) and C-82/19 PPU (PI) = eucrim 1/2019, 31–32). The public prosecutor's offices in Lithuania (→eucrim 1/2019, 33–34), France, Sweden, and Belgium (→judgments delivered on 12 December 2019 in Joined Cases C-556/19 PPU and C-626/19 PPU, Case C-625/19 PPU, and Case C-627/19 PPU = eucrim 4/2019, 242–245), however, are to be understood as bodies independent of the executive and as executing judicial authorities according to the case law of the CJEU. For the status of public prosecutors in EIO cases, see below p. 294. (TW)

FCC: EU Charter is Review Standard for Poor Prison Conditions

spot light

On 1 December 2020, the German Federal Constitutional Court (FCC) backed two constitutional complaints against surrender from Germany to Romania. The FCC found that the ordinary courts failed to sufficiently assess and clarify whether there is a specific risk of inhuman and degrading treatment due to the detention conditions in Romania once the complainants have been surrendered. Therefore, the courts deciding on the surrender upon receipt of EAWs from Romania failed to recognise the significance and scope of the fundamental right not to receive inhuman treatment under Art. 4 of the EU Charter of Fundamental Rights (CFR) and disregarded their duty to investigate (Bundesverfassungsgericht, decision of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18; a press release in English is also provided).

➤ *Facts of the case(s):*

In the first case, the Higher Regional Court of Berlin was satisfied with the information given by the Romanian authorities that the defendant – a Romanian national sentenced to five years of imprisonment for attempted murder – would have a minimum of 3m² of cell space; whether he would subsequently be transferred to semi-open detention with 2m² of non-shared personal space was deemed irrelevant.

In the second case, the Higher Regional Court of Celle/Lower Saxony ordered the surrender of an Iraqi national who was prosecuted for aiding and abetting illegal immigration in Romania. The Romanian judicial authorities informed only the German counterpart about the prison conditions in remand detention. The court in Celle ignored a pending request from the Public Prosecutor General's Office to provide guarantees in respect of the defendant's detention following conviction and decided that surrender was admissible. It argued that a real risk of detention conditions violating human rights could be ruled out in the specific case. It further held that a review of the conditions in prisons in which the individual might be detained at a later point in time is not necessary due to the principle of mutual trust between the EU Member States.

➤ *Findings of the FCC:*

The FCC reminded both Higher Regional Courts that they have to apply the two-step procedure established by the CJEU in *Arranyosi and Căldăraru ex officio* (→eucrim 1/2016, 16) if they assess possible infringements of Art. 4 CFR in cases of alleged, insufficient detention conditions: (1) identification of whether there are systemic or general deficiencies with regard to detention conditions in the issuing Member State; (2) diligent assessment of whether the requested person would be at a real risk of inhuman or degrading treatment within the meaning of Art. 4 CFR after his surrender to the issuing State.

The FCC calls to mind the differentiated case law of the CJEU and ECtHR regarding the space available for prisoners and the required overall evaluation of detention conditions by the executing judicial authority.

Addressing the Higher Regional Court of Berlin, the FCC clarified that it must not only take into account the personal space in prison cells (3m²) in the case at hand but also other factors that may be deficient and may fail to comply with Art. 4 CFR. In addition, the fact that the Berlin court could not negate probable later detention in a shared cell (with only 2m²) may also be incompatible with Art. 4 CFR.

The FCC reproached the Higher Regional Court of Celle, because the court had to set a specific time limit for the Romanian authorities to provide the requested supplementary information on the detention conditions after conviction and defer any decision on the admissibility of the surrender until receipt of that reply. If it had not received a reply within a reasonable time, the Celle court would have had to decide on the termination of the surrender proceedings.

➤ *Put in focus:*

Two aspects make the FCC's decision of 1 December 2020 remarkable:

Firstly, the FCC accepts for the first time in relation to European criminal law that the fundamental rights of the German constitution (the Basic Law – *Grundgesetz*) are not the yardstick for examination but instead the fundamental rights of the European Union (here: Art. 4 CFR). It argues that the matter at issue in the initial proceedings concerns an area fully determined under EU law. Therefore, the fundamental rights of the Basic Law are not applicable as the direct standard of review. In this, the deciding Second Senate of the FCC aligns itself with a judgment of the First Senate ruling in 2019 in relation to the right to be forgotten in the area of data protection law, namely that the domestic application of legislation that has been fully harmonised by EU law must be reviewed in the light of EU fundamental rights.

The Second Senate, however, clarified, as follows: "When interpreting the EU fundamental rights, it is necessary to draw on both the human rights guaranteed by the European Convention on Human Rights and specified by the European Court of Human Rights, and the fundamental rights as reflected in common constitutional traditions and shaped by the constitutional and supreme courts of the Member States."

Secondly, the FCC stated that, in the present context, it is not necessary to limit the precedence of application of EU law through a review on the basis of constitutional identity, because the standards applied by the CJEU when interpreting Art. 4 CFR are in line with Art. 1 of the Basic Law (the right to human dignity) when minimum requirements of detention conditions are assessed. Initial comments classify this statement as a turning point when juxtaposed with the strong "identity review" judgment handed down in December 2015 (→eucrim 1/2016, 17). The FCC now seems to accept the concept of fundamental rights protection as established by the CJEU in *Arranyosi and Căldăraru* and calls on the German ordinary courts to take this approach to heart.

In sum, one could conclude that the present FCC ruling now strikes a more conciliatory tone in the longstanding battle for sovereignty when interpreting fundamental rights in Europe. It is much more "integration-friendly" than previous FCC rulings. The relationship between the judges in Karlsruhe and their colleagues in Luxembourg had cooled noticeably after the FCC's decision in May 2020, which declared a CJEU ruling on the Public Sector Purchase Programme (PSPP) of the European Central Bank "*ultra vires*" and thus not applicable in Germany. Advocate General *Tanchev* bashed this *ultra vires* approach in a recent opinion that actually deals with the independence of the appointment procedure of judges to the Polish Supreme Court (Case C-824/18). According to the AG, the FCC's *ultra vires* approach undermined the rule of law in the EU, which is a *conditio sine qua non* to integration. Whether the relationship between the FCC and the CJEU will now be redefined remains to be seen. (TW)

European Investigation Order

CJEU: German Public Prosecutor's Office Considered "Issuing Judicial Authority" in the EIO Context

The German public prosecutor's offices may issue European Investigation Orders (EIOs) despite being contingent upon individual instructions from the executive. The Grand Chamber of the CJEU came to this conclusion on 8 December 2020 in Case C-584/19 (*Staatsanwaltschaft Wien v A. and Others*), following the opinion of Advocate General *Campos Sánchez-Bordona* (→eucrim 2/2020, 113).

The underlying case concerned an EIO from the Hamburg Public Prosecutor's Office to the Vienna Public Prosecutor's Office, with the aim of obtaining account records of an Austrian bank. In particular, the CJEU had to deal with the question (referred to it by the Vienna Regional Court for criminal matters) of whether its case law on the European Arrest Warrant (EAW) (cf. Joined Cases C-508/18 (*OG*) and C-82/19 PPU (*PI*) = eucrim 1/2019, 31–32), according to which the German Public Prosecutor's Office was not considered sufficiently independent to issue an EAW, should be applied to the interpretation of Directive 2014/41/EU on the EIO. The CJEU denied this and justified its conclusion by clarifying essential differences between the FD EAW and the EIO Directive:

- The EIO Directive expressly specifies the concept of "issuing judicial authority" where the public prosecutor is named next to the judge, court, or investigative judge entitled to issue EIOs. The public prosecutor is also one of the authorities empowered to validate an EIO stemming from other authorities that are not a judge, court, investigative judge, or prosecutor;
- The issuance and validation of an EIO and its execution are subject to distinct procedures and guarantees that ensure the fundamental rights protection of the person concerned;
- The EIO and the EAW pursue different objectives. While an EAW strongly interferes with the right to liberty of the person concerned, an EIO's investigative measures are less intrusive.

In the light of these differences, the CJEU concluded that the criteria for the independence of the issuing judicial authority in the context of an EAW cannot be transferred to the EIO. By contrast, the EIO also covers the public prosecutor's offices of a Member State, even though they are in a relationship of legal subordination to the executive of that Member State, which exposes them to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting an EIO. (TW)

Law Enforcement Cooperation

Council Conclusions on Enhancing Law Enforcement Cooperation

Alongside conclusions on internal security (→separate news item under "Security Union", p. 261), the Council adopted conclusions pointing the ways towards enhancing cross-border law enforcement/police cooperation. The conclusions were adopted on 14 December 2020 and included as Annex I after the conclusions on internal security in Council Document 13083/1/20. They underline that new criminal phenomena and new technologies entail the need to adapt the mechanisms of law enforcement cooperation. Cross-border cooperation should also be better aligned with the objectives of the EU policy cycle for organised and serious international crime. At the same time, the Council prefers the improvement of already available instruments, rather than creating new forms of cooperation and places demands on several entities.

The *Member States* are called on:

- To strengthen operational cross-border law enforcement cooperation by effectively implementing existing instruments. Legislation should be consolidated, simplified, and extended in the following fields:
  - Joint patrols, units, offices, and operations;
  - Cross-border surveillance;
  - Hot pursuit;
  - Police-customs cooperation.
- To further enhance Single Points of Contact (SPOCs) and/or Police and Customs Cooperation Centres (PCCCs);
- To improve the means of regular or *ad hoc* information exchange and direct communication;
- To raise awareness among law enforcement authorities about existing tools and to facilitate the availability of information, e.g., by using web apps or introducing standardised forms;
- To continue developing a common European culture for law enforcement authorities.

The *Commission* is called on:

- To duly take into account the value and success of local, regional, bi- and multilateral cooperations between Member States when assessing the options for a European Police Cooperation Code, which must also be in line with the EU principles of subsidiarity and proportionality;
- To consider consolidating the existing legal cooperation framework, in particular the CISA and the Prüm Decisions;
- To step up support for regional structures/forms of cooperation;
- To contribute to enhancing law enforcement cooperation:
  - By supporting the development of swift and smooth information exchange;
  - By promoting joint trainings, exercises, and workshops;
  - By reducing technical and language barriers;
  - By producing updated manuals;
  - By intensifying legal training.

Europol is, *inter alia*, called on:

- To further support Member States in order to provide the agency with high-quality data;
- To explore technical solutions in order to allow for swift and secure communication between field officers and investigators.

CEPOL should continue its assistance in training Member States' law enforcement officers, in particular by enhancing legal knowledge of cross-border cooperation.

Within its mandate, *FRONTEX* is called on to help the law enforcement authorities of EU Member States and Schengen associated countries manage the external borders in order to provide a high level of security for all EU citizens. (TW)

E-Evidence Package: EP Paves Way for Trilogue Negotiations

On 7 December 2020, the European Parliament's Committee on Civil Liberties (LIBE) voted in favour of the compromise proposal by rapporteur *Birgit Sippel* (S&D/DE) on rules for cross-border access by law enforcement to electronic evidence (the so-called e-Evidence Package). A simultaneous decision was taken to start inter-institutional negotiations. This mandate is considered adopted by the EP as of 16 December 2020. Trilogue negotiations were expected to start in January 2021 under the Portuguese Presidency.

The legislative proposals on e-evidence – one for a Regulation on the European Production and Preservation Order and one for a Directive on the appointment of legal representatives of the IT companies –were tabled by the Commission in April 2018 (→eucrim 1/2018, 35–36) and were critically examined in the LIBE Committee (→eucrim 1/2019, 38–40).

The EP's negotiating draft includes a series of amendments to the Commission's position that are designed to better reflect the differences in criminal law between Member States and to increase fundamental rights protection. The report merges the two Commission proposals (regulation and directive) into one regulation. Another clear difference to the Commission's proposals and the Council's position is that the EP provides for a notification procedure by the executing state for all production and preservation orders, in some cases with suspensive effect. The issuing or validation of an order for the production of traffic or content data must be carried out by a judge. If an order comes from a Member State against which proceedings have been initiated under Article 7 of the EU Treaty, data may only be released after explicit confirmation by the executing state. The Commission is further called on to establish a common European exchange system, with secure channels for the handling of authorised cross-border communication, authentication and transmission of the orders and of the requested data between the competent authorities and service providers.

After the vote in the LIBE Commit-

tee, rapporteur *Birgit Sippel* remarked: "In future negotiations both the Council and the Commission will have to substantially move towards the Parliament's direction and accept that it is not only about speeding up the access to electronic information, but also to make sure that fundamental rights and the rule of law are fully protected."

The Council already adopted its position in December 2018 (as regards the Regulation →eucrim 4/2018, 206) and in March 2019 (as regards the Directive →eucrim 1/2019, 40). The e-Evidence package has been met with fierce criticism from legal professional organisations, academics, and NGOs (→previous eucrim issues)

Recently, the first results of the trilogue negotiations became known. A first agreement was reached on the definition of service providers and data categories. However, questions about notification obligations remain unresolved. Another sensitive issue are safeguard clauses for the rights of journalists and lawyers. Here, the rapporteur for the European Parliament, MEP Birgit Sippel, had outlined red lines in her preliminary reports on the Commission proposal. Several non-governmental organisations have also lobbied for strong safeguards for groups that merit special protection. (TW).

SIRIUS EU Digital Evidence Situation Report

On 1 December 2020, Eurojust, Europol, and the European Judicial Network (EJN) published the SIRIUS EU Digital Evidence Situation Report 2020. It provides an analysis of the access EU Member States currently have to electronic evidence held by online service providers (OSPs) as well as the use of electronic evidence in criminal cases in 2019.

The report presents the perspectives of EU judicial authorities, EU law enforcement, and OSPs on how data is collected for the investigation and prosecution of crime in the EU and addresses the main issues at stake. Furthermore, the report explains the role of Single Points of Contacts (SPoCs), i.e., units or groups of officials specialized in cross-border access to electronic evidence in EU Member States.

According to the report, the main issues identified by EU judicial authorities in the field of electronic evidence mainly concern the retrieval of data in time-sensitive situations. This, for instance, can be due to lengthy procedures involving non-EU OSPs.

EU law enforcement authorities continue to find fault with the length of mutual legal assistance procedures. They are also critical of the lack of standardisation in company policies.

OSPs reported an increase of 14.3% in requests for disclosure of data in 2019 compared to 2018. The volume of Emergency Disclosure Requests submitted by EU authorities even increased by 49.7% from 2018 to 2019. The overall success rate of requests increased from 65.9% to 68.4%.

The report recommends that the following measures be taken by the respective stakeholders:

- EU judicial authorities are called on to promote national initiatives aimed at developing a clearer overview of the different procedures available to request and obtain data;
- Stakeholders should strengthen the interconnection and knowledge exchange among EU judicial practitioners in the field of electronic evidence;
- EU law enforcement authorities are invited to make use of the SIRIUS platform in order to provide periodic training to officers dealing with cross-border requests to OSPs;
- Member States that have not yet established SPoCs for electronic evidence are called on to create them;
- OSPs are called on to provide updates about policies, to report changes in procedures to EU authorities (also by means of the SIRIUS platform), and to publish periodic transparency reports on requests from EU authorities. (CR)

SIRIUS: Contribution Agreement between Eurojust and Europol

On 23 December 2020, Eurojust and Europol signed a contribution agreement to expand their cooperation under the SIRIUS project. The SIRIUS project, which Europol launched in 2017, aims to support Internet-based investigations by co-developing tools and solutions for EU law enforcement and judicial authorities (→eucrim 3/2020, 194–195). Under the new contribution agreement, Eurojust becomes a full partner of the project.

The new agreement also paves the way for the second phase of the SIRIUS project, which focuses on cross-border access to electronic evidence. To achieve this aim, the agreement foresees various practical measures, e.g.:

- Strengthening and speeding up direct cooperation between law enforcement authorities and online service providers in order to improve access to e-evidence by exchanging experiences;
- Exchanging best practices and providing training for EU practitioners on applicable rules in the US related to the mutual legal assistance procedure;
- Expanding the geographical focus of SIRIUS to develop collaboration on existing initiatives and projects with selected non-EU countries, based on the interest of EU Member States. (CR)

New Decryption Platform Launched

At the end of December 2020, Europol launched a new decryption platform. The initiative is available to the national law enforcement authorities of all EU Member States to send lawfully obtained evidence to Europol for decryption. The platform, which was developed in cooperation with the European Commission's Joint Research Centre, is operated by Europol's European Cybercrime Centre (EC3). The launch of the new decryption platform marks a milestone in the fight against organised crime and terrorism in Europe. *Ylva Johansson*, EU Commissioner for Home Affairs also highlighted the importance for the fight against online child sexual abuse. (CR)

Council of Europe

Reported by Dr. András Csúri

Specific Areas of Crime

Corruption

GRECO: Fourth Round Evaluation Report on Liechtenstein

On 16 December 2020, GRECO published its fourth round evaluation report on Liechtenstein. This evaluation round was launched in 2012 in order to assess how states address the prevention of corruption with respect to Members of Parliament (MPs), judges, and prosecutors (for other reports →eucrim 1/2018, 39–40; 3/2019, 184; 3/2020, 196–197 with further references). The assessment includes ethical principles, rules of conduct and conflicts of interest, declarations of assets, prohibition or restriction of certain activities, enforcement of the applicable rules, and public awareness.

Liechtenstein is one of the smaller member states of GRECO. There are no civil society organisations working specifically on corruption, and the country is not covered by corruption perception indexes. Liechtenstein has made significant efforts to adapt its legislation to international requirements concerning various aspects of corruption and fully implemented GRECO's recommendations from the third evaluation round. Due to its size, however, the country faces specific challenges. For many years, only two parties had a political impact, both in parliament and in the government. This has changed in recent years. Currently, there are five parties in parliament, which has also influenced the balance between parliament and government. Another important aspect is the role of the prince, who is the head of state. His powers were greatly strengthened after a constitutional reform in 2003, which the Venice Commission found objectionable, particularly with regard to his veto power over laws passed by parliament.

A peculiarity in the judiciary is that a large number of judges work part-time, additionally serving as barristers in local law firms. Some even come from neighbouring countries, e.g., Austria and Switzerland. These issues might lead to real or perceived conflicts of interest. In contrast, prosecutors occupy full-time positions.

The perception in the country appears to be that corruption levels are low. There were virtually no corruption-related practices in the country, hence no cases reported in the judiciary and prosecution service so far. Against this background, GRECO recommends the following for MPs:

- Increasing the transparency of the legislative process as far as the parliamentary commission's preliminary examination of draft legislation is concerned;
- Adopting a code of conduct for MPs on various relevant integrity matters, accompanied by practical guidance and accessible to the public;
- Introducing *ad hoc* disclosure if conflicts emerge between specific private interests of MPs and a matter under consideration in parliamentary proceedings;
- Establishing rules on contacts between MPs and third parties seeking to influence parliamentary proceedings;
- Introducing a system of public declarations on the financial and economic interests of MPs, including spouses and dependent family members;
- Promoting trainings and awareness-raising measures regarding the conduct expected from MPs as regards integrity and the declaration of interests, including the possibility of confidential counselling for MPs on these matters.

As far as judges are concerned, the GRECO report recommends the following:

- Significantly increasing the role of the judiciary in the selection process of judges, with all respective vacancies to be made public and more transparent;
- Adopting, supervising, and making publicly accessible a judicial code of conduct, including explanatory comments and practical examples;
- Carefully considering the issue of full professionalisation of all judges and limiting the number of part-time judges;
- Introducing rules on conflicts of interest regarding judges who also practise as lawyers.

With regard to prosecutors, GRECO recommends developing a code of conduct, accompanied by explanatory comments and practical examples. Moreover, Liechtenstein is called on to provide training on various topics related to ethics and integrity, with the possibility of confidential counselling.

GRECO: Fifth Round Evaluation Report on Germany

On 15 December 2020, GRECO published its fifth round evaluation report on Germany. The focus of this evaluation round is on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies. The evaluation focuses particularly on issues of conflicts of interest, the declaration of assets, and accountability mechanisms (for other reports on this evaluation round →eucrim 4/2018, 208; 1/2019, 43–44;

3/2019, 182–184 and 1/2020, 30–32 and the following report on Albania).

Germany was among the founding members of GRECO. The country implemented GRECO's recommendations to varying degrees in the first three evaluation rounds and is currently in non-compliance proceedings in relation to the fourth evaluation round. It encountered particular difficulties in the implementation of the recommendations on corruption prevention with regard to Members of Parliament (MPs).

In international surveys, Germany is generally perceived to have low levels of corruption, and the police enjoys a high level of trust among citizens. Nevertheless, a parliamentary committee of inquiry was set up to look into the extensive hiring of consultants by the Minister of Defence in 2018. In recent years, increased attention has also been paid to the close relationships between those in top executive positions and businesses. The lack of transparency of external influences, including the influence of lobbyists who formerly held top executive positions has also become a matter of increasing concern. New rules were therefore introduced in 2015 that restrict the type of employment former federal officials can take up after leaving office. There is also broad public support for more transparency with regard to lobbying.

In this context, GRECO recommends that the following be considered regarding central governments (top executive functions):

- Adopting specific codes of conduct for persons with top executive functions, complemented by appropriate guidance regarding conflicts of interest and other integrity-related matters;
- Subjecting ministers and parliamentary state secretaries to systematic briefings on integrity issues at regular intervals;
- Analysing the Freedom of Information Act in an independent and thorough manner, with a particular focus on the scope of exceptions and their application in practice;
- Identifying, documenting, and disclosing substantial external input to legislative proposals;
- Introducing detailed rules on the way in which persons with top executive functions interact with lobbyists and other parties seeking influence on the government's legislative and other activities;
- Disclosing sufficient information about the purpose of these contacts;
- Ensuring the consistency and transparency of any employment decisions involving state secretaries and directors-general after their public service;
- Considering the extension of the "cooling-off period" and introducing sanctions for failure to comply with any respective decisions;
- Obliging persons with top executive functions to declare their financial interests publicly on a regular basis and taking into consideration that these declarations should also include financial information on spouses and dependent family members.

With regard to law enforcement agencies, GRECO recommends:

- Expanding the Anti-Corruption Code of Conduct to include standards of behaviour for the Federal Criminal Police Office and the Federal Police, complemented by concrete examples and explanations;
- Improving the tailoring of initial and in-service trainings on integrity to the different staff categories within the Federal Police;
- Strengthening the screening processes for new recruits in the Federal Police and repeating them at regular intervals;
- Publishing information on complaints received, actions taken, and sanctions imposed by the Federal Criminal Police Office.

The GRECO report acknowledged the internal and external channels available to staff of the Federal Criminal Police Office and the Federal Police to report misconduct confidentially. However, Germany should strengthen the protection of whistleblowers beyond the mere protection of their identity.

GRECO: Fifth Round Evaluation Report on Albania

On 3 December 2020, GRECO published its fifth round evaluation report on Albania. Albania has been a member of GRECO since 2001 and fully implemented most of the recommendations of the first four evaluation rounds. That said, the level of corruption remains high in the country and is prevalent in many areas of public and business life. Importantly, the Council of the European Union decided to open accession negotiations with Albania on 25 March 2020. Among the requirements to be fulfilled before the first intergovernmental conference on this issue, Albania should *inter alia* ensure the transparency of political funding, continue the implementation of judicial reform, and further strengthen the fight against corruption and organised crime. Strong awareness of these deficits and pressure at the political level is evident regarding the importance of effectively addressing corruption in the country. GRECO observed that the tense political situation in Albania is not conducive to this, with protest marches in 2019 to demand the resignation of the government as well as ongoing tensions between the government and the president of the republic. The latter cancelled and postponed the June 2019 elections, exceeding his powers according to the Venice Commission. Moreover, the Constitutional Court still has not been established to date.

GRECO acknowledges a number of measures that have been taken in recent years to curb corruption in the country under these circumstances. These include an entire series of laws adopted since 2011 to strengthen the integrity of the public sector as well as a 2018–2020 action plan to implement the Inter-Sectorial Strategy against corruption. Some high-ranking state officials have been convicted of corruption offences, and procedures to establish specialised anti-corruption bodies have been completed.

However, GRECO considers the judicial reform to be complex and in need

of acceleration so as not to weaken judicial control over law enforcement. As regards central governments (top executive functions) the Inter-Sectorial Strategy against corruption and the Action Plan for its implementation foresaw the adoption and implementation of an integrity plan by each ministry, which have not been drafted yet. GRECO calls for a swift adoption of these plans, also taking into account the specific integrity risks of ministers and their political advisers. The existing Ministerial Code of Ethics should be complemented with concrete guidance for its implementation regarding conflicts of interest and other integrity-related matters (gifts, lobbying, etc.). Members of the Council of Ministers and political advisors must undergo systematic awareness raising on integrity-related matters via regular training. In addition, the report recommends publishing the names of political advisers online for the sake of transparency. Explicit rules on post-employment restrictions should apply both to ministers and to political advisors. Lastly, as a matter of priority, GRECO recommends the recruitment of prosecutorial and technical staff for the office of the Special Anti-Corruption Prosecutor provided with adequate human and technical resources and with prosecutors who benefit from highly specialised training.

As regards law enforcement agencies (police and border guard), one specific concern is over current transitional vetting in the State Police, which is likely to result in a significant number of qualified staff leaving the force. The vetting process also does not adequately capture all possible integrity risks and should therefore be replaced with regular integrity checks over the course of the careers of police staff members.

Other critical concerns relate to the possibility of the State Police receiving private donations/sponsorship and it providing additional services in return for payment. Private donations and sponsorship need to be eliminated or at least strictly regulated in order to limit any risk of corruption. Any donations and sponsorships received should be published on a regular basis, indicating the nature and value of the donation and the identity of the donor. An integrity plan for the State Police should be implemented as a matter of priority, and the ethical principles and rules of conduct in the State Police Regulation must include a manual providing practical guidance.

GRECO further lists the politicisation of the Albanian Police among its concerns. This development needs to be counterbalanced by measures increasing the stability of top senior officials in their positions, irrespective of political changes. Ultimately, explicit rules on post-employment restrictions should also apply to police employees, and the effective implementation of the law on whistleblowers must be ensured, including by means of regular police staff training.

Procedural Criminal Law

CEPEJ: 8th Evaluation Report on European Judicial Systems

On 22 October 2020, CEPEJ published its eighth biennial evaluation report on the efficiency and quality of justice in Europe. The 2020 report contains data on the functioning of the judicial systems of 45 CoE Member States (Liechtenstein and San Marino were unable to provide data) and three observer states (Morocco, Israel, and Kazakhstan). It describes major trends and, for the first time, it also contains country profiles. For the seventh evaluation report →eucrim 3/2018, 164.

As with previous reports, CEPEJ highlighted the methodological difficulty of comparing significantly diverse legal systems (like the various approaches to courts organisation or the different statistical classifications to evaluate the systems). The methodology therefore relied heavily on the CEPEJ Scheme for Evaluating Judicial Systems (in the form of a questionnaire) and on support from CEPEJ's national correspondents and other specific actors.

The report evaluates the efficiency of justice systems based mainly on the following indicators:

- The availability and allocation of resources;
- The situation of prosecutors and judges and their interrelationship;
- The organisation of courts;
- The performance of the judicial systems.

The reference year for the evaluation cycle was 2018, and the online data collection period officially lasted from 1 March to 1 October 2019. Since then, various states have undertaken fundamental institutional and legislative reforms of their legal systems. For a more detailed analysis, reference can be made to "CEPEJ-STAT," a dynamic Internet database containing all data collected by CEPEJ since 2010.

According to the report, the main trends between 2010 and 2018 regarding courts were the following:

- There was a decrease in the number of courts in Europe, both in terms of legal entities and geographical locations;
- There was an increase in the specialisation of courts, from 21% to 26,7%;
- Small claims were only slightly affected by the above developments.

In this context, the 2020 report especially highlights the following trends:

➤ *Budgets allocated to justice:*

The report defines adequate funding as necessary to enable courts and judges to comply with Art. 6 ECHR and national constitutional standards – and to perform their duties with integrity and efficiency. As resources are limited, it is also important that they be used efficiently. The budget allocations can be summed up as follows:

- In 2018, European states spent on average €72 per inhabitant per annum on the legal system (i.e., €8 more than in 2016) and 0,33% of the GDP. Although countries with a higher GDP per capita invested more per inhabitant in judicial

systems, less wealthy countries had to allocate more budget as a percentage of GDP, thereby showing a greater budgetary effort for their judicial systems;

- 65% of budgets were allocated to courts, 24% to prosecution authorities, and 11% to legal aid. The less wealthy countries spent proportionately more on their prosecution authorities, while states with a higher GDP per capita invested more in legal aid. The most significant budgetary increase, equal to 13% on average, was recorded for courts, a development which seems to be related not only to the wealth of a country but also to the number of courts it has;
- There is a growing trend towards outsourcing of certain services;
- In accordance with the requirements of ECHR and ECtHR case law, almost all states have put in place a legal aid mechanism for criminal and non-criminal cases in order to ensure access to justice for all.

➤ *Justice professionals and the courts:*

Trends and conclusions indicate that the number of professional judges has been stable across the board. Significant differences with regard to the number of judges between the states and entities remain, which can be partly explained by the diversity of judicial organisations, use of occasional professional judges and/or lay judges. There has been a focus on increasing the percentage of judges and prosecutors, in particular when recruiting and promoting them. The glass ceiling has remained firmly in place, however, for managerial positions. The salaries of judges vary widely between states and entities and between levels of jurisdiction. There are still significant disparities in the salary levels of public prosecutors, but more and more states are paying judges and prosecutors identical salaries, at the beginning and at the end of their careers. Although the number of lawyers is still increasing in Europe (with significant differences between states), the profession remains predominantly male.

➤ *Court users:*

The report stresses the importance of including court users in the daily work of the judiciary and welcomes the fact that many states provide specific information to users, both on the judicial system in general and on individual court proceedings. Many examples are given of states addressing specific information and arrangements to vulnerable categories of users, offering the possibility to file complaints as regards the functioning of justice, putting in place compensation systems, carrying out user satisfaction surveys, and creating monitoring mechanisms in respect of ECHR violations.

In order to further improve social responsibility and trust in the judicial system, CEPEJ calls on Member States to devote additional resources to better communication with the users of justice. Information technology enables states to better inform users, to adapt the availability of information, and to create sustainable two-way communication with users. In addition, the analyses and use of data about the satisfaction of court users increases the legitimacy of judicial systems and helps advance the efficiency of justice.

➤ *Information and communication technology (ICT):*

The use of information systems is crucial in the above-mentioned context, even though respectful human interaction remains central to ensuring fair decisions and building trust in the judiciary. ICT has become a constitutive part of justice service provision, and European judicial systems are increasingly moving from paper-based procedures to electronic ones – both for activities carried out in the courts and for communication exchanges between courts and all other parties. When striving to achieve the required balance between technical and judicial components, the report notes that most states tend to consider both aspects equally relevant, with a slight prevalence for the judicial element. As basic technologies are now generally fully deployed in Member States and entities, analysis has focused on court and case management tools, decision support tools, and tools for communication between courts, professionals, and/or court users, all of which show very high levels of application. However, CEPEJ cautions that the economic cost of such innovation should be considered carefully. This particularly affects the areas of decision support, e-communication, and remote proceedings, which have led to an increasing need to monitor the impact of these tools on the principles of fairness, impartiality, and judicial independence.

➤ *Performance of legal systems:*

A number of states and entities have undergone or are currently undergoing significant justice sector reforms that influence the performance of their systems. Monitoring of the results must be paired with an understanding of the legal context in order to gauge the effectiveness of these reforms. Second-instance courts appear to be the most efficient when dealing with the case types analysed. Cases involving asylum seekers and the right of entry/right of residence for aliens continue to have a strong impact on European jurisdictions, which also results in productivity problems for many states, especially in Austria, Belgium, France, Germany, Italy, Spain, and Sweden. For the purpose of the report, the percentage of cases older than two years was available only for a limited number of states, but they showed that the percentage of older cases was constant.

Articles

Articles / Aufsätze

Fil Rouge

Full implementation of EU legislation and thorough review of CJEU decisions by the Member States are crucial to effective and continued development of the entire European system, a system relying essentially on the principle of sincere cooperation and an ever-growing set of shared competences. Review by the Member States is also essential for the effective functioning of European actors – an issue that is tackled in the first two articles of this eucrim issue. *Allegrezza* demonstrates that the progressive setting up of a network of national competent authorities – supporting the pivotal role gained by the ECB and enabling financial crime experts to cooperate directly with financial and banking regulators in accordance with the European principles of loyal cooperation, good faith, and data protection – is the most suitable way to strengthen the effectiveness of investigations and preventive measures against criminal conduct affecting the Union's financial system. In contrast, *Lööf* stresses that significant divergencies still existing among the (participating) Member States, with respect to both substantive and procedural conditions for the prosecution of legal entities, can significantly shatter the imagined, strengthened effectiveness of EPPO investigations in complex cases on the EU territory. Needless to say, full implementation, improvement, and review of the existing legal instruments regulating the EPPO's activity by the participating Member States are key elements in overcoming the many uncertainties surrounding the establishment of this new, investigative EU body.

Looking at the implementation process of many EU legal instruments adopted so far, the situation appears to be quite deceiving. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings is a patent example of how very high expectations for significant improvement in rights protection all over the EU were ultimately disappointed. As described in the article by *Kotzurek*, the protection accorded may even have been weakened with respect to some aspects of these rights.

Positive experiences should not be underestimated, however, especially with respect to review of the CJEU's decisions. The European Arrest Warrant (EAW) is perhaps the most prominent example in the EU criminal justice area. *Wahl* analyses the situation with respect to the judgment in "*LM*" of 25 July 2018 (C-216/18 PPU), which deals with the controversy surrounding respect for fundamental rights protection within the framework of the EAW. The decision can be considered a meaningful example of how the engagement of national judges can trigger a very positive dynamic towards improving common standards, to which national judges significantly contribute by "testing" CJEU solutions in concrete cases, also taking into consideration the legal traditions of the Member States.

Grimaldi deals with the new course pursued in the CJEU's recent jurisprudence (2019–2020) with respect to the notion of "judicial authority" – now expressly requiring functional independence from the executive branch – and the significant impact on legal orders after conferring the role of issuing authority mainly to public prosecutors. Since the CJEU does not exclude prosecution offices as a "judicial authority" *per se*, the new approach may complicate the EAW mechanism, as the executing authority needs to assess the independence of the issuing authority in each individual case. According to *Ruiz Yamuza*, the CJEU's decision in *AY* of 25 July 2018 (C-268/17), which has not received much public attention yet, has had far-reaching consequences as to the execution of EAWs in the Member States. The CJEU not only refreshed its jurisprudence on the *ne bis in idem* principle by introducing a subjective-driven interpretation of this principle but also set standards for preliminary rulings in the EAW context, which are the cornerstone of interaction between the CJEU and national judges.

Last but not least, moving from the EU to the ECHR framework, the review of ECtHR decisions by national judges cannot be emphasized enough. *Zaharova* illustrates that recent legislative amendments in Bulgaria improving legal security, the predictability of judicial decisions, and equality before the law followed the interpretation by the Bulgarian Supreme Court of Cassation in its follow-up decisions to the ECtHR's judgment in *Tsonyo Tsonev v Bulgaria* (Application 2376/03). More generally, this reading by the Supreme Court is indicative of its serious effort to develop an effective mechanism in order to overcome existing legislative loopholes and imperfections as regards the juxtaposition of criminal and administrative penal proceedings.

Prof. Dr. Rosaria Sicurella, University of Catania/Italy,
Member of the eucrim Editorial Board

Information Exchange Between Administrative and Criminal Enforcement

The Case of the ECB and National Investigative Agencies

Silvia Allegrezza*

The banking system is often at the epicentre of large-scale financial crimes. Recent scandals involving major European credit institutions questioned the role of banking regulators in supporting law enforcement agencies and revealed the weakness of the current interaction between the European Central Bank (ECB) and national actors. Despite its ostensible coherence, the Single Supervisory Mechanism legal framework can prove problematic in terms of efficiency and adequacy in facing global financial crime. This article explores the specific case of information exchange between banking supervisors and criminal investigative authorities at national level. After a descriptive overview of the ECB reporting duties of potential criminal offences, we examine the possibility of a more coherent information exchange system, where a direct channel of communication between the ECB and criminal law enforcement agencies could serve as a better integrated strategy.

I. Information Exchange as a Tool for Better Law Enforcement

In recent years, the press has reported several fraudulent misconducts in which prestigious European credit institutions were involved. No alarm was sounded by the European or national regulators. Serious investigations led American regulators to impose high fines for these transnational offences, while European criminal justice systems constantly proved their inadequacy in facing global financial crime. Several factors contributed to this failure.[1] Among them is the inefficiency of the current system of information exchange between financial and banking regulators and criminal investigative agencies.

This article explores the specific case of information exchange between banking supervisors and criminal justice agencies. The topic has been neglected in the literature and is particularly challenging.[2] It implies the understanding of a highly complex matrix of normative and factual components. Several levels of analysis are involved: the interplay not only occurs between administrative and criminal enforcement level, but also calls into play multiple actors (European and national supervisors and investigating agencies), different targets (corporations and individuals), and different normative frameworks (European and national as implementation of European law, together with purely national law). Last but not least, several forces responding to various needs are pushing the European Union (hereinafter, the "EU") to increase centralised law enforcement in certain areas of major "European crimes." Recent reforms have radically changed financial crime strategies in Europe: the European Banking Authority has become a crucial actor in anti-money laundering and counter-terrorism financing enforcement (hereinafter, the "AML-CFT"),[3] and the European Public Prosecutor's Office – becoming operative in 2021 as the first centralised criminal enforcement body for the investigation and prosecution of Euro-fraud – will be a game changer.[4]

In this rapidly evolving context, the European Central Bank (hereinafter, the "ECB") plays a special role as the main banking supervisory authority of the Eurozone.[5] The establishment of the Single Supervisory Mechanism (hereinafter, the "SSM") as the main pillar of the Banking Union puts the ECB at the very heart of prudential supervision for the Eurozone. Because of its role, the ECB collects crucial information related to every significant credit institution in this area. Since the risk-based approach is evolving as the main preventive strategy to keep the financial system from being affected by criminal conduct and to effectively investigate such conduct, it has become crucial to involve regulators in an effort to build up an integrated strategy at the continental level. Due to the current lack of a centralised criminal law enforcement body in the EU,[6] the most common interactions occur between European and national supervisors dealing with criminal investigative authorities at national level.

Our analysis will start with the reporting duties of the ECB in cases in which data indicates potential criminal offences and will then explore the more general informational flow involving criminal agencies at the national level. Two additional paragraphs will focus on specific crimes, such as the so-called "Euro-fraud," money laundering, and terrorism financing, for which dedicated channels involving specialised EU agencies are provided. We will conclude with some suggestions for future improvement.

II. The ECB's Duty to Report Criminal Offences

What happens when the ECB acquires evidence of facts potentially giving rise to a criminal offence in carrying out its supervisory function? The SSM Framework Regulation (hereinafter, the "SSMFR"[7]) answers this question in Art. 136: when "the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant national competent authority (hereinafter, "NCA") to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law." Several issues arise from this apparently straightforward provision.

First, we should note that no direct contact with criminal agencies is provided for by the European Regulation. The ECB, in the exercise of its regulatory powers, decided to impose the mediation of NCAs, instead of setting up a proper reporting channel with the authorities competent for criminal enforcement. There are very good arguments behind criticism of this choice: direct contact with national prosecutors would have made the exchange of information easier and perhaps enabled better coordination among the different enforcement tracks. However, we should consider that the lack of a previous harmonisation of criminal offences in this field implies that national law becomes the main and only normative reference by which to define the potential criminal offence. The involvement of NCAs would allow them to filter the data flow in the light of relevant national provisions.

Secondly, the wording of Art. 136 SSMFR seems to suggest that the duty to report criminal offences is only related to the facts discovered during the ECB's supervisory activities. Here, the field seems to be limited to the common procedures or facts related to relevant banks over which the ECB has direct supervisory powers. It would nevertheless be hardly arguable to exclude the ECB's duty to report potential crimes committed by less significant credit institutions, if they catch the attention of the ECB. The need for sincere cooperation, of course, imposes that this communication takes place, even in the absence of a duty on the part of the ECB.

A third remark concerns the type of crimes that trigger the ECB's duty to report. In order to identify the current interplay between the SSM and criminal law, we should refer to traditional, pre-existing criminal offences and identify two relevant clusters of crime. The first concerns financial crimes, such as market abuse, money laundering,[8] terrorism financing, and insider trading. Harmonisation of these crimes is well accomplished at the European level, and more is sure to come with the implementation of the Directive on the protection of the EU's financial interests.[9] Banks usually play a crucial role in all of these cases. Consequently, law enforcement agencies might need to collect relevant information from the regulators.

The second cluster concerns those crimes that protect fair banking as a *Rechtsgut. We will refer to them as "banking supervision related offences."*[10] The cluster includes the exercise of banking activities without prior authorisation and the false or incomplete disclosure of information to the supervisors.

Art. 136 SSMFR lacks any indication of this sort, clearly suggesting the will to leave the field open to any potential misconduct. These criminal offences are not necessarily strictly related to banking supervision. And the need for an administrative breach of prudential requirements is nowhere mentioned. Evidence of a potential crime might emerge as a purely accidental event. This would allow the supposition that even money laundering or terrorist financing – formally excluded from the competence of the SSM[11] – is covered by this duty.

As for the legal basis upon which the ECB should determine the existence of a potential crime, the existing European legal framework on financial crimes could serve as such: in particular, money laundering, terrorist financing, market abuse, and insider trading as well as the crimes related to the protection of the European financial interests.[12] For these criminal offences a partial harmonisation has already been achieved, and national legislations are at least forced to criminalise certain misconduct.

For crimes that have not yet been harmonised, the ECB cannot draw on any common European reference. In these cases, the above-mentioned incongruences between national systems might have a negative impact on the correct exercise of reporting duties. In the absence of a European reference, the criminal nature of the potential offence (detected during the course of supervisory tasks) is determined by national law. This can be deduced from the wording of the SSMFR, which indicates how reporting duties shall be exercised "in accordance with national law."[13] According to this interpretation, the reference would not only state what the national procedural rules for the correct exercise of the reporting duty are once the NCAs have received the ECB's notice; it would first and foremost indicate the legal framework by which to determine how the facts discovered during supervision might involve a criminal offence.

Once the ECB reports to the NCAs, national rules on the transfer of information from the administrative to the criminal authorities apply.[14] The ECB no longer has any duty, and it is up to the NCAs to transmit the information to criminal agencies and ensure follow-up of the case.

As has emerged from the comparative analysis, the picture at the national level is highly fragmented.[15] In the majority of countries, the NCAs are under an obligation to report suspicion of a crime that emerged during their supervisory activity to the competent judicial authorities. In this case, the same duty shall apply to the facts reported by the ECB. Some other NCAs retain a margin of discretion as to whether to inform the judicial authorities.[16] The consequences of such reporting might, however, differ according to the applicable national legislation.

The constant reference to national law reveals the need to define the domestic law that should be applied. The answer to this question depends on several crucial aspects. National law indeed determines the extent and level of constraint of reporting duties from the NCAs to the criminal enforcement agencies.

A first solution could be to rely on the nationality of the credit institution that allegedly committed the breach. In case of a corporation with branches in several countries – as is often the case with major banks – this would not be the best option. Should the country in which the headquarters of the bank are located be selected as the relevant one? Reporting to criminal agencies located in a country other than the one where the facts of the case occurred would imply their inability to investigate for lack of jurisdiction. This cursory analysis reveals how distant the rationales of the different law enforcement systems are. Transnational banking crime is uncontrollable via traditional criminal law, where the competence to investigate and adjudicate is still almost entirely nationally based, with a few exceptions, such as the future European prosecutor for Euro-fraud.[17]

Therefore, it seems a better option to focus on the *locus commissi delicti* as the traditional principle by which to allocate criminal jurisdiction among different States. This might imply a discrepancy between the nationality of the bank and the location of the competent investigative authorities to whom the ECB shall report. Considering how transnational financial crime has spread in the last few decades, a multi-level reporting duty could be regarded as a good practice for the ECB by transferring information about a transnational criminal offence to all the NCAs of the countries potentially involved. It would then be up to the national authorities to coordinate the investigation and cooperation among themselves, both at administrative and criminal levels.

One could also go even further and suggest that the ECB use its regulatory power to modify Art. 136 SSMFR, adding the possibility to directly contact the national investigative authorities in criminal matters. This would not mean exclusion of the NCAs but rather inclusion of the prosecutors or other investigative agencies among those to whom the ECB may directly communicate. This clear reluctance to set up a direct channel of communication should be transformed into a more efficient communicating vessels system between the ECB and criminal enforcement agencies.

III. The ECB's Duty to Disclose Information to Criminal Enforcement Agencies

The reluctance of the European supervisor to cooperate with criminal law enforcement appears even clearer in the opposite case, i.e., when the national authorities require the ECB to disclose information related to its prudential supervisory tasks in the context of an ongoing criminal investigation. The original regulatory framework neither addressed this issue, nor is there any general European framework applicable to these cases. In June 2016, the ECB adopted ECB Decision 2016/1162 on disclosure of confidential information in the context of criminal investigations,[18] regulating the conditions for cooperation between the ECB and the national criminal investigation authorities. The aforementioned Decision ascertains that these conditions are largely determined by national law,[19] but it stresses the need to protect "the general principles of sincere cooperation, the principles of cooperation in good faith and the obligation to exchange information within the SSM, the obligation to protect personal data and the obligation of professional secrecy."[20]

The notion of information is broad. It includes all "information created or received in carrying out their supervisory tasks and responsibilities" and "confidential information related to monetary policy and other ESCB/Eurosystem-related tasks" as well as "information held by an NCA when assisting the ECB in the exercise of the ECB's tasks."[21] Conversely, there is no freedom for the NCAs to set up a more lenient communication scheme or avoid the strict rules of this Decision. All information collected is under the control of the ECB.

As for the concept of "confidential," it refers to "information covered by data protection rules, by the obligation of professional secrecy, by the professional secrecy rules contained in Directive 2013/36/EU or documents classified as 'ECB-CONFIDENTIAL' or 'ECB-SECRET' under the ECB's confidentiality regime, and excluding any information concerning persons who have an employment relationship with the ECB or a direct or indirect contractual relationship with the ECB for the execution of works, the supply of products or the provision of services."[22] Information may be disclosed under the following conditions: if it is due to an expressed obligation under Union or national law or if it is admissible under the relevant legal

framework and "there are no overriding reasons for refusing" to do so, such as "the need to safeguard the interests of the Union or to avoid any interference with the functioning and independence of the ECB, in particular by jeopardising the accomplishment of its tasks."[23]

In these cases, the competent NCA "commits to acting on behalf of the ECB in responding to such a request" and "commits to asking the requesting national criminal investigation authority to guarantee the protection from public disclosure of the confidential information provided."[24]

The Decision indeed stresses on several occasions that the ECB will have no direct contact with national authorities: both the request to the ECB and the answer to the national investigative authorities should be channelled via the NCAs.

The reporting obligations deriving from Decision 2016/1162 appear inconsistent with the ECB's reporting obligations deriving from Art. 9(1) SSMR, according to which the SSM shall have all the powers and obligations that the competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by the SSM Regulation. This latter consideration shows how unavoidable the clash between European confidentiality and national rules imposing the duty on national supervisors to cooperate with criminal investigative authorities seems. In several Member States, regulators must cooperate with national prosecutors and disclose information. A breach of this duty – refusal to cooperate or incomplete disclosure of relevant information – constitutes a criminal offence.[25]

This clash between conflicting duties is even more problematic if the request by the investigative authorities concerns confidential information that is at the disposal of the NCAs. This might be confidential information about the supervisory tasks of the ECB or related to the supervisory powers of the NCAs when less significant credit institutions are concerned. In these cases, Decision 2016/1162 strongly suggests that the NCAs – to use a euphemism[26] – "consult the ECB, where possible, on how to respond to the request" in order for the latter "to advise as to whether the information in question may be disclosed."[27] When the confidential information is related to the ECB's supervisory tasks, the disclosure can be denied "where there are overriding reasons relating to the need to safeguard the interests of the Union or to avoid any interference with the functioning and independence of the ECB for refusing to disclose the confidential information concerned."[28] When it concerns national supervisory powers, the ECB shall be informed "where that NCA considers that the information requested is material, or that disclosure thereof has the potential to adversely affect the reputation of the SSM."[29] The equivalent position of the SSM and the NCAs (including a duty to report suspicion of crime to judicial authorities, if so provided at the national level), ensured by Art. 9 SSMR, is contradicted by Decision 2016/1162, which leaves a questionable discretion to the ECB.[30]

Data on concrete enforcement of these rules are unfortunately not available, for obvious reasons of confidentiality. These rules are nevertheless a clear indicator of the banking regulators' tormented relationship with the criminal enforcement agencies. They also show lack of trust toward those who should be in the frontline in the fight against economic crime, i.e., prosecutors and judges.

From the point of view of national prosecutors, the procedure by which to request confidential information without being able to address a request directly to the ECB might be puzzling, especially in transnational cases. For the investigative authorities, modern financial crimes often entail the need to collect confidential information held by a foreign credit institution from a regulator located in a different country. Usually, this would imply the use of mutual legal assistance tools, such as a letter rogatory or, more recently, the issuing of a European investigation order, at least in the vast majority of the Eurozone countries. What happens when such a need involves information held by the ECB? Should the prosecutor address it to its national competent authority, even though the latter is not the SSM 'NCA' of the relevant credit institution in the light of the SSMR? Or should the prosecutor address the request to the foreign colleagues via the above-mentioned tools of judicial cooperation, asking them to turn to their NCA? And if this were the case, which country is relevant? That of the credit institution or that in which the confidential information is located?

Lastly, the current legal framework does not provide for any form of communication from national criminal enforcement to the ECB. This lacuna prevents the latter from using that information productively in order to adopt supervisory measures that could prevent further damages. A better enforcement strategy aiming at the eradication of financial crime would seem to suggest more efficient coordination and cooperation among enforcement agencies, built on mutual trust and common values in terms of confidentiality and secrecy.

IV. The ECB and "Euro-fraud": Disclosing Information to OLAF and the Future of a Horizontal Multi-Regulatory Enforcement

The duty of the ECB to report criminal activities to the competent authorities also has a European horizontal dimension.

The reference applies to the duty to disclose relevant information and to cooperate with the European Anti-Fraud Office (hereinafter, "OLAF") when it comes to the protection of the EU's financial interests. OLAF is the European administrative agency in charge of conducting administrative investigations into fraud (so-called "internal investigations") within the institutions, bodies, offices, and agencies of the EU for the purpose of fighting fraud, corruption, and any other illegal activity affecting the financial interests of the Union. OLAF investigations might lead to disciplinary sanctions or, in the most serious cases, to criminal proceedings before national authorities to whom OLAF might report the breach.

In general terms, every institution, body, office, or agency of the EU shall adopt adequate rules in order to impose on its personnel a duty to cooperate and supply information to OLAF while ensuring the confidentiality of the internal investigation.

Due to sensitiveness of the data collected in the exercise of its tasks, being it monetary policy or prudential supervision, the ECB has an intricate legal framework on confidentiality and professional secrecy.[31] It was thus clear that the ECB, as an institution of the Union, could not avoid cooperation with OLAF and that this cooperation would need a specific legal framework. To this end, the ECB adopted Decision 2016/456 concerning the terms and conditions for the European Anti-Fraud Office's investigations of the ECB in relation to the prevention of fraud, corruption, and any other illegal activities affecting the financial interests of the Union.[32] This Decision applies to the members of joint supervisory teams and on-site inspection teams that are not subject to the ECB's conditions of employment. It also covers the staff members of national competent authorities who are members of joint supervisory teams and on-site inspection teams.

According to Decision 2016/456, the ECB has the duty to "cooperate with and supply information to the Office, while ensuring the confidentiality of an internal investigation."[33]

The duty to cooperate is nevertheless not limited to internal investigations; rather, it covers so-called external investigations, the ones where suspicion of possible cases of fraud, corruption, or other illegal activity affecting the Union's financial interests emerges. The ECB's employees shall first inform their directs supervisors, then consult the management hierarchy up to the members of the Executive Board or the President, if necessary. The latter shall transmit the information to OLAF without delay.

A specific procedure applies when the hierarchical reporting proves to be problematic in the sense that it might compromise the correctness of the reporting, in which case the employee can transmit the information directly to OLAF.[34] As a form of protection, the persons involved may in no way suffer inequitable or discriminatory treatment as a result of having communicated the information to their direct supervisor or directly to OLAF.[35]

A few restrictions are provided for when it comes to the communication of sensitive information, i.e., data that "could seriously undermine the ECB's functioning." In these cases, the decision on whether to grant OLAF access to such information or to transmit such information to OLAF shall be taken by the ECB Executive Board.[36] The decision not to grant access should, where relevant, include the NCAs and state the reasons for the refusal. The ban has a time limit of six months.

In terms of its substantive impact, the present decision is limited in its scope to fraud, corruption, and any other illegal activities affecting the financial interests of the Union. It implies for the ECB the duty to register potential breaches affecting the EU budget. In order to understand the material scope, it has to be read in conjunction with the Directive on the protection of the EU's financial interests,[37] where a list of criminal offences presenting a direct link with the EU budget is provided for. This Directive represents the legal basis by which to determine the competence *ratione materiae o*f the future European Public Prosecutor. In this light, it indicates that, in the future, the ECB will have a horizontal duty to report to a European centralised agency dealing with criminal matters. The duty will be twofold: first, via the reports to OLAF and secondly, via the duty to transmit to the future EPPO every criminal offence for which the latter might be competent, according to Regulation 2017/1939[38] and the 2018 Commission proposal on the revision of the OLAF Regulation[39].

V. Toward an Enhanced Cooperation: The Exchange of Information on Money Laundering and Terrorist Financing

In recent years, several systemic banks, supervised by the ECB, were involved in huge money laundering scandals.[40] These events brought into question the role of the ECB in supporting anti-money laundering enforcement agencies. Traditionally reluctant to enter the arena of anti-money laundering enforcement, the ECB was nevertheless lacking a specific competence. At the time, compliance with and enforcement of AML legislation was indeed entirely a national competence. Only the recent reform of December 2019 conferred to the European Banking Authority additional coordination powers and – embryonal – enforcement tools in the AML-CTF field.[41]

However, the need for a better cooperation has become clear over the past years. As *Danièle Nouy* confirmed in 2018, "a more European approach to combatting money laundering should be considered, for example, through enhanced cooperation and exchanges of information between supervisory and AML authorities."[42] Thanks to the amendments to the AML Directive that entered into force in 2018, the Multilateral Agreement (hereinafter, the "Agreement") between the ECB and the AML competent authorities (CAs) was signed in January 2019, indicating the practical modalities for the exchange of information in the area of prevention of misuse of financial systems for the purpose of money laundering and terrorist financing.[43]

The first remarkable step toward a more effective cooperation is that the Agreement refers to a dialogue between the ECB and the CAs: "The exchange of information shall take place between the CAs and the ECB, on request or on their own initiative." The exchange is, however, not limited to the duty to answer specific requests; still, it includes autonomous input from one agency to the other.

Several types of information might be "exchanged." When the request comes from the ECB to the CAs, it might refer to "information, which is gathered or created by the CA in the exercise of its AML/CFT functions, that is relevant and necessary for the exercise of the ECB's tasks under the SSM Regulation, including prudential supervision on a consolidated basis."[44] It may include AML/CFT sanctions or measures imposed on supervised entities and other information gathered from AML/CFT reports received in line with Art. 61(1) of the AMLD and related to material weaknesses in the supervised entity's AML/CFT governance, systems, and controls framework or its exposure to significant AML/CFT risks.[45]

The national CAs are, in principle, obliged to transmit this information to the ECB when the latter requests it. They can also act on their own initiative, providing "any other information, which they deem to be relevant and necessary for the exercise of the ECB's tasks."[46]

As for the opposite, CAs "may submit a request to the ECB for information gathered or created by the ECB in the exercise of its direct supervisory tasks under the SSM Regulation that is relevant and necessary for the performance of their tasks in the area of AML/CFT supervision."[47] Such a request may include information on sanctions or measures imposed on supervised entities by the ECB for shortcomings in their internal governance arrangements or notifications connected with the exercise of the freedom of establishment and the freedom to provide services or received by the ECB as part of breach reports. This list is not exhaustive: CAs can ask for any information collected by the ECB on "business model and governance arrangements gathered during the authorisation process or other information related to AML/CFT gathered for the purposes of the assessment of acquisitions of qualifying holdings and suitability of members of management bodies of the supervised entities."[48]

The ECB should, in principle, transmit this information upon request or on its own initiative. The only limitation to this duty to cooperate is the respect for national and supranational legality. Both the ECB and the CAs can decline a request for information if (a) the request does not conform with the Agreement or the applicable laws or (b) fulfilling the request would require the office "to act in a manner that would violate any applicable laws."[49] The Multilateral Agreement indicates the need for all parties to keep the information received "confidential as required by applicable laws, and use or disclose it only as permitted by applicable laws" and to act in compliance with data protection laws.[50]

The described mechanism represents the most advanced model of information exchange between the ECB and national authorities in relation to a criminal offence. The possibility for both participants to act on their own initiative should be welcomed as a positive improvement in the field of inter-agency enforcement mechanisms. Nevertheless, the information flow, as described in the Multilateral Agreement, does not necessarily imply a direct contact between the banking regulator and criminal enforcement: the Agreement is intended to channel the flow to the CAs, i.e., "the authority or authorities designated as the competent authorities for supervising and ensuring supervised entities' compliance with the requirements of AMLD."[51] These authorities may have different statutes and powers according to the specific context of the Member State.

VI. Some Suggestions for the Future

The endeavour to tackle financial crime as an EU priority requires rethinking traditional relations between financial regulation and criminal policies. It implies an innovative regulatory framework in which administrative and criminal enforcement actors are called on to cooperate at different levels.[52] Major steps would require structural changes in the current EU enforcement network, such as the introduction of specific authorities in the field of AML/CTF[53] or the expansion of the EPPO's competences. Pragmatism and *Realpolitik* suggest the lowering of our expectations and the adoption of a more cautious approach: what can be done to improve the information exchange among the different authorities?

First, setting up a direct channel of communication between the ECB and criminal law enforcement would be extremely beneficial. Member States of the Eurozone – or even the non-Eurozone – could be asked to nominate one of their agencies as the contact point for the ECB, which would be entitled to receive information and requests for information and transmit them to the law enforcement offices in charge. This network of national competent authorities already exists in the field of AML/CTF. It would also be possible to involve pre-existing coordination agencies in the field of criminal justice, such as Eurojust, whose core mission is to build up synergies to fight supranational crime. This would not mean diminishing the role of national banking supervisors, but rather conferring a European dimension to the potential criminal investigation, involving the competent agencies directly, bypassing potential national bias.

*Second, i*t would be preferable to read Art. 136 SSMFR as a real duty to report criminal offences to the competent authorities using the aforementioned network. A more developed risk management could be extremely beneficial for crime prevention and repression, and regulators are the best placed to detect suspicious operations. This privileged position can also serve the purpose of criminal justice, without being detrimental to the core mission of the ECB. The duty to report a potential criminal offence, as provided for by Art. 136 SSMFR, could be improved and include both national supervisors and prosecutors of financial intelligence units already existing in several Member States.[54]

Third, in a more advanced, integrated strategy, composite investigative units, in which financial crime experts might cooperate directly with financial and banking regulators, could be extremely beneficial and avoid information asymmetries. Synergies in terms of knowledge, skills, and good practices develop when people with different expertise cooperate.

There is no doubt that these proposals require time and some political bravery. They also imply the necessity for several adjustments to rules of investigation and to defence rights – to name but a few: access to the file, the right to silence, and the duty to disclose self-incriminating reports. Good results are sure to come about if there is consensus among all actors to cooperate according to the European principles of loyal cooperation, good faith, and data protection.

Prof. Dr. Silvia Allegrezza

Associate professor of Criminal Law and director of the Master in European Economic and Financial Criminal Law at the University of Luxembourg

* Parts of this essay have already been published in S. Allegrezza, The Single Supervisory Mechanism: Institutional Design, Punitive Powers and the Interplay with Criminal Law, in Ead., The Enforcement Dimension of the Single Supervisory Mechanism, Kluwer, 2020, 3–48.

1 See E. Herlin-Karnel, "Constructing Europe's Area of Freedom, Security, and Justice through the Framework of "Regulation": A Cascade of Market-Based Challenges in the EU's Fight against Financial Crime", (2015) 16(1) German Law Journal, 49 ff.; J. Vervaele and M. Luchtman, "Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?", (2014) 5 *New J. Eur. Crim. Law,* 192–220, 194.

2 On the complexity of inter-agency cooperation among criminal enforcement in the EU, see A. Weyembergh, I. Armada and C. Brière, The Inter-agency Cooperation and Future Architecture of the EU Criminal Justice and Law Enforcement Area, Study for the LIBE Committee, November 2014.

3 See EBA Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, as amended by Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019.

4 Directorate-General for Internal Policies, 'Towards a European Public Prosecutor's Office (EPPO)' (European Union, 2016): <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571399/IPOL_STU(2016)571399_EN.pdf> accessed 25 July 2020.

5 The Single Supervisory Mechanism was introduced by Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (hereinafter, the "SSMR"). The SSMR was completed by Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation – hereinafter, the "SSMFR").

6 The EPPO is currently limited in scope and territorial jurisdiction; today, there are twenty-two participating Member States. See: European Commission, 'European Public Prosecutor's Office', <https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en> accessed 25 July 2020.

7 See supra (n. 4).

8 Money laundering represents a special case, analysed in section V. The drafters of the SSMR felt the need to mention money laundering in order to exclude any competence of the SSM in this field. According to Recital 26 SSMR, "the prevention of the use of the financial system for the purpose of money laundering and terrorist financing is not a supervisory task conferred to the ECB." It is fixedly in the hands of national authorities. Nevertheless, Recital 27 SSMR affirms that "the ECB should cooperate, as appropriate, fully with the national authorities which are competent to ensure a high level of consumer protection and the fight against money laundering."

9 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union financial interests by means of criminal law, *O.J.* L 198, 28.7.2017, 29. See section IV on the exchange of information between the ECB and OLAF.
10 See G. Lasagni and I. Rodopoulos, "Comparative Study", in S. Allegrezza (ed.), The Enforcement Dimension of the Single Supervisory Mechanism – The Interplay Between Administrative and Criminal Law, CEDAM 2019, pp. 575–613.
11 See Recitals 28–29 SSMR.
12 See infra, para. 13.
13 Art. 136 SSMFR.
14 For a wider analysis of this issue, see M. Simonato, M. Luchtman and J. Vervaele (eds.), Exchange of information with EU and national enforcement authorities Improving OLAF legislative framework through a comparison with other EU authorities (ECN/ESMA/ECB) (Utrecht University/ RENFORCE, March 2018) <https://orbilu.uni.lu/bitstream/10993/35503/1/Utrecht_University_Hercule_III_Exchange_of_information_with_EU_and_national_enforcement_authorities.pdf> accessed 25 July 2020.
15 See G. Lasagni and I. Rodopoulos, Comparative Study, *op. cit.* (n. 10), p. 621.
16 Specific references in national reports (Part II).
17 See section IV.
18 ECB Decision 2016/1162 of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19).
19 ECB Decision 2016/1162, *op. cit.* (n. 18), Recital 3.
20 ECB Decision 2016/1162, *op. cit.* (n. 18), Recital 3.
21 ECB Decision 2016/1162, *op. cit.* (n. 18), Recitals 1 and 4.
22 ECB Decision 2016/1162, *op. cit.* (n. 18), Art. 1(a).
23 ECB Decision 2016/1162, *op. cit.* (n. 18), Art. 1(a).
24 ECB Decision 2016/1162, *op. cit.* (n. 18), Art. 2(1).
25 See G. Lasagni and I. Rodopoulos, "Comparative Study", *op. cit. (n. 10), p. 632.*
26 The wording is: "the ECB shall request the NCAs and NCBs to agree to consult" or "to inform the ECB" of the national request, ECB Decision 2016/1162, *op. cit.* (n.18), Art. 3(1)(2).
27 ECB Decision 2016/1162, *op. cit.* (n. 18), Art. 3(1).
28 ECB Decision 2016/1162, *op. cit.* (n. 18), Art. 3(1).
29 ECB Decision 2016/1162, *op. cit.* (n. 18), Art. 3(2).
30 G. Lasagni, *Banking Supervision and Criminal Investigation. Comparing the EU and US Experience,* Springer 2019, p. 221.
31 As stated in the Preamble to Decision 2016/456. The ECB's professional duties and obligations, in particular the obligations relating to professional conduct and professional secrecy, are laid down in (a) the Conditions of Employment for Staff of the European Central Bank, (b) the European Central Bank Staff Rules, (c) Annex IIb to the Conditions of Employment concerning the Conditions of Short-Term Employment, and (d) the European Central Bank Rules for Short-Term Employment, and further guidance is given in (e) the Code of Conduct for the members of the Governing Council (2), (f) the Supplementary Code of Ethics Criteria for the members of the Executive Board of the European Central Bank (3), and (g) the Code of Conduct for the members of the Supervisory Board of the European Central Bank (4) (together, hereinafter, referred to as the "ECB conditions of employment").
32 Decision (EU) 2016/456 of the European Central Bank of 4 March 2016 concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank, in relation to the prevention of fraud, corruption and any other illegal activities affecting the financial interests of the Union (ECB/2016/3).
33 Art. 2 Decision (EU) 2016/456, *op. cit.* (n. 32). On OLAF's internal and external investigations, see V. Covolo, *L'emergence d'un droit penal en reseau,* Nomos, 2015.
34 Art. 3(4) Decision (EU) 2016/456, *op. cit.* (n. 32).
35 Art. 3(1) Decision (EU) 2016/456, *op. cit.* (n. 32).
36 Art. 4(1) Decision (EU) 2016/456, *op. cit.* (n. 32) defines the concept of sensitive information as follows: "information concerning monetary policy decisions, or operations related to the management of foreign reserves and interventions on foreign exchange markets, provided that such information is less than one year old; information concerning the tasks conferred upon the ECB by Regulation (EU) No 1024/2013; data received by the ECB from the national competent authorities regarding the stability of the financial system or individual credit institutions; and information concerning the euro banknotes' security features and technical specifications."
37 Supra n. 9.
38 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *O.J. L 283,* /31.10.2017, 1.
39 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations. For the latest developments, see the European Anti-Fraud Office, "OLAF Regulation" <https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation_en> accessed 25 July 2020.
40 See, in particular, the ABLV Bank scandal, in which the credit institution was sanctioned by American regulators for several money laundering incidents. Members of the EU Parliament raised questions regarding the ECB's role in the information exchange between the detection of money laundering risks and the integration of those risks in prudential supervision; see the answer Danièle Nouy, Chair of the ECB Supervisory Board, gave to Sven Giegold, Member of the European Parliament, of 3 May, 2018 at <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter180503_giegold.en.pdf> accessed 25 July 2020.
41 See n. 3.
42 *Ibidem.*
43 Art. 57a(2) AMLD requires the ECB and the competent authorities to conclude, with the support of the European supervisory authorities, an agreement on the practical modalities for the exchange of information.
44 Information might be "relevant and necessary for the purposes of the assessment of acquisitions of qualifying holdings, the authorisation of supervised entities, notifications connected with the exercise of the freedom of establishment and the freedom to provide services and the assessment of the suitability of members of management bodies of the supervised entities" (Art. 3(2)(a) of the Multilateral Agreement).
45 Art. 3(2) of the Multilateral Agreement.
46 Art. 3(3) of the Multilateral Agreement.
47 Art. 3(4) of the Multilateral Agreement.
48 Art. 3(5) of the Multilateral Agreement.
49 Art. 6(3) of the Multilateral Agreement.
50 Art. 7 of the Multilateral Agreement.
51 Art. 2(f) of the Multilateral Agreement.
52 E. Herlin-Karnell, (2015) *German Law Journal, op. cit.* (n. 1).
53 As suggested by Danièle Nouy in her Letter (see above n. 40): "As anti-money laundering concerns both the supervisory and criminal/ judicial spheres (…) establishing a European AML authority could bring about such a degree of improved cooperation."
54 See G. Lasagni and I. Rodopoulos, "Comparative Study", *op. cit.* (n. 10), p. 623.

The EPPO and the Corporate Suspect

Jurisdictional Agnosticism and Legal Uncertainties

Robin Lööf*

The advent of the European Public Prosecutor's Office ("EPPO") has been broadly welcomed throughout the European legal community, including by legal entities operating in the single market and their advisors. Even so, considerable uncertainties remain for these economic actors on how the new enforcement regime will affect them. These uncertainties stem from the fact that the twenty-two jurisdictions in which the EPPO will operate have in some cases radically different approaches to issues such as the nature of and conditions for corporate criminal liability as well as the substantive and procedural framework governing corporate criminal investigations. The fluidity with which the EPPO will conduct investigations across the EU, combined with potential unpredictability of the locus of an ultimate resolution or trial, will mean that these substantive and procedural divergences are likely to raise considerable difficulties, particularly for legal entities. The EPPO should therefore quickly establish guidelines on how to approach multi-jurisdictional investigations and proceedings involving legal entities. The absence of such guidelines will not only unnecessarily reduce companies' ability to manage their enforcement risk, but will also negatively impact the EPPO's effectiveness in dealing with complex corporate investigations and proceedings.

I. Introduction: the EPPO's Jurisdictional Agnosticism

The European Public Prosecutor's Office (EPPO) is intended to be a unitary body, seamlessly conducting investigations into complex, cross-border fraud, corruption, and money laundering across the twenty-two participating EU Member States. It is to be hoped that this institutional innovation will represent a step change in the currently underwhelming enforcement of economic and financial crime laws in the EU. However, particularly for legal entities operating across multiple jurisdictions in the single market, the EPPO's very set-up creates a new type of legal uncertainty. This is due to the fact that, unlike investigations carried out by national prosecutors, EPPO investigations are agnostic as to the jurisdictional locus of their ultimate resolution.

EPPO proceedings will be carried out day-to-day by European Delegated Prosecutors ("EDPs") operating within the jurisdiction of each participating Member State, supervised by the relevant national European Prosecutor ("EP") based at the EPPO's central office in Luxembourg. Investigations are monitored by Permanent Chambers made up of several EPs to which cases are allocated on a random basis.[1] For important procedural steps, EDPs and EPs require a decision from the monitoring Permanent Chamber.

The rules on competence as between EDPs are set out in Art. 26 of Regulation 2017/1939 (hereinafter "the EPPO Regulation"),[2] with paragraph (4) setting out the general rule that proceedings will be:

> initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed.

This general rule can, however, be deviated from. The second sentence of paragraph (4) provides for the possibility that an EDP in another Member State may:

> initiate or be instructed by the competent Permanent Chamber to initiate an investigation where a deviation from the rule set out in the previous sentence is duly justified, taking into account the following criteria, in order of priority:
>
> (a) the place of the suspect's or accused person's habitual residence;
>
> (b) the nationality of the suspect or accused person;
>
> (c) the place where the main financial damage has occurred.

In addition, paragraph (5) provides that until a decision has been taken "to bring a case to judgment" before a trial court in a particular Member State pursuant to Art. 36, the Permanent Chamber responsible for the investigation may:

> in a case concerning the jurisdiction of more than one Member State and after consultation with the European Prosecutors and/or European Delegated Prosecutors concerned, decide to:
>
> (a) reallocate the case to a European Delegated Prosecutor in another Member State;
>
> (b) merge or split cases and, for each case choose the European Delegated Prosecutor handling it,
>
> if such decisions are in the general interest of justice and in accordance with the criteria for the choice of the handling European Delegated Prosecutor in accordance with paragraph 4 of this Article.[3]

The reallocation, splitting, or merging of a case will lead to changes in the supervising EP(s) and, possibly, the transfer of the monitoring of the case to a different Permanent Chamber.[4]

It is therefore clear that in many circumstances, an investigation initiated and carried out at the behest of the EDP in one Member State may, wholly or in part, be resolved before the courts of another Member State (with evidence obtained by EDPs in yet other Member States[5]).

This potential uncertainty as to the eventual forum for the ultimate resolution of an investigation creates particular difficulties for legal entities. As a starting point, the nature and extent of corporate criminal liability for the offences under the EPPO's jurisdiction vary significantly across the 22 participating Member States. Further, there is little uniformity in the approach to legal privilege, a matter of great importance to how companies manage their legal exposure. Finally, legal and procedural frameworks encouraging corporate cooperation with criminal investigations are far from uniform or universally established.

Following a closer look at each of these areas, this article will conclude that this level of uncertainty and unpredictability is unnecessarily detrimental not only to the ability of legal entities to manage their enforcement risks, but also to the EPPO's effectiveness in dealing with complex corporate investigations and proceedings.

II. Divergences in Material Risk

The basis for the EPPO's material competence is Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive"). The PIF Directive does not impose direct corporate criminal liability for the offences it sets out. Rather, its Art. 6 states that Member States have to ensure that legal entities can be "held liable" for such offences carried out "for their benefit."[6]

While corporate criminal liability exists in many of the EPPO's jurisdictions, in some, such as Germany and Italy, it currently does not.[7] On the fundamental point, therefore, of whether a legal entity can be held criminally liable – or merely civilly or administratively liable – the situation varies across the EPPO's jurisdictions. [8]

Whether corporate liability is criminal, civil, or administrative, there is the question of the criteria for that liability to attach. Art. 6(1) of the PIF Directive sets out that legal persons should be liable in respect of the criminal offences set out in the Directive where the offences are:

> committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:
>
> (a) a power of representation of the legal person;
>
> (b) an authority to take decisions on behalf of the legal person; or
>
> (c) an authority to exercise control within the legal person.

Art. 6(2) adds that legal persons should also be held liable "where the lack of supervision or control by a person [in a leading position] has made possible the commission, by a person under its authority, of [a criminal offence set out in the Directive] for the benefit of that legal person."

Nevertheless, a quick survey of the various transposing measures shows that great divergence persists. France, for instance, appears to have taken the view that its pre-existing criterion for corporate criminal liability based on acts on behalf of a legal entity by its "organs or representatives"[9] was adequate. In Italy, however, it appears that legal entities are responsible by virtue of the actions of a wider range of individuals than required by the PIF Directive,[10] whereas Luxembourg's transposing provisions adopt the exact criteria of the Directive.[11]

The PIF Directive also leaves open the issue of penalties applicable for legal entities where considerable differences between Member States exist.[12] Its Art. 9 mandates that corporate sanctions should include "criminal or non-criminal fines," but refrains from setting any reference level for the fines. Art. 9 also leaves it up to the Member States whether non-pecuniary sanctions such as exclusions from public tenders and public support, and judicial supervision or winding-up should be available.[13]

This leaves room for enormous disparity. By way of example, in France, for certain relevant offences, corporate fines are determined by applying a multiplier to any profits derived from the offending conduct (particularly corruption), or to the amounts involved (money laundering). In these latter circumstances, there are no caps. By contrast, Germany, Luxembourg, and Italy are examples of jurisdictions where corporate fines are capped at relatively low levels (€10m[14], €3.75m[15], and €1.549m[16] respectively).[17]

Historically, EU reluctance to harmonise the nature and consequences of corporate liability across Member States is rooted in the broader view of sanctions as instruments for ensuring the effective implementation of substantive policies by member states (without dictating the details of how implementation should be achieved).[18] However, in the context of the EPPO's application of laws transposing the PIF Directive, this instrumental view of corporate liability makes little sense: Given that the EPPO was created as an EU prosecutor specifically tasked with enforcing the criminal law, the availability of specifically *criminal sanctions* would appear to be the whole point. In this context, harmonising the nature and consequences of corpo-

rate liability for legal persons, at least to the same extent as is the case for natural persons, seems relatively uncontroversial. The alternative would be to make it clear that (as in, e.g., Italy) proceedings to hold legal entities liable – be that on a civil or administrative basis – for offences under the PIF Directive fall under the responsibility of the EPPO.

Be that as it may, currently, and as the examples above show, the jurisdiction before which the liability of a legal entity investigated by the EPPO is ultimately to be decided will have an enormous impact on the potential consequences of an adverse finding for that entity. Importantly, the jurisdictional allocation of a case may have little or nothing to do with the status or position of the legal entity, or with its material involvement in the alleged offending.

III. Differing Concepts of Lawyer-Client Confidentiality

Beyond the generally "strengthened protection to exchanges between lawyers and their clients" afforded by Art. 8 of the European Convention on Human Rights (ECHR),[19] there is no conformity within the EU on the scope and extent of the protection of the confidentiality of communications between lawyers and their clients. Consequently, these rules differ across the EU in myriad ways.

At the level of the scope of the protection, and critically for companies, there is no consensus whether lawyer-client confidentiality applies between in-house lawyers and their employer and sole client. For instance, in France it does not,[20] whereas in neighbouring Belgium it does.[21]

At the level of the extent of the protection, the readiness of enforcement authorities to seize lawyer-client communications varies widely across the EU, not only as a result of different procedural rules but also (as we know from experience) different traditions in respect of the interaction between defence counsel and enforcement authorities.

When organising the manner in which they obtain legal advice, legal entities can and often do take into account the rules applicable in the relevant jurisdictions. Difficulties arise, however, when communications originally subject to the confidentiality regime of one jurisdiction become potentially relevant to an investigation in another, where their seizure or admissibility will need to be considered. This difficulty is not new, of course; similar challenges existed prior to the advent of the EPPO.[22] The EPPO regime does, however, introduce a further layer of complexity in that the determination of the lawfulness of seizure and the ultimate determination of admissibility may well take place in two different jurisdictions.

Legal entities may therefore find themselves in the unenviable situation of having taken confidential advice in one jurisdiction, seeing that advice seized at the behest of the EDP in another, less protective jurisdiction, and having the ultimate admissibility of that advice considered in a third. This is hardly compatible with legal certainty and may deter companies from seeking full and frank legal advice for the benefit of their operations, thereby arguably undermining the rationale for lawyer-client confidentiality, as well as undercutting corporate good governance.

The example of EU competition law shows that it is possible to have a distinct privilege regime for substantive areas of EU law;[23] even lawyers from the common law tradition have learned to operate with the non-availability of legal privilege for in-house advice. It is therefore to be hoped that the EPPO in the short to medium term seek to provide as much operational clarity as possible in relation to its approach to the confidentiality of lawyer-client communications. In the long term, the EPPO will hopefully provide an impetus for EU co-ordination or harmonisation of the applicable conflict rules.

IV. Approach to Corporate Cooperation with Criminal Investigations and the Availability of Out-of-Court Resolutions

Corporate criminal enforcement is an atypical branch of fraud enforcement. This is due to factors such as the dispersal of knowledge within organisations, complex decision-making structures, and a variety of fiduciary obligations. When a prosecutor targets a corporate entity, in most instances those responsible for representing the entity vis-à-vis the prosecutor will have little or no knowledge of the specific conduct under investigation. What is more, company management will be concerned to know as early as possible the potential impact of the investigation and any subsequent proceedings on the company. This is in order to reduce the uncertainties inherent in the investigation and to limit associated negative impacts on the company's operations. At the same time, investigations into complex economic offending often begin with the discovery of potential wrongdoing by a company employee or official, in the course of its internal processes.

These factors have, in some jurisdictions, led to the adoption of procedures whereby legal entities are incentivised to "self-report" suspected, potentially criminal wrongdoing that is discovered within their organisations, leading to an important source of intelligence for law enforcement. Part of the incentive is often the prospect of some form of out-of-court resolution for criminal acts which the legal entity does not contest. One notable advantage to avoiding a formal conviction is that

the company is spared automatic debarment from participation in public tenders, a consideration that will almost inevitably be critical for companies targeted by the EPPO.[24] The French *Convention judiciaire d'intérêt publique*[25] is the best-known example of this kind of procedure within the EPPO's jurisdiction.

Although these derogatory procedures for companies are controversial, there is little doubt that they save scarce public resources and time, and often give prosecutors access to information otherwise inaccessible to them, or accessible only with great difficulty. It is therefore hardly surprising that there is a growing movement towards formalising procedures which incentivise companies to cooperate with enforcement authorities.[26] We also know from practice that the ability to co-ordinate the settlement of cross-border investigations into corporate misconduct is largely dependent on the availability of such procedures, which provide the necessary procedural predictability for all parties involved.

All of these considerations are clearly highly relevant to the EPPO, and Art. 40 of the EPPO Regulation does indeed provide for investigations to be closed by means of out-of- court resolutions if the law applicable to the handling EDP provides for it. The EDPs operating in jurisdictions with such resolutions for legal entities will therefore be able to use them.

The critical question for legal entities and their advisers is what guarantees they would have that their active engagement with, and assistance to, the EPPO will benefit them. In a recent interview, the Dutch EP *Daniëlle Goudriaan suggested that companies should treat the EPPO as they would national prosecutors.*[27] However, this does not take into account the potentially drastic consequences for legal entities of the EPPO's power to decide on the final jurisdiction for the resolution of any given investigation of which they are a target. Companies that consider engaging with the EPPO on the assumption that the handling EDP will be able to offer them a non-conviction resolution as well as credit for co-operation will have legitimate concerns that these benefits from co-operating are at risk of being lost with the transfer of the case to an EDP in a jurisdiction where such benefits are not available. In such circumstances, we may well find that companies prove reluctant to engage actively with the EPPO. For the reasons set out above, this would be detrimental to the EPPO's effectiveness.

V. Conclusion

Until recently, companies operating in the single market had the certainty that engaging with the prosecutor in one jurisdiction would engage the procedures applicable in that jurisdiction. As we have seen above, that certainty does not exist for a company faced with a potential EPPO investigation into suspected cross-border criminality. Given the potentially far-reaching implications for the scope and consequences of their legal exposure, companies may well be concerned about "internal forum shopping" by the EPPO. A company that finds itself the target of an investigation by the EPPO and potentially a "victim" of a transfer of the matter to a jurisdiction where its legal risks are materially worse may argue against the transfer: it will be possible to submit written arguments to the EDP as well as the monitoring Permanent Chamber. The EPPO Decision on the Permanent Chambers even contemplates the possibility of "any other person" being invited to attend meetings of the Permanent Chambers,[28] a provision which would presumably cover the representatives of a company under investigation making their case *viva voce*. A company that considers itself unreasonably penalised by a jurisdictional decision by the EPPO could seek judicial review of that decision, ultimately before the Court of Justice of the EU.29

Even so, this level of legal uncertainty, due solely to the ultimate choice of jurisdiction for the resolution of the investigation and unrelated to the seriousness of the suspected misconduct, is clearly undesirable. It is to be hoped that the EPPO eventually provides clear guidance on its approach to jurisdictional selection in relation to legal entities under investigation. Such clarity would enable the EPPO to maximise the potential for corporate cooperation with its investigations. It would also be in the interests of justice.

Dr. Robin Lööf
Barrister (England & Wales), *avocat (barreau de Paris)*; International Counsel, Debevoise & Plimpton, London/Paris.

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1 The organisation of the Permanent Chambers is set out in EPPO College Decision 015/2020 of 25 November 2020, available at: <https://ec.europa.eu/info/sites/info/files/2020.015_decision_on_the_permanent_chambers_-_final_0.pdf> accessed on 2 February 2021.

2 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *O.J.* L 283, 31.10.2017, 1.

3 Paragraph (7) further states that the Permanent Chamber must take into account the current state of the investigation when making decisions under paragraph (6).

4 See Articles 50(2), 19(4), 20(3), and 51 of the Internal Rules of Procedure (EPPO College Decision 003/2020 of 12 October 2020). This will occur in particular where the new supervising European Prosecutor is a permanent member of the Permanent Chamber currently monitoring the case.
5 Art. 31(1) of the EPPO Regulation.
6 Recital (14): "Insofar as the Union's financial interests can be damaged or threatened by conduct attributable to legal persons, legal persons should be liable for the criminal offences, as defined in this Directive, which are committed on their behalf."
7 See generally, P. Lewisch, "Corporate criminal liability for foreign bribery: perspectives from civil law jurisdictions within the European Union", (2018), 12:1, Law and Financial Markets Review, 31. A proposal for the institution of corporate criminal liability in Germany is currently under consideration.
8 See, e.g., D. Benito Sanchez, "The Directive on the Fight against Fraud to the Union's Financial Interests and its Transposition into the Spanish Law", (2019), vol. 11(3), Perspectives on Federalism, E-122.
9 Art. 121-12 French Code pénal ("organes ou représentants").
10 Art. 5(1) of Decr. Leg. No. 231 of 8 June 2001.
11 Art. 34 of the Luxembourg *Code pénal.*
12 As noted in H. Christodoulou, "Spécialisation de la justice ou montée en puissance des procureurs ?" (7 January 2021), Dalloz actualité.
13 This should be contrasted with the relatively detailed provisions on the penalties applicable for natural persons in Art. 7 of the PIF Directive.
14 § 30, Gesetz über Ordnungswidrigkeiten (OWiG).
15 Arts 36 and 37 of the Code pénal.
16 Art. 10 of Decr. Leg. No. 231 of 8 June 2001.
17 Note, however, that in certain jurisdictions legal entities may, separately to any fine imposed, be ordered to forfeit an amount corresponding to profits derived from the offending.
18 For an overview in the corporate context, see V. Franssen, "The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential", (2018) vol. 19(5), *German Law Journal, 1221.*
19 See ECtHR, 6 December 2012, *Michaud v France,* Appl. No. 12323/11, para. 118.
20 On 22 January 2021, the general assembly of the French bar associations rejected by a large majority a government proposal to trial a system of in-house lawyers enjoying a similar status to avocats; see <https://www.cnb.avocat.fr/fr/communiques-de-presse/avocat-en-entreprise-vote-de-lag-du-cnb> accessed on 2 February 2021.
21 The distinct profession of *juriste d'entreprise was created by the Law of 1 March 2000, but lawyers (avocats)* are also able to be temporarily employed by a company (see Title IV, chapter 11 of the *Code de déontologie de l'avocat (Ordre des barreaux francophones et germanophone)).*
22 For an interesting discussion in the French context, see J-C. Jaïs, C. Cavicchioli and A. de Mazières, "La confidentialité des correspondances internationales des avocats et juristes en entreprise – la question du droit applicable" (4 October 2020), n° 4, October 2020, var. 8, Journal du droit international (Clunet).
23 See Case C-550-07, *Akzo Nobel Chemicals Ltd v European Commission.*
24 See the debarment provisions in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.
25 Instituted by Art. 22 Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption, et à la modernisation de la vie économique ("Sapin II"). See also the Guidelines on the implementation of the CJIP, issued jointly by the National Financial Prosecutor (PNF) and the Anti-Corruption Agency (AFA) on 26 June 2019 (available at: <https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public> accessed on 2 February 2021).
26 See, e.g., the report by the IBA Anti-Corruption Committee, Structured Criminal Settlements Subcommittee (Akinwa and Søreide (eds.), *Structured Settlements for Corruption Offences Towards Global Standards? (December 2018).*
27 J. Thomas, "European Prosecutor: Treat EPPO like national enforcement agencies", (6 November 2021), Global Investigations Review, <https://globalinvestigationsreview.com/article/1234855/european-prosecutor-treat-eppo-like-national-enforcement-agencies> accessed on 26 January 2021.
28 Art. 8(2) of EPPO College Decision 015/2020, *op. cit.* (n. 1).
29 Art. 42 of the EPPO Regulation.

Die Richtlinie 2010/64/EU zum Dolmetschen und Übersetzen in Strafverfahren – Neues Qualitätssiegel oder verpasste Chance?

Zur Umsetzung in Deutschland, Polen und Spanien

Magdalena Kotzurek

About ten years ago, the European Parliament and the Council of the European Union adopted Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. The Directive initially inspired high hopes, mainly because it explicitly addressed the issue of quality in interpretation and translation services. Its implementation in the EU Member States, however, has tended to be disheartening. Some even fear that current standards may be inferior to those that prevailed before the Directive was implemented. This article analyses the implementation of the Directive in Germany, Poland and Spain, and –

taking the changes made to the relevant national legislation in 2013 (Germany and Poland) and 2015 (Spain) as a starting point – sheds light on early tendencies in the judicial interpretation of domestic law. It concludes that up to this day, neither Germany nor Poland nor Spain has fully complied with the Directive's quality standards for interpretation services. With respect to translation – especially the translation of judgments – it concludes that a rather restrictive interpretation of the amended national laws appears to be taking root.

Gerichtsverfahren, an denen Dolmetscher und Übersetzer beteiligt sind, sind in der EU juristischer Alltag. Gerichtsdolmetscher und übersetzer, deren Berufsbild sich in den Nürnberger Prozessen konturierte, sind nicht mehr aus Gerichtssälen und Polizeistationen wegzudenken. Keine andere zwischenstaatliche Einrichtung nutzt annähernd so viele Amtssprachen wie die EU[1] (nämlich 24), und gesprochen werden in der EU heute sogar um die 450 Sprachen. Kaum jemand stellt ernsthaft infrage, dass die EU so multilingual ist wie nie zuvor. Mehrsprachigkeit gehört zu den Grundprinzipien der Union und betrifft natürlich auch Strafverfahren: Es ist selbstverständlich, dass jede beschuldigte Person verstehen muss, was ihr vorgeworfen wird – und zwar egal, in welchem Mitgliedsstaat sie sich befindet. Die flächendeckende, effektive Durchsetzung dieses Rechts begegnet jedoch vielfältigen Herausforderungen. Im Oktober 2010 verabschiedeten das Europäische Parlament und der Rat die Richtlinie 2010/64/EU über das Recht auf Dolmetschleistungen und Übersetzungen in Strafverfahren.[2] Es war der erste Versuch, auf EU-Ebene für Mindeststandards im Strafverfahren zu sorgen.[3] Zudem bezog man sich – auch das war ein Novum – explizit auf die Qualität von Dolmetsch- und Übersetzungsleistungen in Strafverfahren. Dieser Artikel untersucht die Umsetzung der Richtlinie in Deutschland, Polen und Spanien und zeigt – ausgehend von den 2013 bzw. 2015 veränderten Gesetzesartikeln in diesen Ländern – erste Tendenzen in der Rechtsprechung auf. Es wird deutlich, dass die drei Länder den Qualitätsansprüchen der Richtlinie in puncto Dolmetschen bis heute nicht gerecht werden und sich bei Übersetzungen – vor allem Urteilsübersetzungen – eine restriktivere Auslegung der novellierten Gesetzestexte zu etablieren scheint.

I. Hintergründe

Zu Beginn der 2000er Jahre hatten Nachforschungen der EU-Kommission ergeben, dass sich die Mitgliedstaaten ihrer Pflicht zur unentgeltlichen Beiziehung von Dolmetschern und Übersetzern in Strafverfahren zwar theoretisch bewusst sind, sie in der Realität aber nicht ausreichend erfüllen. Gründe waren Kosten, Bürokratie und die komplexeren Organisationsanforderungen im Falle von selteneren Sprachen.[4] Dabei bekräftigten internationale und europäische Übereinkünfte zu diesem Zeitpunkt schon seit etwa fünfzig Jahren, dass jede Person, die die Sprache ihres Strafverfahrens nicht versteht, unentgeltlich durch Dolmetscher und Übersetzer unterstützt werden muss. Niedergelegt ist dieses Recht unter anderem in der Europäischen Menschenrechtskonvention (EMRK), dem Internationalen Pakt über bürgerliche und politische Rechte (IPbpR) und der EU-Grundrechtecharta (GRCh). Der europäische Prozess zur Vereinheitlichung der Strafverfahrensstandards in den EU-Mitgliedsstaaten hatte 1999 mit den Schlussfolgerungen von Tampere und dem darauf aufbauenden Stockholmer Programm an Fahrt aufgenommen. Dazu gehörte ein 2009 angenommener Fahrplan zur Stärkung der Verfahrensrechte im Strafverfahren, der 2010 bis 2016 schrittweise durch insgesamt sechs Richtlinien umgesetzt werden sollte.[5] Als erstes wurde im Oktober 2010 die Richtlinie 2010/64/EU über das Recht auf Dolmetschleistungen und Übersetzungen in Strafverfahren verabschiedet. Sie fordert neben der Kostenübernahme von Dolmetsch- und Übersetzungsleistungen für das gesamte Strafverfahren auch die Sicherstellung von ausreichender Qualität, um faire Verfahren zu garantieren. Ferner betont sie die Wichtigkeit von Fortbildungen für Richter, Staatsanwälte und Justizbedienstete mit Augenmerk auf das Dolmetschen, damit die Kommunikation effizienter und wirksamer gestaltet werden kann. Zudem unterstreicht sie die Bedeutung von offiziellen Registern für Dolmetscher und Übersetzer, wie sie aktuell bereits in 17 EU-Mitgliedstaaten existieren.[6]

II. Dolmetscher- und Übersetzergesetze und staatliche Prüfungen in Deutschland, Polen und Spanien

Der Beruf des Gerichtsdolmetschers und/oder -übersetzers ist bis heute überraschend unbekannt. Im allgemeinen Sprachgebrauch und teils auch in der Fachsprache verschwimmen die Grenzen, obwohl sich die Tätigkeiten von Dolmetschern und Übersetzern stark unterscheiden,[7] und auch unterschiedliche Ausbildungen und Fähigkeiten erfordern. Während Dolmetscher im Simultan- oder Konsekutivmodus (mit Kopfhörern in der Kabine oder mit gezücktem Block und Stift neben dem Redner) quasi „live" und unter höchstem Zeitdruck mündliche Aussagen sinngetreu in andere Sprachen übertragen, arbeiten Übersetzer mit fixierten, schriftlich festgehaltenen Texten, die sie bis zur Abgabe überarbeiten, kontrollieren und korrigieren können. Da die Berufsbezeichnungen weltweit kaum geschützt sind, können auch Quereinsteiger bzw. Laien mit Fremdsprachenkenntnissen als Dolmetscher/Übersetzer tätig sein. Dies hält die Branche einerseits jung und dynamisch, lässt sie aber auch oft an Grenzen stoßen.

Die gesetzlichen Berufsregelungen sahen in Deutschland, Polen und Spanien zum Zeitpunkt der Verabschiedung der Richtlinie sehr unterschiedlich aus. In Deutschland existieren aktuell nur auf der Ebene der Bundesländer Übersetzer- und Dolmetschergesetze. Der Bund hat jedoch im Zuge der Modernisierung des Strafverfahrens Ende 2019 das Gesetz über die allgemeine Beeidigung von gerichtlichen Dolmetschern (Gerichtsdolmetschergesetz – GDolmG) erlassen, welches am 1. Juli 2021 in Kraft tritt.[8] Allerdings wird es, wie der Titel verrät, nur für Dolmetscher gelten. In Polen wurde schon 2004 ein fortschrittliches Gesetz (*Ustawa o zawodzie tłumacza przysięgłego*) verabschiedet, das teils als das beste Dolmetscher- und Übersetzergesetz Europas bezeichnet wird,[9] jedoch aufgrund mangelnder gesetzlicher Verankerung in der polnischen Strafprozessordnung (*Kodeks postępowania karnego*, Kpk) und im Gerichtsverfassungsgesetz (*Prawo o ustroju sądów powszechnych*) nicht effektiv greifen kann. In Spanien gibt es bis heute weder Dolmetscher- und/oder Übersetzergesetze auf nationaler noch auf Ebene der autonomen Regionen und auch keine umfassende Regelung der Berufe. Das verwundert, weil es in den letzten zwanzig Jahren einen großen Anstieg an Verfahren mit Beteiligung von Dolmetschern und Übersetzern in Spanien gegeben hat.[10] Für Verdolmetschungen können Gerichte in allen drei Ländern letztendlich jede Person heranziehen, die über die nötigen Sprachkenntnisse verfügt – wobei die Gesetzestexte kaum definieren, welche Kenntnisse genau gemeint sind und auch kein bestimmtes Sprachniveau festgelegen. Strengere Kriterien gelten jedoch für Übersetzungen: In allen drei Ländern dürfen nur beeidigte Übersetzer den Beglaubigungsstempel verwenden, der die Richtigkeit von Übersetzungen für Gerichte und Behörden bescheinigt.

Zum Beruf des Gerichtsdolmetschers und/oder -übersetzers gibt es verschiedenste Wege. In vielen EU-Ländern werden staatliche Prüfungen angeboten, die ausreichende Sprachkompetenzen, Dolmetsch- und/oder Übersetzungsfertigkeiten und – je nach Prüfungsort in unterschiedlichem Maße – auch Kenntnisse in der Rechtssprache bescheinigen. Erst nach bestandener Prüfung darf ein Eid abgelegt und der Titel getragen werden, der die Beeidigung[11] bestätigt. Anders als einige nationale Behörden bzw. Ministerien und auch der EuGH verfügen die Gerichte in Ländern wie Deutschland und Polen über keine eigenen Sprachendienste,[12] weshalb die dortigen Gerichtsdolmetscher und -übersetzer meist Freiberufler sind und über die offiziell eingerichteten Datenbanken kontaktiert/geladen werden müssen. Dies gestaltet sich etwas mühsam und wird in allen untersuchten Ländern gerne an Agenturen übertragen. Solch ein Schritt birgt jedoch nicht nur finanzielles Konfliktpotenzial, da Agenturen einen Teil der im EU-Vergleich nicht besonders üppigen Honorare einbehalten, sondern erschwert zudem die Kontrolle, ob eine Person wirklich qualifiziert ist.[13] Ein spanischer Investigativjournalist berichtete 2016, wie er sich ohne jegliche Arabischkenntnisse als Arabischdolmetscher bei einer Madrider Agentur bewarb und schon am nächsten Tag einen Dolmetschauftrag vor einem Gericht bekam, da die Agentur seine Sprachkenntnisse nicht weiter geprüft hatte.[14]

Inwiefern die Richtlinie 2010/64/EU etwas an dieser Situation verändert hat, wird kontrovers diskutiert. Anfangs weckte der siebenseitige Text große Hoffnungen. Viele europäische Berufsverbände von Juristen, Dolmetschern und Übersetzern engagierten sich bei der Ausarbeitung und setzten sich auch nach der Verabschiedung für eine umfassende Umsetzung in die nationalen Gesetzestexte ein. Diese ging im gesamteuropäischen Kontext allerdings eher schleppend voran. Das Ergebnis blieb für viele „unbefriedigend“,[15] wird teils sogar als „misslungen“[16] bzw. als verpasste Chance gewertet.

III. Die Umsetzung der Richtlinie in Deutschland, Polen und Spanien

Nach der Richtlinie sollte die Umsetzung durch die Mitgliedsstaaten bis zum 27. Oktober 2013 abgeschlossen sein.[17] Ein Jahr später, am 27. Oktober 2014, sollte ein Bericht der Europäischen Kommission zum Status quo vorliegen.[18] Der Prozess verzögerte sich jedoch stark und erst Ende 2018 folgte der Bericht der Kommission, deren Fazit zwar nüchtern, aber insgesamt positiv ausfiel.[19] Menschenrechtsorganisationen kritisierten, dass die Umsetzung der Richtlinie in den Mitgliedstaaten sehr unterschiedlich ausgefallen sei und die juristische und behördliche Praxis selbst bei vorbildlicher legislativer Umsetzung in nationales Recht teils stark hinterherhinke: Im Arbeitsalltag von Polizisten und Juristen kämen schließlich erschwerende finanzielle, bürokratische und berufspraktische Faktoren hinzu.[20] Die Menschenrechtsorganisationen forderten gesetzliche, prozessrechtliche und behördliche Verbesserungen.

Deutschland, Polen und Spanien werden den Forderungen der Richtlinie derzeit nur teilweise gerecht. Schaut man auf die Frage, ob die Verpflichtungen erfüllt worden sind, gibt es zwischen den drei Ländern auffällig viele Überschneidungen: So wurde überall der Anspruch auf kostenfreie Dolmetsch- und Übersetzungsleistungen verankert (gefordert in Art. 2 Abs. 1 und Abs. 2 sowie Art. 4 der Richtlinie 2010/64/EU), wobei in Polen teils weiterhin diskutiert wird, ab wann dieser greift[21] und wie es mit der Kostenübernahme im Fall von Verurteilungen aussieht.[22] Auf die Wichtigkeit der Vertraulichkeit von Dolmetschern und Übersetzern (gefordert in Art. 5 Abs. 3 der Richtlinie 2010/64/EU) wurde in den Gesetzestexten aller drei Länder eingegangen.

IV. Zur Umsetzung der Richtlinie veränderte Gesetzesartikel in Deutschland, Polen und Spanien

In Deutschland wurde zur Umsetzung der Richtlinie am 2. Juli 2013 das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren verabschiedet. Die größten Veränderungen wurden bei § 187 GVG vorgenommen. Abs. 1 setzt die Forderung nach kostenfreien Dolmetsch- und Übersetzungsleistungen für das gesamte Strafverfahren um, wobei die Kostenübernahme unabhängig vom Ausgang des Verfahrens erfolgt. Abs. 2 regelt die Erforderlichkeit der schriftlichen Übersetzung strafprozessualer Entscheidungen. Abs. 3 geht auf die Forderung der Richtlinie nach der vollen Kenntnis der Folgen im Fall eines Verzichts ein. Für Kontroversen sorgt insbesondere Abs. 2. Es stellt sich die Frage, ob durch die Umsetzung den Gerichten und Behörden nicht mehr Spielraum eingeräumt worden ist als durch die EU-Richtlinie intendiert. In Art. 3 der Richtlinie heißt es, dass *alle wesentlichen* Unterlagen übersetzt werden müssen und schriftliche Übersetzungen nur ausnahmsweise durch mündliche Übersetzungen oder Zusammenfassungen ersetzt werden können, unter der Bedingung, dass dies „einem fairen Verfahren nicht entgegensteht". Dagegen heißt es in § 187 Abs. 2 GVG, dass Übersetzungen „in der Regel" erforderlich sind. Kritiker bemängeln an diesem Wortlaut, dass „erhebliche Zweifel an einer ordnungsgemäßen Umsetzung der Richtlinie [aufkommen]".[23]

Ähnliches lässt sich zu der Häufigkeit von Stegreifübersetzungen (spontan verdolmetschten schriftlichen Texten) sagen: Während in Art. 3 der Richtlinie von Ausnahmefällen gesprochen wird, in denen „mündliche Übersetzungen oder Zusammenfassungen" möglich sind, fällt diese Einschränkung in § 187 Abs. 2 GVG größtenteils weg, wenn Beschuldigte einen Verteidiger haben. Kritiker sprechen hier von einer „Durchbrechung des Regel-Ausnahme-Prinzips"[24] und zeigen Schwachstellen bei der Kostenübernahme auf.[25] Trotz dieser Kritik wird § 187 GVG von den deutschen Gerichten als richtlinienkonform eingestuft.[26] Ein offizielles Register für Dolmetscher und Übersetzer (gefordert in Art. 5 Abs. 2 RL 2010/64/EU) existierte bereits drei Jahre vor Ablauf der Frist. Die bundesweite, vom Bundesland Hessen im Auftrag der Länder geführte „Datenbank für beeidigte, öffentlich bestellte bzw. allgemein ermächtigte Dolmetscherinnen und Dolmetscher sowie Übersetzerinnen und Übersetzer" ist seit Jahresbeginn 2010 online.[27]

In Polen ist die Situation widersprüchlich. Das Land verfügte, wie oben erwähnt, bereits sechs Jahre vor der Verabschiedung der Richtlinie über ein modernes Dolmetscher-/Übersetzergesetz[28] und erfüllte von vorneherein viele Forderungen der Richtlinie, unter anderem jene nach ausreichender Qualität (Art. 2 Abs. 8; Art. 3 Abs. 9; Art. 5 Abs. 1 RL 2010/64/EU).[29] Art. 196 Abs. 3 Kpk bietet die Grundlage für die Anfechtung mangelhafter bzw. nicht geleisteter Übersetzungen/Verdolmetschungen. Laut Art. 143, Art. 147 und Art. 205 Abs. 3 Kpk besteht für Verdolmetschungen/Übersetzungen Dokumentationspflicht (gefordert in Art. 7 RL 2010/64/EU). Eine offizielle Datenbank für beeidigte Dolmetscher/Übersetzer gibt es seit 2004, sie wird vom Justizministerium in Warschau verwaltet.[30] Zur Umsetzung der Richtlinie wurden 2013 einige Artikel des Kpk novelliert: Art. 72 zum Recht auf Hinzuziehung eines Dolmetschers/Übersetzers, Art. 195 zur Pflicht zur Erfüllung der Tätigkeiten eines Sachverständigen, Art. 196 zum Ausschluss von Sachverständigen und Art. 205 zum Eid, den vor Gericht erscheinende Fachkundige zu leisten haben.[31] In Polen gibt es jedoch bis heute kein effektives Vorranggebot für beeidigte Dolmetscher,[32] was auch immer wieder gerichtlich bestätigt wird – zuletzt durch das Berufungsgericht Katowice in einem Entscheid vom 13. September 2011.[33] Die hohen Qualitätsstandards, die 2004 eingeführt wurden, sind somit keineswegs juristischer Alltag.

Spanien verabschiedete zur Umsetzung der Richtlinie am 28. April 2015 die *Ley Orgánica* (LO) 5/2015, mit der das Recht auf Dolmetsch- und Übersetzungsleistungen vor Gericht und bei Behörden umfangreich ausgeweitet wurde und deren erster Artikel die spanischen Strafprozessordnung (*Ley de Enjuiciamiento Criminal*, kurz LeCrim) um das neue Kapitel „Vom Recht auf Übersetzung und Verdolmetschung" (*Del derecho a la traducción e interpretación*) ergänzte. Es besteht aus fünf Artikeln: 123, 124, 125, 126 und 127 LeCrim. Art. 123 entspricht u.a. den Forderungen der Richtlinie nach kostenfreien Dolmetschleistungen für das gesamte Strafverfahren und der kostenfreien Übersetzung aller wesentlichen Unterlagen. Art. 123 regelt ebenfalls die Dokumentationspflicht, während Art. 124 auf das geforderte Register für Dolmetscher und Übersetzer eingeht. Art. 126 regelt die Belehrung im Falle eines Verzichts auf Dolmetsch- und Übersetzungsleistungen. Zwar stehen die genannten Vorschrift formal für eine vollständige Umsetzung der Richtlinie; dies muss jedoch mit einem Fragezeichen versehen werden. Denn die Ausweitung der Rechte ging nicht mit einem zusätzlichen Budget einher: In der Ersten Zusatzbestimmung der LO 5/2015 hieß es ausdrücklich, dass „die in dieser Rechtsnorm enthaltenen Maßnahmen sich weder auf zusätzliche Mittel für Personal, höhere Gehälter noch auf sonstige Personalkosten stützen können".

Unklarheiten bestehen in allen drei Ländern in Bezug auf die Anfechtung fehlender bzw. mangelhafter Dolmetsch- und Übersetzungsleistungen (gefordert in Art. 2 Abs. 5, Art. 3 Abs. 5 RL 2010/64/EU).[34] Obwohl das Recht auf Anfechtung theoretisch in den entsprechenden Gesetzestexten angelegt ist,[35] stellt sich die Frage, wie die Bereitstellung bzw.

Qualität von Dolmetsch- und Übersetzungsleistungen wirklich überprüft und ggf. angefochten werden soll. Dolmetscher sind in mehrsprachigen Gerichtsverfahren schließlich meist die einzigen im Gerichtssaal, die den Beschuldigten verstehen, und Äußerungen in der Fremdsprache werden nicht mit ins Protokoll aufgenommen. Richter, Staatsanwälte oder Justizbedienstete können sich oft nur indirekt ein Bild von ihrer Leistung machen, denn sie verfügen über wenig Hintergrundwissen zum Dolmetschen oder BestPracticeBeispiele zur Überprüfung von Sprachkenntnissen bzw. Sprachverständnis. Manche plädieren dafür, zur Qualitätssicherung immer zwei Dolmetscher einzusetzen, die sich gegenseitig kontrollieren und ggf. korrigieren können.[36] Andere fordern, audiovisuelle Aufnahmen zum Standard zu machen.[37]

Unerfüllt blieben überall die in der Richtlinie enthaltene Forderungen nach ausreichender Qualität von Dolmetsch- und Übersetzungsleistungen und nach Weiterbildungen für an Strafverfahren beteiligte Richter, Staatsanwälte und Justizbedienstete mit Augenmerk auf das Dolmetschen (Art. 6 RL 2010/64/EU). Weder in Deutschland noch in Polen noch in Spanien gibt es momentan ein Vorranggebot für qualifizierte Dolmetscher, wodurch Ad-hoc-Beeidungen leider eher an der Tagesordnung als Ausnahme sind. So kann nicht sichergestellt werden, dass nur qualifizierte Dolmetscher vor Gerichten und in Behörden tätig sind, und es gilt weiterhin, was schon vor über sechzig Jahren kritisiert wurde:

> In Wirklichkeit ist es [...] so, dass die Öffentlichkeit in gar keiner Weise eine Gewähr dafür hat, dass jeder, der seine beruflichen Dienste und Leistungen als Dolmetscher und Übersetzer anbietet, die erforderliche Eignung besitzt. Vielfältige Erfahrungen der letzten Jahre haben umgekehrt gezeigt, dass zahlreiche Personen sich als Dolmetscher und Übersetzer bezeichnen, die nicht einmal die Mindestvoraussetzungen für die Ausübung dieses Berufes erfüllen. [...] Die Hauptursache dieses Übelstandes ist die bisher völlig freie und ungehinderte Verwendung der Berufsbezeichnungen [...].[38]

Darüber hinaus bestehen in den Ländern weitere Defizite. In Polen wurde der Verzicht auf Dolmetsch- und Übersetzungsleistungen durch Beschuldigte nicht gesetzlich geregelt. Spanien wiederum ist der Forderung nach der Einrichtung einer offiziellen Datenbank für Dolmetscher und Übersetzer bis heute nicht nachgekommen.[39] APTIJ, der spanische Verband der Gerichtsübersetzer und -dolmetscher und beeidigten Übersetzer und Dolmetscher (*Asociación Profesional de Traductores e Intérpretes Judiciales e Jurados*) weist darauf hin, dass Länder ohne offizielles Register grundsätzlich auf Agenturen angewiesen sind, „die weder die geeignete Ausbildung der beauftragten Übersetzer und Dolmetscher gewährleisten, noch in vielen Fällen die Vertraulichkeit der Gerichtsakten wahren und obendrein den Übersetzern und Dolmetschern ein unangemessenes Gehalt zahlen".[40] APTIJ fordert deshalb, die Auftragsvergabe an Agenturen grundsätzlich zu verbieten.

V. Erste Tendenzen in der Auslegung der novellierten Gesetzestexte

In den ersten Jahren, die seit der Umsetzung der Richtlinie in Deutschland, Polen und Spanien vergangen sind, scheint sich bei Übersetzungen, vor allem Urteilsübersetzungen, eine restriktive Auslegung der veränderten Gesetzestexte etabliert zu haben. In allen drei Ländern lässt sich die Praxis beobachten, dass Beschuldigte, die während der Verhandlung durch einen Verteidiger und einen Dolmetscher unterstützt werden, keine Übersetzungen bekommen – teils sogar, wenn Übersetzungen ausdrücklich beantragt wurden. Auch die bisherige Rechtsprechung des EuGH zur Auslegung der Richtlinie fördert kein Umdenken.[41] Bisher wurden zwei Fälle vor dem EuGH verhandelt und sie endeten mit der Schlussfolgerung, dass Gerichte in der EU grundsätzlich selbst entscheiden dürfen, welche Dokumente wesentlich sind – abgesehen von den explizit in Art. 3 der Richtlinie erwähnten Dokumenten (Anordnungen freiheitsentziehender Maßnahmen, Anklageschriften, Urteile).[42] Diese Linie wurde kritisch gesehen.[43] Doch auch der Eindruck, dass die Umsetzung der Richtlinie im Kontext der Wirtschaftslage nach der globalen Finanzkrise „knausriger" verlief, als es zu einem anderen Zeitpunkt der Fall gewesen sein könnte,[44] manifestiert sich in Bezug auf Deutschland, Polen und Spanien, wenn man die Rechtsprechung der letzten Jahre analysiert.

In Deutschland schränkten Gerichte den Anspruch auf Urteilsübersetzung in ihrer Auslegung von § 187 GVG immer deutlicher ein.[45] Die BGH-Urteile vom 22. Januar 2018 und vom 13. September 2018[46] haben gezeigt, dass es zum Regelfall geworden ist, Urteilsübersetzungen durch Verdolmetschungen oder mündliche Zusammenfassungen zu ersetzen, obwohl Urteile an sich zu den Dokumenten gehören, die Art. 3 der Richtlinie als wesentlich einstufte. Manche befürchten sogar eine Unterschreitung der Standards der EMRK.[47]

In Polen beschäftigten sich Gerichte nach 2013 auffallend oft mit der Frage, wieviel Polnischkenntnisse nötig sind, um ein Strafverfahren ohne Dolmetsch- bzw. Übersetzungsleistungen zu bestreiten, und ab welchem Sprachniveau der Anspruch darauf nicht mehr gilt.[48] Auffällig ist die große Anzahl an Berufungsverfahren.[49] Ein Grund dafür könnte die mangelnde gesetzliche Regelung des Verzichts auf Übersetzungs-/Dolmetschleistungen sein: Oft und vor allem bei Muttersprachlern slawischer Sprachen wird indirekt auf einen Verzicht geschlossen, der zu einem späteren Zeitpunkt nicht mehr anfechtbar ist.[50] Ob sich diese Tendenz in den nächsten Jahren fortführt, bleibt abzuwarten.

In Spanien wurde der Anspruch auf die Übersetzung wesentlicher Dokumente durch ein jüngeres Urteil des Obersten Ge-

richtshofs (*Tribunal Supremo*) geschwächt.[51] Zudem stellte der Gerichtshof in einer Grundsatzentscheidung klar, dass Fehler in Verdolmetschungen akzeptiert werden, bis die Verteidigung beweisen kann, dass dies dem Angeklagten Nachteile verursacht hat – was sich in der Realität schwierig gestalten dürfte.[52] Auch vor den spanischen Provinzgerichten (*Audiencias Provinciales*) zeichnet sich seit 2015 immer mehr die Praxis ab, dass Übersetzungen gesondert beantragt werden müssen, auch, wenn es sich um wesentliche Dokumente handelt.[53] Zudem werden Übersetzungen teils durch kreative Lösungen ersetzt, zum Beispiel Video-Aufnahmen von Stegreifübersetzungen.[54] Dies wird als ein Anzeichen dafür gesehen, dass das Recht auf Übersetzung wesentlicher Dokumente in Zukunft weiter eingeschränkt werden wird.[55]

VI. Ausblick

Das in der Richtlinie 2010/64/EU formulierte Ziel, EU-Mindeststandards für Dolmetsch-/Übersetzungsleistungen in Strafverfahren zu etablieren, wurde zumindest in Teilen verfehlt, vor allem in Bezug auf das Herzstück der Richtlinie: Qualität. In allen drei hier untersuchten Ländern (Deutschland, Polen, Spanien) zogen Dolmetscher, Übersetzer und Juristen nach den Implementierungen der Richtlinie 2013 bzw. 2015 das Fazit, dass sich nach der Umsetzung nur wenig verändert habe.[56] Obwohl die juristische Auseinandersetzung mit dem Thema Dolmetschen und Übersetzen in Strafverfahren seit 2010 durchaus an Fahrt aufgenommen hat, was die europäische und nationalstaatliche Rechtsprechung und die vielen Publikationen zum Thema beweisen, ist von einer wirklichen Verzahnung der Interessen und gebündelten Anstrengungen noch wenig zu spüren.

Damit hochqualitative Dolmetschleistungen in Zukunft Normalität in Gerichtssälen werden, braucht es einen intensiven, interdisziplinären Dialog, effiziente Weiterbildungen für alle Beteiligten und Mechanismen zur Qualitätskontrolle. In diesem Kontext muss auch ein EU-weiter Berufskodex für Dolmetscher im Justizbereich und die regelmäßige Überprüfung der Kompetenzen der in offiziellen Datenbanken geführten Dolmetscher und Übersetzer diskutiert werden. Letzteres ist derzeit in Österreich, den Niederlanden und in Griechenland der Fall.[57] In puncto Kosten bieten das vieldiskutierte (und auf lange Sicht unvermeidliche) Remote-Dolmetschen – die Hinzuziehung von Dolmetschern per Audio- und/oder Videoübertragung[58] – großes Potenzial, um kurzfristig und unabhängig vom Verfahrensort für qualifizierte Gerichtsdolmetschleistungen zu sorgen. Dies setzt zwar die entsprechende Technik und kurzfristig zusätzliche Ausgaben voraus, könnte aber unter Einhaltung bestimmter Standards[59] nicht nur die Qualität sichern und für angemessene Arbeitsbedingungen sorgen, sondern auch Kosten einsparen.[60]

Vor allem ist jedoch wichtig, dass Informationen zum Thema in die Branche und in die Öffentlichkeit getragen werden. Angesichts einer Situation, die noch lange nicht zufriedenstellend ist, bleibt zu hoffen, dass sowohl Juristen als auch Dolmetscher und Übersetzer sie aufmerksam verfolgen und bestenfalls in Zukunft gemeinsam mitgestalten werden.

Magdalena Kotzurek, M.A.
Übersetzerin und Dolmetscherin

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Refusal of European Arrest Warrants Due to Fair Trial Infringements

Review of the CJEU's Judgment in "LM" by National Courts in Europe

Thomas Wahl

One of the most controversially discussed and unresolved issues in extradition law, namely whether extradition can be denied because elements of a fair trial will not be ensured in the requesting (issuing) State, gained new momentum after the CJEU's judgment in "*LM*" of 25 July 2018 (C-216/18 PPU). This judgment relates to the framework of the European Arrest Warrant – the surrender system established in the EU in 2002. After briefly classifying the problem doctrinally and discussing the approach taken by the ECtHR, the article explains the CJEU's line of arguments in LM. The analysis focuses, in particular, on the necessary test phases that the executing judicial authority must carry out in order to find out possible fundamental rights breaches in the issuing EU Member State. The article then analyses the reviews of this judgment by national courts. The follow-up decision of the referring Irish court is compared with court decisions addressing, in detail, this specific problem of fair trial infringements in the United Kingdom, Germany, and the Netherlands. In doing so, the practical challenges that are encountered by the national courts in applying the CJEU's required test are also identified.

I. Background: The Human Rights Exception in European Extradition Law

One of the most controversially discussed but unresolved issues in extradition law is the question of whether – and, if so, to what extent – an extradition request can be denied by the authorities of the requested State if certain fundamental rights standards are not upheld in the requesting State. In legal doctrine, this issue is dealt with under the catchphrases "human rights exception/clause" or "public policy/order reservation" or *"ordre public."*[1] Although scholars often advocate the full application of fundamental rights protection in transnational situations,[2] it can be discerned from the case law of national and European courts that the protection of fundamental rights (as ensured by the system in domestic cases) should not and cannot be transferred to transnational cases. This holds true for extradition cases, in particular, as the most prominent form of international cooperation in criminal matters.[3] Courts admit that it is necessary to lower one's sights concerning the level of fundamental rights protection for the sake of achieving effectiveness in the cross-border fight against crime and fostering the mutual trust inherent to international cooperation in criminal matters. Therefore, courts have developed a formula that strives to strike a balance between the interests of international justice and the individual's interest in having his/her fundamental rights protected in the extradition scheme. This is especially true when the defence argues that certain procedural safeguards will not be maintained in the requesting State following surrender, as a consequence of which the right to a fair trial would be breached. These safeguards include the right to be tried before an independent and impartial judge, the right to be heard, the right to be present at trial, the right not to incriminate oneself, the right to an effective legal remedy, the right to have access to a lawyer of one's own choice, etc.

In view of these counterarguments, the European Court of Human Rights (ECtHR) established the "flagrant denial of justice" concept in its landmark judgment in *Soering* in 1989

and further clarified it in *Othman* in 2012. Accordingly, a requested CoE Member State must refrain from extraditing if "the circumstances lead the fugitive to suffer or risk suffering *a flagrant denial of a fair trial* in the requesting country."[4] This requires "a breach of the principles of fair trial guaranteed by Article 6 ECHR which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."[5]

The CJEU only had occasion to establish its concept in relation to potential breaches of the Charter of Fundamental Rights of the European Union (CFR) in 2018. The case is officially referred to as *LM* but has also been dubbed the "*Celmer* case," referring to the person in surrender proceedings in Ireland. Surrender of the person had been requested by Poland on the basis of a European Arrest Warrant for the purpose of conducting criminal prosecutions*, inter alia,* for trafficking in narcotics and psychotropic substances. In contrast to ECtHR case law at the time, which predominantly dealt with extraditions involving a CoE Member State and a third country (e.g., the USA), the CJEU was concerned with the question of fair trial infringements within the Union's "new" surrender scheme, which is based on Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States[6] (hereafter FD EAW). The alarming structural reforms of the Polish judicial system that impinge on the independence and legitimacy of constitutional review as well as on the independence of the ordinary judiciary,[7] prompted the Irish High Court to seek guidance as to which requirements Union law poses for the test to deny surrender on the grounds of possible fair trial infringements in the requesting (= issuing) State.[8] The response of the CJEU's Grand Chamber[9] (detailed in the following section) was mainly driven by its previous groundbreaking judgment in *Aranyosi and Căldăraru.*[10] In this judgment, for the first time, the judges in Luxembourg accepted possible fundamental rights refusals of EAWs due to infringements of the absolutely protected prohibition of torture and inhuman or degrading treatment or punishment, as enshrined in Art. 4 CFR (due to insufficient detention conditions in certain EU Member States).

II. The Approach of the CJEU in *LM*

1. Main parameters of the decision

In its judgment of 25 July 2018, the CJEU first reiterates the cornerstones of its previous case law on the meaning of fundamental rights in the context of judicial cooperation in criminal matters in the EU, based on the principles of mutual trust and mutual recognition:[11]

- In general, presumption that all EU Member States comply with the fundamental rights recognised by EU law.
- As a rule, no fundamental rights check in a specific case by other Member States;
- Refusal only on the grounds for non-execution expressly and exhaustively listed in Arts. 3, 4, 4a, and 5 of the FD EAW.

The judges in Luxembourg accept, however, that limitations to these principles may be placed in "exceptional circumstances," i.e., on the grounds of non-respect for fundamental rights on the basis of the general fundamental rights clause in Art. 1(3) FD EAW.[12] The CJEU admits first that not only the fundamental rights embodied in Art. 4 CFR but also those laid down in Art. 47(2) CFR are suitable for enabling the executing authority to refrain from executing an EAW. The main reasons are as follows:

- A simplified surrender system involving only judicial authorities can only work if the independence of the authorities in the issuing State is guaranteed;
- The high level of mutual trust between Member States is founded only on the premise that the criminal courts of the other Members States meet the requirements of effective judicial protection, particularly including the independence and impartiality of these courts.

Second, the CJEU largely extends the application of the "*Aranyosi & Căldăraru test"* to the right to a fair trial, i.e., a two-step assessment is necessary:[13]

- First step: Based on objective, reliable, specific, and properly updated material concerning the operation of the system of justice in the issuing Member State, the executing authority must assess whether there is a *real risk* of the fundamental right to a fair trial being breached that is connected to a lack of independence of the courts in the issuing Member State, on account of *systemic or generalised* deficiencies there.[14] In other words, the executing court must be convinced that an danger to the fundamental rights of the individual exists *in abstracto* (as standardised in Art. 47(2) CFR).
- Second step: The executing authority must *specifically and precisely assess* whether, in the particular case, there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the *essence* of his fundamental right to a fair trial, as laid down in Art. 47 CFR.[15] In other words, the executing authority must examine whether there is a probability that the danger will be realised *in concreto*.

In contrast to *Aranyosi & Căldăraru,* where the CJEU only required the national judge to ascertain the presence of an individualised risk, the test in *LM* requires the national judge

to consider all the individual circumstances of the case and obliges the judge to carry out *two sub-steps*:[16]

- Asking first whether the risk established in the first step applies at the level of the court with jurisdiction over the criminal proceedings to which the requested person (extraditee) will be subject;
- Asking secondly whether the risk exists in the case of the requested person himself/herself, having regard to his/her personal situation, as well as to the nature of the crime for which he/she is being prosecuted.

As set out in *Aranyosi & Căldăraru,* the CJEU further establishes the necessity of a *dialogue* between the executing State and the issuing State: Pursuant to Art. 15(2) FD EAW, the executing judicial authority must request from the issuing judicial authority any *supplementary information* that it considers necessary for assessing whether there is such a risk. The issuing authority should particularly have the task to provide any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing State, material which may rule out the existence of that risk for the individual concerned.[17]

2. Interim conclusion

For the first time, the CJEU explicitly admits that rights which are not also absolute in nature are capable of limiting the operativeness of mutual recognition. From this point of view, the CJEU's judgment in *LM* can indeed be considered a "genuinely ground-breaking decision, a new milestone leading to a turning point in the jurisprudence of the CJEU in the matter [of having the technical possibility to refuse an EAW on the grounds of a hazard for procedural rights]."[18] On closer inspection, the judgment reveals some parallels to the approach of the ECtHR briefly described above: It resembles the ECtHR's rulings in that fundamental rights can only limit surrender in exceptional circumstances.[19] Both the ECtHR and the CJEU rule out the refusal of extradition in case of mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Art. 6 ECHR / Art. 47 CFR if occurring within the State itself.[20] In addition, both courts established that general irregularities in the judicial system of the requesting State do not suffice for a refusal. Instead they established the "real risk doctrine:" A specific and precise individual assessment as to the existence of a real risk is necessary. In *LM,* the CJEU clarified that there must be a substantial link between the general deficiencies of (judicial) independence/disregard for fair trial standards and the denial of fair trial rights in the concrete criminal proceedings. Therefore, a case-orientated analysis by the national judge deciding on the execution of an EAW is indispensable.

The latter concept is certainly shared by the ECtHR. However, the reasoning followed by the CJEU for a concrete test is different, due to peculiarities in Union law. First, in the view of the judges in Luxembourg, exceptions to the principles of mutual recognition and trust (even those not clearly stipulated in the underlying legal act, such as the human rights exception in the FD EAW) must be construed narrowly.

Second, the founders of the FD EAW already anticipated a possible conflict between general rule-of-law deficiencies in an EU country and application of the EAW. In Recital 10 of the FD EAW, they took account of the sanctioning mechanism in Article 7 TEU (introduced 5 years before by the (1997) Amsterdam Treaty) if an EU country is at risk of breaching the bloc's core values. According to the founders of the EAW, only the second step of this Article 7 procedure should have effects on the EAW, i.e., the implementation of the EAW can generally be suspended if the European Council determined a *serious and persistent breach* of the Member State concerned of the principles set out in Art. 2 TEU (with the consequences set out in Art. 7(2) TEU). By insisting on a concrete assessment, the CJEU wishes to avoid blurring the boundaries between a general suspension of the EAW scheme vis-à-vis a particular EU Member State (following the Article 7 procedure as set out in Recital 10) and fundamental rights protection (as grounded in Art. 1(3) FD EAW). With regard to the different competencies of the CJEU and the Council in the envisaged Article 7 procedure, it is already not deemed compatible to create a blanket approach to surrender refusals.[21] The CJEU concedes that a Commission proposal addressed to the Council to determine a "*clear risk of serious breach*" of EU values by the accused country as set out in Art. 7(1) TEU could indicate the fulfilment of the "systemic and generalised deficiencies."[22]

Everything considered, one can formulate an "as-long-as reservation:" As long as the European Council does not decide that there has been a "serious and persistent" breach of the rule of law as the second step of the Article 7 procedure, execution of an EAW can only be refused in exceptional circumstances, namely if the executing authority acknowledges a real risk of violation of the essence of the right to a fair trial on account of a specific and precise examination of the individual case.

III. Follow-Up to the *LM* Judgment by National Courts

The CJEU's judgment in *LM* seems to have been received differently in the jurisdictions of the EU Member States. In some jurisdictions the case has seemingly not experienced much – or even any – attention in court cases,[23] whereas, in other jurisdictions, arguments like those in *LM* were often put forward, and courts delivered several follow-up deci-

sions. In most of the latter jurisdictions, test cases were selected, which served as orientation for subsequent decisions on EAW cases in the respective country. The following gives an overview of the court decisions that are subsequently analysed in detail:

- In Ireland, the Irish High Court (which, as the referring court, was the main addressee of the CJEU's judgment) rendered its follow-up decision on the extradition of *Celmer* on 19 November 2018 (hereinafter IEHC in *Celmer*).[24]
- This decision referred to a large extent also the judgment of the High Court of Justice of England and Wales of 31 October 2018 in the extradition proceedings of *Lis, Lange and Chmielewski* (hereinafter EWHC in *Lis*).[25] The EWHC (based in London) resumed extradition proceedings in which the defence claimed the discontinuance of the defendant's surrender to Poland in light of the preliminary ruling put forward by the Irish court.
- In Scotland, a basic decision was taken by the Sheriff Court of Lothian and Borders in Edinburgh in the case of *Maciejec* who was also being sought by Polish authorities by means of an EAW (hereinafter SC Edinburgh in *Maciejec*).[26]
- The *LM* judgment was raised in a number of cases before the Rechtbank Amsterdam (the central court instance that decides on the execution of all incoming EAWs in the Netherlands).[27] The Rechtbank Amsterdam took leading decisions on 16 August 2018[28] and 4 October 2018,[29] by which surrenders to Poland were suspended for the time being. In July 2020, the Rechtbank Amsterdam again decided to refer two EAW cases to the CJEU, seeking clarification of the CJEU's approach in *LM* in the light of recent developments involving the deterioration of Poland's rule of law.[30]
- As a neighbouring country to Poland, the issues of the *LM* judgment have also frequently been dealt with by German courts. Since there is no central instance in Germany for extradition cases, several decisions have been handed down by various Higher Regional Courts (*Oberlandesgerichte*).[31] The following will discuss, in particular, the path taken by the Higher Regional Court of Karlsruhe (hereafter HRC of Karlsruhe). In several subsequent decisions, the court intensively and thoroughly dealt with the argumentation given by the CJEU in *LM*.[32] According to the current state of knowledge, it is the only court to date that confirmed a concrete individualised danger to the essence of fair trial by Poland on the basis of the standards established by the CJEU in *LM*. Its decisions of February 2020[33] and November 2020[34] therefore actually led to the refusal of surrender.

The following will not re-narrate one judgment after another but instead discuss commonalities and differences between said decisions as a follow-up to *LM* at the national level.

1. Commonalities

a) Standard of fundamental rights examination

All examined court decisions implement the two-step test established in *LM*. Hence, there is no fragmentation in the sense that some executing judicial authorities apply the test but others do not. For Germany, in particular, this is not a matter of course, since the Federal Constitutional Court (based in Karlsruhe) took a different stance as the CJEU in its 2015 "identity control decision."[35] Accordingly, German courts are obliged to refuse the execution of an EAW if there are sufficient grounds to believe that the essential fundamental rights guarantees embodied in Art. 1 (human dignity) and Art. 20 (rule of law) of the German Constitution – the principles resistant to any integration compromise – are not ensured in the issuing (requesting) EU Member State. This approach differs in various aspects to the one taken by the CJEU a bit later in *Aranyosi & Căldăraru* (II. above),[36] which left the judges at the German Higher Regional Courts sitting between two chairs (and having to reconcile obligations put forward by the highest court of their own jurisdiction in Karlsruhe and the leading court in Luxembourg when interpreting Union law).[37] It also triggered the question of whether the threshold for refusing EAWs on the grounds of fundamental rights violations (*ordre public "à la facon allemande*") is lower than the thresholds established by the CJEU in *Aranyosi & Căldăraru* and *LM,* respectively.[38]

b) Results of the concrete test

All courts confirmed the abstract danger to the right to an independent tribunal and thus to the right to a fair trial in Poland, as a consequence of which the first requirement of the *LM* test was considered fulfilled. Courts base their decisions on various sources; the main source here is the Commission's Reasoned Proposal for a Decision of the Council on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, which was issued on 20 December 2017 in the framework of the Article 7 TEU procedure.[39] Therefore, the decisive and most critical stage for all courts was the second step of the test. It entailed the necessity to carry out an assessment of whether the systemic and generalised deficiencies in the independence of the Polish judiciary have an impact on the extraditee's individual situation. The courts executing the Polish EAWs agree that it is a stringent test with rather narrow criteria and often highlight that refusal can only be admitted in exceptional circumstances.[40]

Except for the HRC of Karlsruhe in the recent judgments cited above, all courts have so far negated the fulfilment of the requirements of the second stage, i.e., they refused to assume the realisation of a concrete danger of fair trial infringements towards the requested person once he/she is surrendered to

Poland. In *Celmer*, Justice *Donnelly* clarified that, although the Minister of Justice had replaced the presidents of each of the Polish courts in which the defendant would stand trial if surrendered, all other indications of fair trial rights in Poland remain intact.[41] Therefore, the essence of the right to a fair trial of Mr *Celmer* was not at risk. The SC Edinburgh in *Maciejec* strongly resorted to expert witness statements from defence lawyers practising extradition law in Poland and from NGO lawyers. The SC stated that the witnesses were all critical of the changes in Polish law and in Poland's judicial structure, but they could not point to a proven instance of an unfair trial. From the case law to date, we can therefore conclude the following:

- It did not suffice that the requested persons referred to changes at the ordinary courts, which were brought about by the judicial reforms, and to disciplinary power of the Polish Minister of Justice over the Presidents of the Courts as well as the chilling effect it has had on the administration of justice;
- It did not suffice that the requested persons referred to statements made by Polish justice officials in the media against them, thus leaving doubts as to the presumption of innocence;
- It did not suffice that evidence given by witnesses (even by Polish judges) was in the defendants' favour in voicing serious concerns over the independence of Polish judges, because the statements at the same time pointed out that judges try to perform their obligations to the best of their abilities to administer justice impartially and free from pressure.

In its first follow-up decision of January 2019, the HRC of Karlsruhe shared these lines of argument, stressing that the changes at the "supreme level" of the Polish judiciary – including the introduction of the "exceptional appeal" that has enabled the Polish Supreme Court to adjudicate on the case, even though no application was made by the parties to the proceedings – have not affected the capabilities of the ordinary courts to decide on criminal cases in an independent and impartial manner. The deteriorations in the rule of law, however, that occurred after the so-called "muzzle law" took effect on 14 February 2020 were the turning point for the HRC. The law particularly resulted in a tightening of the disciplinary responsibilities of judges, also at the ordinary court level.

In its groundbreaking decision of 17 February 2020, the HRC of Karlsruhe produced excerpts from the translation of the new law and stressed that the elements enabling disciplinary proceedings against judges are far-reaching and not delimited. The court also took into account developments against the Polish reform at the EU level that occurred after the CJEU's judgment in *LM*. The HRC paid particular attention to the CJEU's judgment of 19 November 2019, in which doubts were raised as to the independence and impartiality of the new Disciplinary Chamber at the Polish Supreme Court.[42] It also took into consideration other (pending) infringement actions against the reform referred to the CJEU by the European Commission. Against this background, an unfair trial due to a lack of judges' independence is no longer an abstract danger, because the new disciplinary regime has foreseen repercussions for the entire judiciary, including for judges at the competent criminal court deciding on the offense for which the EAW was issued. In its decision of 27 November 2020, the HRC of Karlsruhe indicated that − in view of the status of the judicial reform and the continuing struggle between EU institutions and the Polish government to respect the EU's core rule-of-law value of an independent judiciary − non-extradition to Poland is principally to be assumed for the moment, unless a different result can be concluded after comprehensive investigation of the facts/situation.

c) Burden of proof

Notwithstanding this new case law development in Germany, which has seemingly not taken been up in other EU jurisdictions so far (see also 2. below as regards the new reference for a preliminary ruling by the Rechtbank Amsterdam), the approach towards the burden of proof still remains a major obstacle for the defendant: For the assessment, the courts normally consider the information provided by the requested person, i.e. the defendant is placed to substantiate that the fair trial infringement would concretely affect his/her case.[43] It can be observed that most cases have failed, because the defence counsel of the requested person could not provide substantial grounds for believing that fair trial standards are not being upheld in the client's concrete trial case. In other words, the failure at step 2, substep 2 demonstrates that the threshold of the test for the requested person is nearly not achievable.

d) Nature of the offense

Another important issue in the argumentation of the courts is the nature of the offence at issue. It plays a decisive role in the applicability of the test. The EWHC properly put it by saying that "run-of-the mill criminal allegations," such as drug trafficking, tax evasion, and sexual abuse without a political connotation, can hardly justify an individualised real risk of fair trial infringement.[44] The EWHC but also the SC Edinburgh, German HRCs, and especially the Rechtbank Amsterdam stress the nature of the offence and the factual context as important elements of the second sub-step in *LM*. Therefore, the result may be different if the requested person demonstrates a political or special government interest in his/her punishment/prosecution or the probability of discriminatory treatment for

social or ethnic reasons. The HRC of Karlsruhe additionally stressed the aspect of whether the defendant deliberately absented himself for his/her trial or is willing to stand trial in the *executing* Member State, if necessary.[45]

e) Purpose of EAWs

Lastly, courts have stated that a distinction must be made between EAWs issued for the purpose of conducting a criminal prosecution and EAWs issued for the purpose of enforcing a custodial sentence (see also Art. 1(1) FD EAW). The HRC of Bremen stressed that it is nearly impossible to establish a real risk of an unfair trial at the extradition stage of proceedings, when EAWs issued for the purpose of enforcing sentences, because it is not clear whether it will actually come to further court decisions. Similarly, the SC Edinburgh in *Maciejec* and the EWHC in *Lis* argued that, in execution cases, there is either a court decision on early release (if there is a conviction for a single charge) or a disaggregation hearing (if *a cumulo* sentence is imposed after multiple convictions). Both prospective procedures must be assumed to be within the guarantees of Art. 6 ECHR and Arts. 47, 48 CFR, however, unless the hearings are particularly sensitive or political in nature.

2. Differences

a) "Flagrancy" or "essence" test?

Parties before the IEHC and the EWHC raised the question as to which threshold exactly needs to be observed, since the CJEU in *LM* has not explicitly aligned its case law to that of the ECtHR. This conclusion stems particularly from the fact that the CJEU referred in *LM* to a breach of the *essence* of the fundamental right to a fair trial. The CJEU avoided using the phrase "flagrant denial of justice," although AG *Tanchev* recommended that the judge's bench follow suit with the flagrancy test, as established by the ECtHR in *Soering* (I. above). Parties before the IEHC and the EWHC therefore wondered whether the CJEU's approach means a lower threshold for denying the execution of EAWs than the refusal ground for extraditions in the remit of the ECHR. In the affirmative, this would also have altered the evidentiary standards required to establish a breach on the part of the defence. This question was not discussed by the German and Dutch courts and was even skipped (SC Edinburgh). Both the IRHC and the EWHC concluded, however, that the "flagrancy" and "essence" tests are the same. They are of the opinion that the CJEU did not amend the test of a "flagrant denial of justice."[46] One of their lines of argumentation is remarkable: if the Luxembourg Court were seeking to differ from the often-repeated formulation of a flagrant denial of justice of the Strasbourg Court, it would have said so.

b) Consequences of systemic and generalised deficiencies in judicial independence

In the cases *Celmer* and *Lis,* the IEHC and EWHC also had to discuss the question of whether the establishment of systemic or generalised deficiencies in the independence of the Polish courts would (more or less automatically) amount to a flagrant denial of justice and whether this is sufficient to refuse an EAW from Poland. This may sound surprising, since the CJEU made clear in *LM* that the mere conclusion of systemic and generalised deficiencies in itself does not justify the refusal of an EAW. The defence counsels before the IEHC and EWHC argued, however, that independence of judicial authorities is so fundamental, that a lack of independence would distort the foundation upon which the EAW mechanism functions and, therefore, the Polish court issuing an EAW can no longer be considered a judicial authority within the meaning of the FD EAW.

Interestingly, the Rechtbank Amsterdam argued similarly when it put forward its reference for a preliminary ruling in July/September 2020 (see above). However, the Amsterdam court took up the latest developments concerning judicial reforms in Poland (see above III.1.b). Against this backdrop, the Rechtbank Amsterdam argued that the reforms aggravating rule-of-law compatibility now affect all Polish courts and, consequently, the right of all individuals in Poland to an independent tribunal is no longer ensured.[47] The CJEU was asked whether this finding is sufficient in itself to deny the status of "issuing judicial authority" to the court that issued the EAW and to presume that there are substantial grounds for believing that the requested person will run a real risk of breach of his/her fundamental right to a fair trial − without there being any need to examine the impact of deficiencies in the particular circumstances of the case.[48] In its reply of 17 December 2020, the CJEU completely upheld its approach taken in *LM*. National courts must pay regard to the individual situation of the person concerned and be convinced that the concrete danger of the deficiencies is likely to be realised in the proceedings against that person. Denial of the status "issuing judicial authorities" to all courts of the Member State in question, due to the assumption of systemic and generalised deficiencies in the independence of judges (even if the seriousness of the deficiencies increased), would lead to a general exclusion of the Member State from the mutual recognition instrument.[49] The existence of or increase in the systemic and generalised deficiencies can only be indicative. Furthermore, dispensing a specific and precise assessment would mean a general suspension of the EAW mechanism, which would blur the lines of the procedure provided for in Article 7(2) TEU.[50]

This standpoint was also taken by the IEHC and EWHC in their preceding decisions. Objecting to the counter-arguments

by the defence counsel, the courts in Dublin and London advocated that the flagrant denial test requires something more than the mere establishment of a lack of independence, be it systemic or generalised. The court must be convinced of exceptional circumstances. In conclusion, it is therefore necessary to point to specific concerns about the lack of impartiality and independence, as this is what may affect the individual requested person.

c) Evidentiary basis

A large difference exists as regards the evidence adduced by the courts that forms the basis of their rulings. The different traditions between common law and civil law cultures are responsible for the differences when deciding extradition cases: Whereas continental European courts heavily rely on the supplementary information sought officially from requesting/issuing authorities, common law courts extensively rely on expert witnesses. The latter invite neutral legal experts from the issuing State, who are not involved parties of the case, to give a statement on the legal situation in their country and their position on the controversial issues of the case. This not only includes written statements but also the presence of experts at oral hearings before the British, Scottish, and Irish courts, where they are also cross-examined.[51] Supplementary information from the official Polish authorities is only used to contribute to the overall court assessment, i.e., as a basis to be properly informed. The parties to the extradition proceedings, including the defendant, have the opportunity to participate intensively in drafting the questions for submission to the issuing judicial authority.

In contrast, the German courts and the Rechtbank Amsterdam considered supplementary information essential and it therefore serves as the main basis for their surrender decisions.[52] The Rechtbank Amsterdam emphasised that the dialogue launched by requesting supplementary information in accordance with Art. 15 para. 2 FD EAW is an important basis for objective information about changes in the issuing State or about conditions for the protection of the individual's fundamental rights. As a result, both the HRC of Karlsruhe and the Rechtbank Amsterdam submitted a long list of detailed questions to the Polish District Court, which had issued the EAW.[53] Both courts placed weight on the answers from their colleagues in Poland in order to dispel doubts about whether the requested person does or does not run a concrete risk of being subject to an unfair trial.

The evidentiary value of the additional information from the issuing country in the second step of the *LM* test is, incidentally, viewed differently. The EWHC held that it is impossible to give information on the second prong of the test. Therefore, the court did not submit any supplementary information, because they were only to underpin general deficiencies that were already clearly evidenced by the Reasoned Opinion of the Commission in the Article 7 procedure as well as other supporting material from public bodies, NGOs, and expert witnesses. In contrast, the IEHC considered the additional information necessary to support its findings.

d) Safety net and assurances

At the end of its ruling of January 2019 (first follow-up decision), the HRC of Karlsruhe posed the question of whether an additional safety net, established by means of assurances or by setting conditions, is needed if *no* real risk of breach of fundamental rights to an independent tribunal is determined in the concrete case. In *Celmer*, Justice *Donnelly* contemplated this option only in the reverse, i.e., if she had admitted in the specific and precise assessment that there are substantial grounds for believing that *Celmer* would be at real risk of breach of his fundamental rights to an independent tribunal, the Polish authorities would have to give assurances that he would not. The other courts that are the subject of the present analysis do not even mention the problem or the possibility of assurances. Insofar, the HRC of Karlsruhe stands out: In its decision of January 2019 – which, in principal, backs the surrender of the requested person to Poland – it stated that the issuing authority was unable to give the requested binding assurance (that the deciding judges would not be subject to disciplinary proceedings). However, in order to rule out that a political or improper influence governs the proceedings at issue, the surrender is to be granted under the condition that the German ambassador in Poland or his representative can take part in the trial against the requested person and visit the person in jail if he is convicted. This reflects the stance that the executing authorities have a certain duty of care towards the requested person (regardless of his/her nationality) and must proactively take measures against possible fair trial infringements – an approach that has seemingly not been followed by any other court. In reaction to this stance, the HRC of Cologne bluntly rejected the inclusion of any condition in the admissibility decision by arguing that there is no factual basis for assuming unfairness in the trial proceedings of the defendant in Poland.[54]

IV. Final Remarks

The majority of national courts has come to the same conclusions, i.e., that the reforms of the judiciary in Poland have not yet affected the fundamental rights position of the person concerned in the concrete criminal trial proceedings. The analyses in this article showed that this finding was reached via different routes and approaches. They also demonstrated

that the test established in *LM* is a very stringent – and, in the end, too narrowly construed – test, one which has produced much paperwork but has hardly led to any added value for the person concerned (extraditee).[55] From the perspective of defence lawyers, the test is rather disappointing: they must invest too much effort to provide the respective material evidencing potential fair trial violations against the client in the issuing State, with little effects. Against this backdrop, the *LM* judgment might be considered a Pyrrhic victory only.

Although the CJEU in *LM* reached the long overdue clarification that human rights can and must play a role in surrender proceedings, thereby acknowledging that the EAW is not a black box that must be automatically recognized,[56] the door for refusing EAWs on fundamental rights grounds is merely ajar. In practice, the approach triggers a number of challenges and questions for national judges, e.g.:

- How can the judge reconcile serious concerns put forward by the individual within the tight time limits for taking surrender decisions foreseen in the FD EAW?
- Which type of evidence is suitable for the different steps of the test, in the end proving the specific circumstances of the person concerned?
- Which questions can be addressed within the framework of the required dialogue with the issuing judicial authority (bearing in mind the tension between the Damocles sword of mutual recognition, on the one hand, and doubts over mutual trust, on the other)?[57]
- Is the request for supplementary information expedient and are the answers received trustworthy?
- Which more mitigating efforts can be taken instead of refusal (e.g., the request for assurances or the setting of conditions vis-à-vis the issuing authority)?
- What are the consequences if there is no indication of systemic and generalised deficiencies in relation to fair trial guarantees in an EU Member State but if the guarantee is likely not to be maintained in a specific case (e.g., in the case of a politically motivated criminal trial in Member State X)?[58]

Notwithstanding, the HRC of Karlsruhe demonstrated in its recent jurisprudence (decisions of February and November 2020) that the diverging extradition interests can also be adequately reconciled within the framework of the established *LM* test. The court showed that the CJEU's approach includes a certain amount of leeway for interpretation by the national authorities examining the execution of EAWs from countries in which shadows lie over the rule of law. If well founded, the second prong of the test can be affirmed, especially when considering the recent, most alarming rule-of-law developments in the respective Member State. It would be a positive development if other courts in the EU took greater account of this courageous approach.

Thomas Wahl
Senior Researcher, Max Planck Institute for the Study of Crime, Security and Law – Department of Public Law, Freiburg/Germany

1 S. Maffei, Extradition Law and Practice, 2019, p. 24; S. Gleß/T. Wahl/F. Zimmermann, HT I, "§ 73 Grenzen der Rechtshilfe", mn. 1, in: Schomburg/Lagodny, *Internationale Rechtshilfe in Strafsachen*, 6th ed. 2020; J. Vogel/C. Burchard, "IRG, Vor § 1", mn. 229, in: Grützner/Pötz/Kreß/Gazeas (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, 3rd ed.

2 O. Lagodny, Die Rechtsstellung in der Bundesrepublik Deutschland, 1987, p. 256; Gleß/Wahl/Zimmermann, *op. cit.* (n. 1), mn. 14 et seq.

3 Cf. ECtHR, 7 July 1989, *Soering v United Kingdom*, Applic. no. 14038/88, para. 89 stressing that the establishment of safe havens would endanger the foundations of extradition. Analyses of the CJEU's case law allow a similar approach to be concluded: compare the LM judgment discussed in this article and the CJEU's judgment of 27 February 2018 in Case C-64/16, Associação Sindical dos Juízes Portugueses (cf. A. Torres Pérez, "From Portugal to Poland: The Court of Justice of the European Union as a watchdog of judicial independence", (2020) 27 MJ, 105; M. Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM", (2019) 15 *European Constitutional Law Review*, 17, 47; A. Fr ckowiak-Adamska, "Drawing Red Lines With No (Significant) Bite – Why an Individual Test Is Not Appropriate in the LM Case", *Verfassungsblog* (30 July 2018), <https://verfassungsblog.de/drawing-red-lines-with-no-significant-bite-why-an-individual-test-is-not-appropriate-in-the-lm-case/> accessed 21 January 2021. For the approach of the German Federal Constitutional Court, cf. BVerfG, Official Case Reports E 75, 1, 16, entitled by Vogel as "restriktive Einheits- und Mischformel" (literally translated: "restrictive omnium and mixing formula") – see J. Vogel, "IRG, § 73", mn. 51, in: Grützner/Pötz/Kreß/Gazeas, *Internationaler Rechtshilfeverkehr in Strafsachen*, *op. cit.* (n. 1).

4 ECtHR, *Soering, op. cit.* (n. 3), para. 113.

5 ECtHR, 17 January 2012, Othman [Abu Qatada] v United Kingdom, Applic. no. 8139/09, paras. 259/260. In the case at issue, the ECtHR confirmed a "flagrant denial of justice" because it was well founded that evidence obtained by means of torture would be used at retrial in the requesting state (Jordan) against the person concerned. The ECtHR also gives examples of other cases having the potential of a flagrant denial of the guarantees enshrined in Art. 6 ECHR. For subsequent ECtHR case law see also Advocate General Tanchev, Opinion of 28 June 2018 in Case C-216/18 PPU, LM, para. 84.

6 *O.J.* L 190, 18.7.2002, 1.

7 As detailed by the European Commission in its Reasoned Proposal of 20 December 2020 on Art. 7 TEU requesting the Council to determine that there is a clear risk of a serious beach by the Republic of Poland of the rule of law, COM(2017) 835 final.

8 [2018] IEHC 153.

9 CJEU, 25 July 2018, Case C-216/18 PPU, *LM; see also* T. Wahl, "CJEU: Refusal of EAW in Case of Fair Trial Infringements Possible as Exception", (2018) *eucrim,* 104.

10 CJEU, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, see also T. Wahl, "CJEU Strives to Balance Human Rights and Mutual Recognition", (2016) *eucrim, 16.*
11 CJEU, LM, *op. cit.* (n. 9), para. 36.
12 CJEU, LM, *op. cit.* (n. 9), paras. 43 et seq. referring to the judgment in Aranyosi & Căldăraru, *op. cit.* (n. 10).
13 See also P. Bárd and W. van Ballegoij, "The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU", Verfassungsblog, 29 July 2018, <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>, accessed 23 January 2021; M. Payandeh, "Europäischer Haftbefehl und Grundrecht auf ein faires Verfahren", (2018) Juristische Schulung (JuS), 919, 920.
14 CJEU, LM, *op. cit.* (n. 9), para. 61; CJEU, Aranyosi & Căldăraru, *op. cit.* (n. 10), para. 92.
15 CJEU, LM, *op. cit.* (n. 9), para. 68; CJEU, Aranyosi & Căldăraru, *op. cit.* (n. 10), para. 94.
16 CJEU, LM, *op. cit.* (n. 9), para. 74 et seq.; M. A. Simonelli, "'… And Justice for All?' The right to an independent tribunal after the ruling of the Court of Justice in LM", 10 (2019) New Journal of European Criminal Law (NJECL), 1, 7 ; A. Martufi/D. Gigengack, "Exploring mutual trust through the lens of an executing authority: The practice of the Court of Amsterdam in EAW proceedings", 11 (2020), *NJECL*, 282, 288.
17 CJEU, LM, *op. cit.* (n. 9), paras, 76, 77.
18 F-G. Ruiz Yamuza, "LM case, a new horizon in shielding fundamental rights within cooperation based on mutual recognition. Flying in the coffin corner", 20 (2020) *ERA Forum*, 371, 388.
19 Cf. ECtHR, Othman, *op. cit.* (n. 5), para. 258; ECtHR, Soering, *op. cit.* (n. 3), para. 113.
20 Cf. the formulation in Othman, *ibid*.
21 J. Geneuss/A. Werkmeister, "Faire Strafverfahren vor systemisch abhängigen Gerichten?", 132 (2020) *ZStW*, 102, 113; M. Krajewski, "Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges", 14 (2019) *European Const. Law Rev.*, 792, 805; D. Sarmiento, "A comment on the CJEU's judgment in LM", (2018) 25 MJ, 385 – all stressing the "Article 7 dilemma" implied in the FD EAW. Payandeh ((2018) JuS, *op. cit.* (n. 13), 921) criticizes the CJEU's approach, because it makes a judicial question dependent on a political mechanism.
22 CJEU, *LM*, *op. cit.* (n. 9), para, 61.
23 This conclusion results from desk research and replies that the author received from foreign experts of the International Extradition Group in September 2019. The International Extradition Group was initiated by Prof. Dr. Stefano Maffei/University of Parma in 2016 and is a forum for extradition lawyers and scholars all over the world. More information on the group is available at <https://internationalextradition.org/>.
24 [2018] IEHC 639.
25 [2018] EWHC 2848 (Admin).
26 [2019] SC EDIN 37.
27 See the overview at Martufi/Gigengack, *op. cit.* (n. 16), 11 (2020) *NJECL*, 294 et seq.
28 ECLI:NL:RBAMS:2018:5925.
29 ECLI:NL:RBAMS:2018:7032; see also T. Wahl, "Fair Trial Violation: Amsterdam Court Refuses Surrender to Poland", (2019) *eucrim*, 159.
30 Joined Cases C-354/20 PPU and C-412/20 PPU, "*L and P"/Openbaar Ministerie*.
31 Decisions in Germany that can be considered as a follow-up to *LM* are, for instance: HRC of Brandenburg, Decision of 18 August 2020 – 2 AR 16/20; HRC of Berlin, Decision of 3 April 2020 – (4) 151 AuslA 201/19 (234/19); HRC of Düsseldorf, Decision of 14 June 2019 – 4 AR 38/19; HRC of Cologne, Decision of 15 January 2019 – 6 AuslA 115/18 – 80; HRC of Bremen, Decision of 7 September 2018 – 1 Ausl. A 31/18.
32 Cf. the decisions of the HRC of Karlsruhe in case Ausl 301 AR 95/18, in particular the decision of 7 January 2019. This decision is commented in English by A. Oehmichen at <https://www.linkedin.com/pulse/after-cjeus-decision-lm-25072018-c21618-ppu-german-court-oehmichen?trk=portfolio_article-card_title>.
33 HRC of Karlsruhe, Decision of 17 February 2020, Ausl 301 AR 156/19. This decision is summarised in English by T. Wahl, "Fair Trial Concerns: German Court Suspends Execution of Polish EAW", (2020) *eucrim*, 27–28.
34 HRC of Karlsruhe, Decision of 27 November 2020, Ausl 301 AR 104/19, BeckRS 2020, 36266.
35 Federal Constitutional Court, Order of 15 December 2015. An English summary is provided by the press release available at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html> accessed 21 January 2021.
36 H. Satzger, "Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant", 8 (2018) *EuCLR*, 317, 327 et seq.
37 T. Wahl and A. Oppers, "European criminal procedure law in Germany: Between tradition and innovation", in: E. Sellier and A. Weyembergh (eds.), *Criminal Procedures and Cross-Border Cooperation in the EU Area of Criminal Justice*, 2020, pp. 54, 104.
38 T. Wahl, "Federal Constitutional Court Invokes Identity Review in EAW Case", (2016) *eucrim*, 17.
39 COM(2017) 835 final, *op. cit.* (n. 7).
40 IEHC in Celmer, mn. 71; EWHC in Lis, mn. 71; HRC of Karlsruhe, Decision of 27 November 2020, mn. 43.
41 IEHC in Celmer, mn. 105
42 Joined Cases C-585/18, C-624/18, and C-625/18; see details in *eucrim* 3/2019, pp. 155–156.
43 For the approach by the Rechtbank Amsterdam, see Martufi/Gigengack, *op. cit.* (n. 16), 11 (2020) *NJECL*, 295. See also R. Kert, "Grundrechtsschutz und gegenseitige Anerkennung strafrechtlicher Entscheidungen in einem Raum der Freiheit, der Sicherheit und des Rechts", (2020) *ÖJZ*, 719, 728, who is critical to the CJEU's approach to expect the defendant to prove repercussions of deficiencies in his/her individual case.
44 This was also the main argument by the HRC of Brandenburg (*op. cit.*, n. 31): A (general) extradition ban cannot be accepted if the defendant is accused of "common criminal offences", such as breach of maintenance obligation.
45 Decision of 27 November 2020, mn. 41.
46 After Brexit (i.e., from 1 January 2021 onwards), UK courts must decide, however, to which test they feel inclined in extradition cases with EU countries, since they are no longer bound to the EU's mutual recognition instruments and the CFR (see the questions raised in Sheriff Court (Edinburgh), judgment of 21 December 2020, [2020] 12 *WLUK* 457, *Lord Advocate v Zagajewska & Others*). Notwithstanding, the "essence" of the fundamental right to a fair trial is difficult to define (cf. M. Wendel, (2019) 15 *Europ Const L Rev*, *op. cit.* (n. 3), 27; in general, K. Gutmann, "The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?" (2019) 20 *German Law Journal*, 884).
47 Using similar arguments, the EWHC granted permission to appeal against an extradition to Poland (cf. [2020] EWHC 1459 (Admin), *Wozniak v Poland*).
48 Cf. CJEU, 17 December 2020, Joined Cases C-354/20 PPU and C-412/20 PPU, "*L and P*", para. 33.
49 CJEU, "L and P", *op. cit.* (n. 48), para. 43.
50 CJEU, "L and P", *op. cit.* (n. 48), para. 59; some authors share the CJEU's approach: M. Bonelli, "Intermezzo in the Rule of Law Play: The Court of Justice's LM Case", in: A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States*, 2021, p. 455; L. Bachmaier Winter, "Judicial independence in the Member States of the Council of Europe and the EU: evaluation and action", (2019) *ERA Forum* 20, 113, 125.
51 The SC Edinburgh judgment in Maciejec is instructive in this sense. In the Celmer case before the IEHC, the Irish Human Rights and Equality Commission – an NGO – was invited amicus curiae; it assisted in the assessment of evidence.
52 For the approach of the Amsterdam court emphasing the dialogue with the Polish authorities, see Martufi/Gigengack, *op. cit.* (n. 16), 11 (2020) *NJECL*, 282.
53 The length of the list of questions seeking supplementary information is not unproblematic. In relation to bad prison conditions (Art. 4 CFR), the CJEU stressed that the list must be practicable and in compliance with the duty of sincere cooperation and cannot lead to a "standstill" of the cooperation instrument (CJEU, 25 July 2018, Case C-220/18 PPU, *ML/Generalstaatsanwaltschaft Bremen*, paras. 103–104).
54 HRC of Cologne, *op. cit.* (n. 31).
55 The CJEU's too narrowly designed test and the difficulty of perform-

ing the test in practice are also the major points of criticism in the legal literature. See, for instance, P. Bárd and W. van Ballegoij, "Judicial Independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v LM", (2019) *NJECL*, 353, 360; N. Šubic, "Executing a European Arrest Warrant in the Middle of the Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality (*LM/Celmer*)", (2018) 21 *Irish Journal of European Law*, 98; Simonelli, *op. cit.* (n. 16), 1; Krajewski, *op. cit.* (n. 21), 811; Geneuss/Werkmeister, *op. cit.* (n. 21), 102.

56 This is a longstanding call by German practitioners and academics. Cf. T. Wahl, "The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany," in: G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, 2009, p. 115, 121.

57 Cf. CJEU, 25 July 2018, C-220/18, ML, para. 103.

58 For an example, see the case [2020] EWHC 2709 (Admin), *Adamescu v Romania*.

Independence of Public Prosecutors' Offices

Recent Case Law of the CJEU on the European Arrest Warrant and its Impact on the EU Criminal Justice System

Giuseppe Ruben Grimaldi*

The independence of the judiciary has been a recurrent issue in the case law of the Court of Justice of the European Union in recent years. In particular, in 2019 and 2020, in a series of new cases concerning the status of national public prosecutors, the Court examined the level of independence necessary for public prosecutors to fall within the concept of an "issuing judicial authority" within the meaning of Article 6(1) of the Framework Decision on the European Arrest Warrant. After an exposition of these cases, this article seeks to investigate the impact of this case law on the EU criminal justice system. Crucially, it is argued that the new case law is likely to change the EAW dynamics that the Member States, especially those that have conferred upon their public prosecutors' offices the power to issue EAWs, have been relying on so far and, as a consequence, the EU criminal justice system as a whole. This new framework gives rise to several practical difficulties for the executing judicial authorities that may entail, *inter alia*, a longer deprivation of liberty of the requested persons. A deeper reflection on this outcome is therefore also needed at the legislative level.

While the Court of Justice of the European Union ("CJEU" or "the Court") has regularly provided clarification on the scope of various provisions of the Framework Decision on the European Arrest Warrant (FD EAW)[1] since its entry into force, never had it had the chance to interpret the notion of "judicial authority", referred to in Art. 6 of the FD EAW, as extensively as it was asked to do in a series of cases in 2019 and 2020, notably as regards national public prosecutors. In particular, the Court was asked to establish criteria for determining the level of independence necessary for public prosecutors to be regarded as judicial authorities capable of issuing, and executing, an EAW.

The issue of judicial independence has undoubtedly been a *Leitmotiv* of the Court's case law in recent years. In this regard, we cannot but recall, for instance, the importance of the Court's findings in the judgments on the "Polish rule-of-law crisis."[2] In general terms, judicial independence can be defined as the ability of the judiciary to execute its duties free from the influence of, in particular, the executive power,[3] and without being driven by private interests. The simplicity of this general definition clashes, however, – as in all aspects of life, when it comes to applying a general principle in practice – with the complexity of the multifaceted reality, as will be shown in the next paragraphs dedicated to the status of national public prosecutors in various Member States with regard to the FD EAW.

I. The Concept of an 'Issuing Judicial Authority' within the Meaning of Art. 6(1) of the FD EAW

Art. 6(1) FD EAW provides that "[t]he issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue [an EAW] by virtue of the law of that State." Behind this tautological text is the lack of a real definition of the concept in question – a fact which has given rise to doubts in the national practice, leading several States to seek guidance from the CJEU to interpret that provision. The resulting case law of the Court, which in certain cases has caused strong reactions in the Member States, provides clari-

fication as to the concept of an "issuing judicial authority." However, the Court's clarification is not without consequences: as will be exposed in section III of this article, it could entail deep changes in the national law of some Member States.

In fact, this case law first began to take shape with the rulings of 10 November 2016 in *Poltorak*, *Kovalkovas* and Özçelik.[4] In these cases, the CJEU clarified, in the first place, that the concept of an "issuing judicial authority" is an autonomous concept of EU law; accordingly, it cannot be left to the assessment of the Member States.[5] In the second place, the Court ruled that police services and ministries of justice cannot be regarded as "issuing judicial authorities" in the sense of Art. 6(1) FD EAW.[6] Indeed, in accordance with the principle of the separation of powers, the judiciary must be distinguished from the executive; therefore, administrative authorities or police authorities, which are placed under the hierarchy of the executive, or a ministry of justice, which is an organ of the executive, are not covered by the concept of judicial authority.[7]

II. Recent Case Law of the CJEU on the Status of National Prosecutors

As mentioned above, in 2019 and 2020, the Court of Justice was confronted with a number of requests from several Member States for a preliminary ruling about the interpretation of the concept of a "judicial authority" under Art. 6 FD EAW. This time, however, the issues raised in these cases specifically concerned the status of national public prosecutors and their level of independence.

1. Joined Cases C-508/18 and C-82/19 PPU (*Public Prosecutors' Offices in Lübeck and Zwickau, Germany*)

The landmark judgment of 27 May 2019 in the joined cases C-508/18 (*Public Prosecutor's Office in Lübeck*) and C-82/19 PPU (*Public Prosecutor's Office in Zwickau*),[8] delivered by the Grand Chamber of the CJEU, ushered in the case law at issue. The referring courts – in the context of two EAWs issued by two German public prosecutors' offices – asked the CJEU whether those German prosecutors could be regarded as "issuing judicial authorities" within the meaning of Art. 6(1) FD EAW, insofar as they are hierarchically subordinate to the Minister for Justice of the relevant *Land*, who may exercise, in relation to those prosecutors, directly or indirectly, an "external" power of supervision and direction, or even instruction, in connection with the adoption of a decision to issue an EAW.[9]

The Court, building on its previous findings in *Poltorak* and *Kovalkovas*, reiterated that the concept of a "judicial authority" must be understood as designating not only the judges or courts of a given Member State, but also, in a broader way, the authorities *participating* in the administration of criminal justice in that Member State, as long as they do not belong to the executive.[10] It found that this first requirement was satisfied by the German prosecutors in question, given their essential role in the conduct of criminal proceedings.

However, in order to be regarded as a judicial authority, the authority responsible for issuing an EAW must also, as a second requirement, act independently in the execution of its functions and, accordingly, must not be exposed to any risk of being subject to an instruction in a specific case from the executive. In that regard, the Court recalled the dual level of protection of procedural and fundamental rights that the person against whom an EAW has been issued must enjoy – that is, protection of these rights both when a national decision is adopted and when an EAW is issued.[11] Where this judicial protection [12] is carried out by entities that are not courts or judges, it can only be guaranteed by an institution that acts independently, without being exposed to an external power of instruction, in particular from the executive.[13] Furthermore, the decision taken by such an entity to issue an EAW, and the proportionality of that decision, "must be capable of being the subject … of court proceedings which meet in full the requirements inherent in effective judicial protection."[14]

In this case, notwithstanding the safeguards provided by German law to circumscribe the power of instruction enjoyed by the Minister for Justice to extremely rare situations, the possibility that a decision by a public prosecutor's office to issue or not to issue an EAW may be influenced by the external power of such a minister cannot be ruled out. Thus, since that second requirement is not satisfied, German public prosecutors do not fall within the concept of an "issuing judicial authority."

2. Case C-509/18 PF (*Prosecutor General of Lithuania*)

The same day of the judgment analysed above, the Grand Chamber of the CJEU, in its judgment in the similar case C-509/18,[15] found, by contrast, that the Prosecutor General of Lithuania fell within the concept of an "issuing judicial authority" under Art. 6(1) FD EAW. Indeed, that prosecutor's office participates in the administration of criminal justice in Lithuania[16] and satisfies the independence requirement as, whilst institutionally independent from the judiciary, its legal position in Lithuania affords it a guarantee of independence from the executive in connection with the issuing of an EAW, allowing it to act free of any external influence in exercising its functions.[17]

3. Opinions of Advocate General *Campos Sánchez-Bordona*

Advocate General *Sánchez-Bordona's* position in the two cases above was somewhat more "radical" than the one of the Court and is consistent with his position expressed in previous cases, notably Özçelik,[18] of which it constitutes a sort of continuation. In his Opinions, not only did the Advocate General, like the Court, exclude that the German prosecutors' offices be considered judicial authorities with the ability to issue judicial decisions such as EAWs, but he concluded that "the term 'issuing judicial authority' does not include the institution of the Public Prosecutor's Office,"[19] implying that only judges and courts are capable of issuing EAWs.[20] As a result, and unlike the Court in its subsequent findings, the AG concluded that the Prosecutor General's Office of Lithuania could not be regarded as an "issuing judicial authority" either.

In the AG's view, only courts *stricto sensu* can ensure a sufficiently high degree of independence in decisions regarding the deprivation of liberty of the person concerned for a significant amount of time[21] – as may be the case with an EAW – and are "capable of properly assessing the proportionality of issuing an EAW."[22] A public prosecutor's office, for its part, does not administer justice and lacks by its very nature "judicial independence" even if it is recognised in national law as having the status of an independent body,[23] since

> [i]n a State governed by the rule of law, this role is the exclusive responsibility of judges and courts and not of other authorities, including those which participate in the administration of justice, such as the Public Prosecutor's Office. The latter are not, like the judge, subject only to the law, are not independent to the same degree as judges, and, moreover, are always subject to the final decision of the court.[24]

This fundamental distinction between legal entities that administer justice (*ius dicunt*) and those that participate in its administration (such as the public prosecutor's office) or simply collaborate in its execution (such as the police or, in certain cases, private individuals) is specific to criminal law. It is thus important to define the limits within which these entities can act and, more importantly, to differentiate the contexts in which they act: the AG observes, for instance, that a public prosecutor's office may have a judicial nature in certain areas of criminal law cooperation, such as the taking of evidence, but this does not imply that it enjoys the same judicial nature in other matters, such as the issuing of an EAW, an act which may lead to long periods of detention.[25]

4. Joined Cases C-566/19 PPU and C-626/19 PPU (*French Public Prosecutor's Office*)

It did not take long before other national courts referred questions to the CJEU to seek clarifications concerning the independence requirement set out in the judgments in *Public Prosecutors' Offices in Lübeck and Zwickau* and *Prosecutor General of Lithuania*. In particular, questions were asked in respect of the Court's finding, at paragraph 75 of the first of these judgments, that the decision to issue an EAW "must be capable of being the subject … of court proceedings which meet in full the requirements inherent in effective judicial protection."

In joined cases C-556/19 PPU and C-626/19 PPU,[26] the referring courts had doubts as to whether French public prosecutors may be regarded as "issuing judicial authorities," insofar as, whilst independent from the executive, they are hierarchically subordinate to the Principal Public Prosecutor, who has the power to direct them. They also had doubts as to whether the fact that a court monitors compliance with the conditions for issuing an EAW, in particular its proportionality, before the actual decision of the prosecutor to issue such a warrant is adopted, satisfies the second level of judicial protection, as set out above in the analysis of the *Public Prosecutors' Offices in Lübeck and Zwickau* case.

As to the first question, the CJEU clarified that internal instructions given to public prosecutors by their hierarchical superiors, who are themselves public prosecutors, do not run contrary to the independence requirement, which prohibits only external instructions, in particular from the executive.[27]

As to the second question, the Court recalled that, where the decision to issue an EAW is taken by an entity which, whilst participating in the administration of justice in the Member State, is not a court or judge, the decision and the proportionality thereof must be capable of being the subject of court proceedings that ensure their compliance with the requirements inherent in effective judicial protection.[28] In that regard, it is for the Member States to decide which measures to apply to ensure that level of protection.

The Court found that the French system meets those requirements of effective judicial protection, as it provides for procedural rules that guarantee that the conditions for issuing an EAW and the proportionality of the EAW are subject to judicial review. Therefore, French public prosecutors fall within the notion of "issuing judicial authorities."

5. Case C-625/19 PPU (*Swedish Prosecution Authority*)

In case C-625/19 PPU,[29] the referring court asked the CJEU whether a public prosecutor's office, such as the Swedish Prosecution Authority, which acts independently from the executive and has issued an EAW, may be regarded as an "issuing judicial authority" if the *conditions* for issuing an EAW (i.e.

the issuance of a provisional national arrest warrant), and the proportionality thereof, have been assessed by a judge before the actual decision of that public prosecutor to issue the EAW.

The Court found that the Swedish system meets the requirements of effective judicial protection, as it guarantees that the conditions for issuing an EAW, and its proportionality, are subject to judicial review. Indeed, according to the Swedish law, the decision to issue an EAW must be based on a decision ordering the provisional detention of the person in question. The latter decision is made by a court, which must assess the proportionality of future measures, such as an EAW. In addition, the requested person is entitled to challenge the decision ordering his provisional detention and, in the event this decision is annulled, the EAW based on it is automatically invalidated. Therefore, the Swedish Prosecution Authority also falls within the notion of "issuing judicial authorities."

6. Case C-627/19 PPU (*Belgian Public Prosecutor's Office*)

In case C-627/19 PPU,[30] the national court asked the CJEU whether a public prosecutor, such as the Belgian Public Prosecutor's Office, who acts independently from the executive and has issued an EAW, may be regarded as an "issuing judicial authority" if the legislation of that Member State does not provide a separate judicial remedy to challenge the public prosecutor's decision to issue the EAW.

As in the last two judgments above, the Court found that the Belgian system meets the requirements of effective judicial protection. However, the case at issue, unlike those referred to above, concerned an EAW issued for the purposes of executing a custodial sentence, not of conducting criminal proceedings. The EAW was therefore based on an earlier enforceable final judgment, which suggests that the person concerned had already had the benefit of effective judicial protection.

The Court, departing from the Advocate General's Opinion,[31] concluded that the FD EAW does not preclude Member States from having legislation that does not provide for a separate judicial remedy to challenge the decision of a public prosecutor to issue an EAW for the purposes of executing a sentence.

7. Case C-510/19 (*Openbaar Ministerie*)

In its recent judgment of 24 November 2020 in case C510/19,[32] the Court dealt, this time, with the question of whether a national public prosecutor, namely the Public Prosecutor for the Amsterdam District, may be regarded as an "executing judicial authority" under Art. 6(2) FD EAW. The Court found that its case law on the concept of an "issuing judicial authority" can apply to the concept of an "executing judicial authority," since the status and nature of those authorities are identical. On this premise, it held that public prosecutors in the Netherlands cannot be regarded as "executing judicial authorities" within the meaning of the FD EAW, because they may be subject to instructions from the Netherlands Minister for Justice relating to the exercise of their functions and powers.

III. The Recent Case Law in Context: Critical Aspects and Impact on the EU Criminal Justice System

Considering the unequivocal answer of the Court in *Public Prosecutors' Offices in Lübeck and Zwickau*, the judgment in these joined cases had an immediate and direct impact.[33] The effects of the judgment were immediately the subject of discussions at the Council, within the Working Party on Cooperation in Criminal Matters (COPEN), to ascertain whether Member States were considering adopting legislative changes and whether the judgment could cause the release of requested persons in those States.

Since the vast majority of EAWs in Germany were issued by public prosecutors, that State, in particular, had to find a quick legal solution in order to remedy the fact that a large number of EAWs had suddenly become invalid. In a note, the German delegation stated at first that, acting on the basis of the Court's judgment, Germany would adjust its procedures for issuing EAWs, which "[f]rom now on … will only be issued by the courts … without [the need to change] the existing laws."[34] The German Ministry of Justice added, a few days later, that 5,300 existing EAWs were to be replaced by new warrants issued by courts.[35] This short-term choice was rather predictable, since the alternative solution – namely, a radical reorganisation of the hierarchical structure of German public prosecution offices, in which the instruction power of the executive would be suppressed and, accordingly, the entire balance of powers reformed – would have taken a much longer time.[36] Other Member States followed Germany in describing, through notes, the status of their public prosecutors' offices.[37]

The case law at issue also has an impact in those Member States in which, although the public prosecutor's office is fully independent, the national law does not provide for adequate legal remedies allowing the prosecutor's decision to issue an EAW to be challenged before a court. Such States will have to introduce legislative changes in that regard, on the understanding that, in accordance with the principle of procedural autonomy, they can choose how to ensure effective judicial protection.[38]

This new case law of the Court relating to the status of national public prosecutors is thus likely to change the EAW dynamics on which the Member States – namely, those that have conferred upon their public prosecutors' offices the power to issue EAWs – have relied to this point and, as a consequence, the EU criminal justice system as a whole. A closer exploration of this case law, however, inevitably raises the question of whether the stringent interpretation of Art. 6(1) FD EAW given by the Court actually does provide greater protection of the fundamental rights of the requested person.

The two-level protection required by the CJEU would *prima facie* suggest an affirmative answer to this question, as the issuing Member State must ensure that, even though a national arrest warrant has been issued by a court, the subsequent EAW will be issued by a fully independent entity able to guarantee effective judicial protection of the person concerned.[39] This rigorous two-level test, which requires the issuing authorities to assess the proportionality of the EAW and fulfil precise criteria, seems therefore to provide stronger protection of the person's fundamental rights.

Yet, on the other hand, and despite the consistency of the jurisprudence developed so far by the Court in the matter, relevant practical difficulties may arise for the executing authorities. In this respect, as stated above, these authorities now have to assess whether the criteria elaborated by the Court (in relation to the status of the issuing State's public prosecutors) are satisfied; that is, they must ensure that a proportionality assessment has taken place in the issuing Member State, that its public prosecutor's office is independent, etc. Not only does this evaluation require more time, thus potentially delaying surrender,[40] but it is also difficult for an authority of another Member State to carry out. As a result, the requested person's fundamental rights may, paradoxically, be less protected and the deprivation of his liberty even longer.

In this respect, it is worth recalling the astute legal arguments advanced by Advocate General *Campos Sánchez-Bordona* in his above-mentioned Opinions in cases C508/18, C82/19 PPU, and C-509/18, according to which only judges and courts administer justice (*ius dicunt*) and may guarantee the level of independence necessary to adopt an act, such as an EAW, capable of depriving a person of his liberty for a significant amount of time. This approach implies that, although in certain Member States, as in Lithuania, the Public Prosecutor's Office is not subject to directions or instructions from the executive and is, in this sense, fully independent from hierarchical constraint, such an entity does not have, by its own nature, the level of independence required to issue an EAW; thus, it cannot be considered *de plano* an "issuing judicial authority." In other words, what matters is not the "functional" independence, but the specific and exclusive "judicial" independence of the entity.

Moreover, according to the AG, when it comes to assessing the independence of a public prosecutor, not only the executive's power to give *specific* instructions, but also its power to give *general* instructions is relevant,[41] as is the hierarchical subordination of public prosecutors to their superiors. In addition, he maintained that a person requested under an EAW issued by a public prosecutor must be able to challenge that EAW before a judge or court in the issuing Member State, without having to wait until he/she is surrendered.[42]

The Court did not specifically address the issue raised by the Advocate General about the difference between functional independence and judicial independence, and it confirmed its broader interpretation of the notion of a "judicial authority," in line with its previous jurisprudence (see *Poltorak*).

In sum, whereas the Court "simply" requires that an authority participating in the administration of criminal justice, such as a public prosecutor's office, be functionally independent from the executive branch in order to be regarded as a judicial authority competent to issue an EAW, the Advocate General takes the view that account must be taken not only of the existence of a "vertical" dependency relationship, but especially of the judicial function of the authority in question.

While the CJEU is certainly not required to expressly refute AGs' reasoning, it would have been interesting if it had justified in greater detail its more extensive approach, whereby entities *participating* in the administration of criminal justice, if functionally independent from the executive, are included in the notion of an "issuing judicial authority."

The difficulties explained above could also have the effect of increasing the number of references for a preliminary ruling to the Court of Justice where executing authorities do not manage to determine whether the prosecution authority of a Member State is sufficiently independent to constitute a judicial authority. Such cases would entail an even longer delay to the surrender decision and, notably, a longer deprivation of liberty of the requested person. Admittedly, conferring the power to issue EAWs only upon courts, as is the case in some countries, could be less problematic in practice. It has the advantage that executing judicial authorities can presume – by relying on the principle of mutual trust – that the issuing authority is sufficiently independent, without the need to conduct an examination in each individual case.

Furthermore, the EAW system still suffers from flaws that the recent case law of the Court is not, *per se*, able to solve. One

issue, for example, is the lack of effective implementation, in several Member States, of EU procedural rights provided for by acts of EU law, such as the right for a requested person to have access to legal assistance before surrender.[43] It is thus essential that the European institutions strictly monitor Member States' implementation of those acts, in order to ensure that requested persons are not deprived of their liberty any longer than necessary, and that their procedural rights do not remain a dead letter.

Giuseppe Ruben Grimaldi
Lawyer Linguist, Court of Justice of the European Union

* The views expressed in this article are solely those of the author and do not necessarily reflect the views of his employer.

1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J.* L 190, 18.7.2002, 1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, *O.J.* L 81, 21.3.2009, 24.

2 *Inter alia*: CJEU, 24 June 2019, case C-619/18, *Independence of the Supreme Court*; 5 November 2019, case C-192/18, *Independence of the Ordinary Courts*; 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *Independence of the Disciplinary Chamber of the Supreme Court*. This article will not deal specifically with this series of cases, which would require a separate and thorough analysis.

3 The theory of the "separation of powers" is notoriously associated with the figure of the Baron de Montesquieu, and in particular with his famous treatise "*The Spirit of Laws,*" published in 1748.

4 CJEU, 10 November 2016, case C-452/16 PPU, *Poltorak*; 10 November 2016, case C-477/16 PPU, *Kovalkovas*; 10 November 2016, case C-453/16 PPU, *Özçelik*.

5 See, for example, *Poltorak*, *op. cit.* (n. 4), paras 31 and 32.

6 See *Poltorak*, *op. cit.* (n. 4), paras 35 and 46, and Opinion of AG Sánchez-Bordona in the same case, para. 39; *Kovalkovas*, *op. cit.* (n. 4), paras 35 and 45, and Opinion of AG Sánchez-Bordona in that case, para. 34.

7 Accordingly, an EAW issued by them cannot be considered a "judicial decision" within the meaning of Art. 1(1) FD EAW. Nevertheless, the confirmation by a public prosecutor's office of a national arrest warrant that had previously been issued by a police authority may be considered a "judicial decision" within the meaning of Art. 8(1)(c): see *Özçelik*, *op. cit.* (n. 4), operative part.

8 CJEU, 27 May 2019, joined cases C-508/18, *OG*, and C-82/19 PPU, *PI* ("*Public Prosecutors' Offices in Lübeck and Zwickau*").

9 Under Section 147 of the *Gerichtsverfassungsgesetz* (German Courts Constitution Act), "[t]he right of supervision and direction shall lie with: 1. the Federal Minister of Justice in respect of the Federal Prosecutor General and the federal prosecutors; 2. the *Land* agency for the administration of justice in respect of all the officials of the public prosecution office of the *Land* concerned; 3. the highest-ranking official of the public prosecution office at the Higher Regional Courts and the Regional Courts in respect of all the officials of the public prosecution office of the given court's district."

10 *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit.* (n. 8), para. 50.

11 "… since, 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 European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision", *ibid.*, para 67; see also CJEU, 1 June 2016, case C-241/15, *Bob-Dogi*, para. 55.

12 It was noted that the Court, stating in paragraph 72 that judicial protection has to be ensured also at the second level, "backtrack[ed] somewhat from its previous statement (para 68)," according to which the requirements inherent in effective judicial protection should be adopted at least at one of the two levels of that protection: see in this sense K. Ambos, "The German Public Prosecutor as (no) judicial authority within the meaning of the European Arrest Warrant: A case note on the CJEU's judgment in OG (C-508/18) and PI (C-82/19 PPU)", (2019) 10(4), *New Journal of European Criminal Law*, 399, 401. In reality, this is not a contradiction: those statements of the Court must be read as simply requiring that a *judge or court* intervene at least at the first level, *and*, where the authority competent to issue the subsequent EAW (second level) is not a judge but a prosecutor, this authority has to be fully independent and ensure that the decision to issue an EAW is proportionate. The proportionality of that decision, as will be explained in the following cases, could also be reviewed, before the decision itself is finalised, by the court that adopted the national arrest warrant, while a subsequent and separate remedy is just one of the options Member States can provide for in their national law.

13 The fact that, as is the case in Germany, a national arrest warrant is issued by a judge (first level), and thus the subsequent EAW is based on a national decision that has already been "checked" by an independent institution, does not suffice to satisfy the independence requirement, as, at the second level, the judicial authority must assess the proportionality of the decision to issue an EAW, which requires that the authority in question be fully independent; see *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit.* (n. 8), paras 71-73. See also C. Heimrich, "European arrest warrants and the independence of the issuing judicial authority – How much independence is required? (Case note on joined cases C-508/18 and C-82/19 PPU OG and PI)", (2019), 10(4), *NJECL*, 389, 397.

14 *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit.* (n. 8), para. 75.

15 CJEU, 27 May 2019, case C-509/18, *PF (Lithuanian Prosecutor General's Office)*.

16 *Ibid.*, paras 40-42.

17 *Ibid.*, para. 55 and operative part.

18 CJEU, 19 October 2016, Opinion of AG Sánchez-Bordona in case C-453/16 PPU, *Özçelik*.

19 See AG Sánchez-Bordona, Opinion of 30 April 2019 in case C-508/18, *Public Prosecutors' Offices in Lübeck and Zwickau*, conclusion.

20 See *ibid.*, para. 57.

21 *Ibid.*, paras 61 and 84. The AG, recalling his opinion in *Özcelik*, *op. cit.* (n. 18), stated that a public prosecutor may, when they adopt a national arrest warrant, be regarded nevertheless as an authority that issues a "judicial decision" for the purpose of Art. 8(1)(c) of the Framework Decision, insofar as the prosecutor's decision in the given case will be checked and reviewed by a judge or court within a very short period of time (see, in particular, *ibid.*, paras 50 and 62). In the specific case at issue, however, since German public prosecutors are not even entitled to issue national arrest warrants (which can be issued only by courts), it is the view of the AG that it would be paradoxical to allow these public prosecutors to issue an EAW, which could entail a much longer deprivation of liberty (see para. 76).

22 *Ibid.* para 71. The AG referred in this respect to the Opinion of AG Bot of 3 March 2016 in case C-404/15, *Aranyosi and Căldăraru*, paras 137 et seq.

23 AG Sánchez-Bordona, Opinion of 30 April 2019 in case C-509/18, *Lithuanian Prosecutor General's Office*, paras 21 and 22.

24 Opinion in *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit.* (n. 19), para. 67.

25 *Ibid.* paras 39–44.
26 CJEU, 12 December 2019, joined cases C-566/19 PPU and C-626/19 PPU, *French Prosecutor's Office*.
27 *Ibid.*, para. 56.
28 *Ibid.*, paras 63 and 64.
29 CJEU, 12 December 2019, case C-625/19 PPU, *Swedish Prosecution Authority*.
30 CJEU, 12 December 2019, case C-627/19 PPU, *Belgian Public Prosecutor's Office*.
31 According to AG Sánchez-Bordona, "in order to issue an EAW, the existence of a NAW or, as in the case here, of a final judgment imposing a custodial sentence, is not the only prerequisite. It is also a requirement that the issue of the EAW should not be disproportionate. And the examination of proportionality is a matter for the courts …"; accordingly, "[EAWs] issued by the Prosecution Authority for the purposes of enforcing a custodial sentence imposed by an enforceable decision must be capable of being the subject of court proceedings similar to those that apply in the case of [EAWs] issued for the purposes of conducting a criminal prosecution", see AG Sánchez-Bordona, Opinion of 26 November 2019 in case C-627/19 PPU, *Belgian Public Prosecutor's Office*, paras 24, 26 and conclusion.
32 CJEU, 24 November 2020, case C-510/19, *Openbaar Ministerie*.
33 See also T. Wahl, "CJEU: German Public Prosecution Office is not a "Judicial Authority" in the EAW Context", (2019) *eucrim*, 31, 33.
34 The text of this note is available at: <https://www.ejn-crimjust.europa.eu/ejnupload/News/WK-6666-2019-INIT.PDF> (accessed on 24 January 2021).
35 See <https://data.consilium.europa.eu/doc/document/ST-9974-2019-ADD-1/en/pdf> (accessed on 24 January 2021).
36 A draft law to strengthen the independence of the public prosecutor's office (*Gesetzentwurf: Entwurf eines Gesetzes zur Stärkung der Unabhängigkeit der Staatsanwaltschaft (Drucksache 19/11095)*) is currently being discussed by the German *Bundestag*.
37 For example, Italy stated that the Italian Constitution "excludes Public Prosecutors from the sphere of influence of the executive power" and that they enjoy maximum independence, in compliance with the principle of separation of powers. Similarly, Sweden stated that Swedish prosecutors are not exposed to the risk of being subject to directions or instructions from the executive and that, therefore, their competence to issue EAWs is not affected by the Court's ruling in *Public Prosecutors' Offices in Lübeck and Zwickau*. These notes are available at: <https://data.consilium.europa.eu/doc/document/ST-9974-2019-INIT/en/pdf> and <https://data.consilium.europa.eu/doc/document/ST-9974-2019-ADD-1/en/pdf> (accessed on 24 January 2021). It is also worth mentioning the "Questionnaire on the CJEU's judgments in relation to the independence of issuing judicial authorities and effective judicial protection" drafted by Eurojust to illustrate the current legal situation in each Member State, available at: <https://www.eurojust.europa.eu/questionnaire-cjeus-judgments-relation-independence-issuing-judicial-authorities-and-effective> (accessed on 24 January 2021).
38 See, in that regard, 53rd Plenary meeting of the European Judicial Network - Conclusions on current developments on the application of the EAW, p. 9, available at: <https://data.consilium.europa.eu/doc/document/ST-14503-2019-INIT/en/pdf> (accessed on 24 January 2021).
39 The effects of the two arrest warrants are indeed different: an EAW may result in the person's surrender to a Member State with which that person usually has no links of any kind, whereas a national arrest warrant does not entail such a surrender. Accordingly, the assessments behind these acts are not the same.
40 See T. Wahl, "Lithuanian Prosecutor General Included in the Concept of "Judicial Authority" in the FD EAW", (2019) *eucrim,* 34.
41 In that respect, the AG recalled the Court's findings in *LM* (25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality*), according to which an issuing judicial authority "exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever" (*LM*, para. 63); see AG Sánchez-Bordona, Opinion of 26 November 2019 in joined cases C-566/19 PPU and C-626/19 PPU, *French Prosecutor's Office*, para 37.
42 *Ibid.*, conclusion.
43 L. Baudrihaye-Gérard, "Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors", *EU Law Analysis*; available at: <http://eulawanalysis.blogspot.com/2020/01/can-belgian-french-and-swedish.html> (accessed on 24 January 2021).

The *AY* Case

Construing EAW *ne bis in idem* within the Boundaries of the Preliminary Ruling Reference

Florentino-Gregorio Ruiz Yamuza

This article analyses and comments on the opinion of the Advocate General and the ECJ judgment in case C-268/17 (European arrest warrant against *AY*). Interestingly, the case has remained somewhat unnoticed, the literature on it being scarce. However, it addresses some quite appealing issues. First, the case poses interesting questions on the admissibility of the reference for a preliminary ruling. Here, the Advocate General's and the Court's views disagree, which opens a general debate around the preliminary ruling reference mechanism. Second, the case deals with the obligation of the executing authority to decide on each incoming EAW, even if an earlier one relating to the same person and the same facts had already been refused. Third, the ECJ had the opportunity, for the first time, to specify its case law on the provisions reflecting the *ne bis in idem* principle in the Framework Decision on the European Arrest Warrant (Arts. 3(2) and 4(3)). This article stresses that the ECJ lays down the foundation of a neatly subjective *ne bis in idem* principle, which primarily refers to the requested person rather than to the offence that was the subject of criminal proceedings.

"…it is, first and foremost, for the executing Member State to trust the actions of the issuing Member State. However, the issuing Member State must also trust the actions of the executing Member State when the latter relies on grounds of refusal of execution of an EAW." (Opinion of Advocate General *Szpunar*, Case C-268/17, *AY*, paragraph 32)

I. Context of the *AY* Case: Facts and Questions Referred

In 2011, the Croatian Office for Suppression of Corruption and Organised Crime (USKOK) requested Hungarian authorities to interview *AY* as a suspect in the context of a corruption-related investigation carried out in Croatia. Hungary declined the request on the grounds of national interest but opened an investigation on the same facts, interviewing *AY* as a witness. This investigation was closed by the Hungarian National Bureau of Investigation (HNBI) in 2012. The Croatian investigation was also suspended in December 2012. In 2013, the USKOK issued a European Arrest Warrant (EAW) against *AY* over the same facts. The Budapest High Court refused it, claiming that criminal proceedings had already been brought before the court in Hungary for the same acts and that these proceedings had been stopped. After said decision, *AY* moved to Germany and Austria, where authorities also refused to take action on the Interpol notice, as its execution could infringe the *ne bis in idem* principle − taking into account the Hungarian refusal of the EAW. In 2015, after an indictment against *AY* in Croatia, a new EAW was issued, this time by the Zagreb County Court. This EAW was not executed by Hungary either. In 2017, the EAW was reissued, stating that circumstances had changed and criminal that proceedings against *AY* had been brought before the court. After not having received any answer from the Hungarian authorities, the Zagreb court contacted the authorities via Eurojust in order to know their position; the Hungarian authorities replied that the case had already been decided and, therefore, they were not obliged to act on the EAW.

Essentially, the referring court asked whether Arts. 3(2) and 4(3) FD EAW must be interpreted as meaning that a decision by the public prosecutor's office, terminating an investigation against an unknown person, in which *the individual* was merely interviewed as a witness, may be relied on to refuse to execute an EAW under either of these provisions (questions 1 to 4). Calling to mind, Art. 3(2) FD EAW includes among the mandatory grounds for refusal of EAWs the case in which a Member State has finally judged the requested person "in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State." And Art. 4(3) lists as an optional ground for refusal the situation where "the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the EAW is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings."

In addition, the referring court asked whether Art. 1(2) FD EAW – the obligation of Member States to execute any EAW on the basis of the principle mutual recognition – must be interpreted as requiring the executing authority to adopt a decision on any EAW forwarded to it, even when a ruling in that Member State had already been made on a previous EAW concerning the same person and the same acts, but the second EAW was issued by a different authority on account of the requested person's indictment (question 5).

II. The Admissibility Question: Reference by the Issuing Authority?

1. The Advocate General's Opinion

In his opinion of 16 May 2018, Advocate General (AG) *Szpunar* distinguishes two groups of questions for the preliminary ruling: (1) questions 1 to 4, which he considers outside of the CJEU's jurisdiction and (2) question 5, which he considers the only admissible one.[1]

Regarding questions 1 to 4, the AG underlines that the preliminary reference is somewhat unusual. The answer provided by the Court would only concern the executing authorities, who are generally responsible for seeking clarity to ascertain whether they may or may not execute an EAW. In this case, the reference was made by the issuing authority (i.e., the Zagreb County Court), and it seems that the Zagreb court's subsequent action would depend on the decision of the ECJ: If the ECJ determines that grounds for refusal are sound, the EAW should be withdrawn. Concerning questions 1 to 4, the AG not only discards the admissibility of the request for a preliminary ruling but even denies the jurisdiction of the ECJ.[2] The AG's analysis is primarily based on the lack of necessity of the Court's reply on the procedure before the referring court, because there is no link between the EAW withdrawal and the existence of non-execution grounds. Should the ECJ hold that Hungarian authorities can rely on Arts. 3(2) or 4(3) FD EAW to refuse the EAW, the referring court could maintain or withdraw the EAW. Ultimately, questions 1 to 4 referred for preliminary ruling concern interpretation of Hungarian law in the light of the FD EAW, and only

the Hungarian authorities, not the referring court, would be bound by the ECJ's decision.[3]

On the contrary, the AG finds the ECJ competent to deal with the fifth question, considering it pertinent to answer this question: It is necessary for the authorities of the executing Member State but also necessary for the referring court "to know whether it can legally expect a response from the executing judicial authority. This will enable the referring court to establish whether it should withdraw the second EAW or not. Question 5 is the only one which does not require any interpretation of Hungarian law by the referring court."[4]

2. The Approach of the European Court of Justice

The ECJ does not address the matter of the admissibility of the reference from the perspective of jurisdiction but rather from that of the admissibility of the preliminary ruling.[5] The inadmissibility of references on the basis of Art. 267 TFEU is an exception, the Court being obliged to rule if the questions raised refer to the interpretation of Union law.[6] Such obligation only lapses in three situations:

- If it is evident that the interpretation of EU law being sought is unrelated to the facts of the main action or its object;
- If the problem is hypothetical;
- If the Court does not have before it the factual or legal material necessary to provide a useful answer to the questions submitted.

The Court underlines that the present case does not correspond to any of these situations. The Zagreb County Court is dealing with both a trial *in absentia* against *AY* and the EAW proceedings and maintains that the withdrawal of the EAW depends on the ECJ's responses. Although the issues raised mainly refer to the obligations of the executing judicial authority, the issuance of the EAW may lead to the arrest of the requested person, affecting his freedom. The Court held, *inter alia*, in *Piotrowski* that the observance of fundamental rights in EAW proceedings primarily falls within the responsibility of the issuing Member State.[7]

3. The controversy between the AG and the ECJ

The ECJ's judgment triggers an exciting debate, establishing a doctrine of Art. 267 TFEU that will likely expand our understanding of the boundaries of the preliminary ruling reference. For his part, the AG's reading of Art. 267 draws different conclusions despite being in line with the Court's recommendations about the initiation of preliminary ruling proceedings and with the binding effect that ECJ decisions in this field have.

The ECJ's rationale, which holds that the EAW affects the requested person's liberty is of undeniable general validity, but it should be carefully scrutinised in this case, since *AY* was free, and Hungary had already denied his surrender. In other words, as far as Hungary was concerned, there was no risk that the Croatian decision to maintain or withdraw the EAW would affect *AY's* liberty. We should also bear in mind that the request for surrender had been indirectly refused in Germany and Austria at the police level. As a consequence, the climate was unfavourable to *AY's* surrender, and there was little to no arrest risk for him in any of the States linked to this matter.

On the other hand, the AG's view, with which I basically agree, shows a divergent position that may appear as somehow inconsistent; his line of argument varies, without a clear explanation for such a different approach. Regarding questions 1 to 4 (interpretation of Arts. 3 (2) and 4 (3) FD EAW), he holds that the ECJ does not have jurisdiction to deal with them. By contrast, concerning the fifth question (interpretation of Art. 1 (2) FD EAW), he concedes that it can influence the EAW's withdrawal by the Croatian authorities. Therefore, he is in favour of an ECJ's decision on the merits of the case.

I do not aim to dive into the discussion between inadmissibility of the preliminary ruling reference and the ECJ's lack of jurisdiction, which the AG addresses. However, the wording of Art. 267 TFEU links the scope of application of the reference for a preliminary ruling with a situation in which a decision on the question is necessary to enable the referring Court to render judgment. Here, two questions arise: First, can we construe the decision to maintain or withdraw the EAW as equivalent to "judgment" in this context? Second, can we assume for this purpose that the case the referring authority is dealing with does not just involve the criminal proceedings but could also be the very EAW under consideration? In the present case, there was an ongoing criminal proceeding *in absentia* against *AY* in Croatia in addition to the EAW request for his surrender. Hence, it is questionable whether the criminal proceeding depended on the response of the ECJ in the preliminary ruling reference or whether just the EAW depended on it.

The questions posed to the ECJ seem rather not aim to elucidate a doubt emerged to the Croatian part, but instead to validate the actions of the Hungarian authorities, eminently applying Hungarian law. Taken further, the third question in the preliminary ruling reference (i.e. whether the decision to terminate an investigation, in which the requested person was merely interviewed as a witness, constitutes, for the other Member States, a ground not to act on the EAW under Art. 3(2) FD EAW?) is, in my view, highly hypothetical, as it does not concern Hungary's actions but the involvement of a third Member State.

However, we can assume that the controversy has been definitely settled by the ECJ's ruling in *AY* and the recent *Gazanozov case*. In *Gazanozov*, the Court decided on a preliminary ruling reference from the issuing authority of a European Investigation Order (EIO). The ECJ faced questions on the compatibility of the referring authority's national law with the EIO Directive. Although the Court neither broaches this time the issue of the admissibility of a preliminary ruling reference coming from the issuing authorities nor refers to the *AY* case, it implicitly reiterates its position in favour of the admissibility of such references.

III. The Executing Authority's Obligation to Adopt a Decision on the EAW

The fifth question referred to the ECJ asks whether Art. 1(2) FD EAW must be interpreted as requiring the executing authority to adopt a decision on any EAW forwarded to it, "... even when, in that Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts, but the second EAW has been issued only on account of the indictment, in the issuing Member State, of the requested person." In answering this question, both the AG[8] and the Court[9] agree that the Hungarian executing authority was obliged to decide on the surrender request received, despite the fact that it had previously refused another EAW issued in the same proceedings and relating to the same person. The AG's opinion is unclear as to whether the issuance of the second EAW by another judicial authority or *AY's* indictment is the relevant event that triggers such an obligation.[10] At first glance, the ECJ seems to link the executing authority's obligation to adopt a decision on the EAW with a change in the circumstances, especially the indictment of the requested person in the issuing Member State.[11] However, the Court underlines the absolute nature of the obligation to decide.[12] It reiterates that, from the wording of Art. 1(2) FD EAW and based on the principle of mutual recognition, and unless there are exceptional circumstances, the EAW refusal may only rely on the exhaustively listed non-execution grounds provided for by Arts. 3, 4 and 4a FD EAW.[13] The ECJ also argues that, in any case, pursuant to Arts. 15(1), 17(1) and (6) and 22 FD EAW, the executing judicial authority must decide, within the time limits and under the conditions defined in the instrument, on the requested person's surrender. Should any ground for refusal be applicable, it shall be detailed in the pertinent decision to be notified to the issuing authority. Consequently, if the executing judicial authority fails to respond to an EAW forwarded to it and fails to communicate its decision to the issuing authority, it would breach its obligations under the provisions of the FD EAW.

Upon closer inspection, we can therefore observe that the obligation to reach a decision on an EAW arises unconditionally by its mere reception and regardless of the new circumstances if it is a kind of "reissuance" of a previous request. The surrender of the requested person might be granted or refused but, in any event, the executing authority has to decide on the EAW it received. We can conclude from the judgment that it is not the analysis of the nature of the change in circumstances that is important but rather the obligation to decide on any EAW received; the validity of this obligation is separate from an inquiry in terms of any impact that the new circumstances might have on application of the *ne bis in idem* principle. In other words, should none of the circumstances have changed, the obligation to decide on the EAW would still exist.

IV. The Concept of *ne bis in idem* in the EAW Context

The core of the preliminary ruling reference lies on questions 1 to 4. These questions revolve around four issues:
(1) Regarding Art. 4(3) FD EAW: Is the decision by the executing state not to prosecute or stop criminal proceedings for the offence on which the EAW is based, related only to the offence itself or must it also refer to the person sought as a suspect or accused person in these proceedings?
(2) Can Art. 4(3) FD EAW be invoked as a ground for refusal if the requested person is merely a witness and not a suspect or accused person in the criminal proceedings?
(3) Regarding Art. 3(2) FD EAW: Can the decision to terminate an investigation if the requested person is only questioned as a witness be invoked as a refusal ground by a third Member State for surrender under that provision?[14]
(4) How can the mandatory and optional grounds for refusal set out respectively in Art. 3(2) ("the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts") and Art. 4(3), *in fine*, ("a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings") be articulated?

It is worth making some clarifications on these four issues: The first and second questions, which refer to Art. 4(3) EAW FD, correspond to non-identical scenarios with different elements: a) a decision not to prosecute or stop criminal proceedings was adopted; b) such a decision was taken before the criminal proceedings have been started or once they were in progress; c) the person sought played the role of investigated/accused or was just a witness in these criminal proceedings. The institution of criminal proceedings is a *conditio sine qua non* requirement for a person to acquire the status of investigated or accused person or even to give evidence in those proceedings as a witness. In this sense, the first question is

crucial and goes straight to the core of the debate: Is the ne bis in idem an objective or subjective notion? Is it connected to the criminal proceedings or the persons concerned by the proceedings? On the one hand, the decision not to prosecute or stop criminal proceedings is linked with a fact or set of facts and also with a specific investigated or accused person. On the other hand, the fact that criminal proceedings are not brought against a specific person at a given moment does not imply that such a person might not qualify as an accused or person under investigation at a later stage. Merely being a witness in a criminal case is a neutral situation that, in principle, does not indicate any connection between the person who testifies and the crime, apart from the information he or she can provide.

The second question complements the first one by delimiting the scope of the problem, which makes it pertinent as well. However, it refers to a hypothetical situation that would hardly occur in practice, which is finding the pair: a decision not to prosecute and an individual who has reached the personal status of investigated/accused or witness. If a decision not to prosecute, as not to initiate proceedings is taken, no person can get the status of investigated/accused or witness. Hence, the only way to make sense out of the wording of the question would be considering that the decision not to prosecute is adopted concerning a particular person within ongoing criminal proceedings.

The third question underlines that Croatian authorities were not asking the CJEU about the Hungarian position. They rather indicate what would be the influence of the situation for EU Member States other the issuing State. The question implicitly reflect the attitude of Germany and Austria, those EU Member States that rejected acting on the EAW at the police level by taking into account the Hungarian decision.

1. The Advocate General's Opinion

a) Interpretation of Art. 3(2) FD EAW

Regarding the interpretation of Art. 3(2) FD EAW,[15] the AG first points out that the language versions differ as regards the phrase *"finally judged"*. This problem (which is also present in Art. 4(3) FD EAW) should not be underestimated, since a consistent translation is crucial to achieving a uniform legal understanding throughout the EU, not only from a linguistic but also from a conceptual point of view. The term *"finally judged"* seems to refer to a judgment handed down as the conclusion of criminal proceedings. The wording of Art. 3(2) contemplates explicitly only the event of a conviction by establishing the situation where "the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State."

AG *Szpunar* points out that the ECJ has not given a clear answer on the matter; nonetheless, its case law supports his opinion that Art. 3(2) of the FD EAW is not applicable to *AY's* situation:

- In *Mantello,* the ECJ interpreted the concept of *"finally judged"* broadly and – by transposing its case law on Art. 54 of the Convention Implementing the Schengen Agreement – concluded that the person sought is considered finally judged if, as a result of the proceedings, the public action was definitively extinguished or the accused person was definitively acquitted.[16] In the same judgment, it stated that the fact that a person has been definitively judged for the purposes of Art. 3(2) FD EAW has to be determined under the law of the executing State.
- In *Turansky,* the ECJ held that the *ne bis in idem* principle does not apply to a situation where the authority of a Member State examines the merits of the case and suspends the criminal proceedings before a suspected person is accused and where such decision neither bars further prosecution nor precludes new criminal proceedings, in respect of the same acts, in that State under its national law.[17]
- In *Kossowski*, it was established that a prosecutor's resolution "terminating criminal proceedings and finally closing the investigation procedure against a person could not be characterised as a final decision when it is clear that the procedure was closed without a detailed investigation having been carried out."[18]

On the one hand, the AG concedes that, based on the relevant documentation provided in the case at issue, it was not possible to determine whether such an in-depth investigation had been performed in Hungary; however, following the principle of mutual trust, it must be presumed, since the Croatian court was unable to rebut that presumption, which is not an easy task for the referring court. On the other hand, the AG stresses that these considerations are hypothetical, given that AY had never been an accused at a certain stage in the proceedings. Thus, contrary to the views of the Hungarian government and AY, the situation of the requested person does not fall within the category of a person "finally judged" according to the meaning of Art. 3(2) FD EAW.

b) Interpretation of Art. 4(3) FD EAW

Regarding Art. 4(3) FD EAW, the AG calls to mind that the ECJ has not yet interpreted this provision, although it established in *Poplawski*[19] that the executing authority has a margin

of discretion to refuse surrender *a priori.* The AG also stresses that the scope of Art. 4(3) is partly wider than Art. 3(2) FD EAW, because it refers to the offence rather than to the person sought, and the provision has an optional nature, meaning that *ne bis in idem* cannot limit or curtail it. Nonetheless, the first limb of Art. 4(3), which is at stake in the present case, is a manifestation of the *ne bis in idem* principle, like Art. 3(2). Although it is not apparent from the wording of Art. 4(3) that the proceedings must be directed against the requested person, it would be too excessive to interpret this provision as being applicable if the facts were the same, but the persons concerned were different. On the contrary, a more restrictive interpretation aligns with national legislations establishing first investigations *in rem* and then *in personam*; it is not possible to conclude that a crime has been committed from the investigation *in rem*.

According to the AG, the decision not to initiate or to conclude criminal proceedings must refer to the requested person. Yet, it is not necessary that such person has been formally classified as an accused person or a suspect. The decisive factor is "... the possibility that the sought person committed the offence in question has been examined." Nonetheless, Art. 4(3) FD EAW would not apply to the present situation since Hungarian authorities have concluded the proceedings without AY having been accused or investigated and without having examined the possibility that he has committed the offence on which the EAW issued by Croatian authorities is based."

2. The Decision of the European Court of Justice

a) Interpretation of Art. 3(2) FD EAW

The ECJ concurs with the AG's opinion[20] but adds some useful remarks that elucidate a number of specific interpretative issues.[21] The term "judgment" might not only refer to a court decision but also to other decisions from judicial authorities such as decisions of a prosecutor to definitely discontinue criminal proceedings.[22] According to its doctrine in *Mantello*, the person sought is deemed to have been finally judged in respect of the same facts, "when, as a result of criminal proceedings, further prosecution is definitively barred or when the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts."[23]

The term "final judgment" in Art. 3(2) FD EAW presupposes the existence of criminal proceedings initiated against the requested person.[24] The ne *bis in idem* principle applies only to persons who have been definitively tried in a Member State, not to those who have only been called as witnesses.[25] Technically, *AY* had not been judged in this regard. In conclusion, the Hungarian prosecutor's decision to terminate an investigation in which *AY* had merely been interviewed as a witness cannot be relied on to refuse the EAW under said Art. 3(2).

b) Interpretation of Art. 4(3) FD EAW

Regarding Art. 4(3) FD EAW, the judges in Luxembourg underline that the provision is broken down into three optional sub-grounds for refusal, devoting separate considerations to each of them: The first and third sub-grounds are not applicable to the present scenario. The first sub-ground justifies refusal if the executing authorities decide not to prosecute for the offence. Obviously, such circumstances do not match those in the *AY* case in which Hungary opened a case based on the same facts, and the HNBI's decision does not concern the discontinuance of criminal proceedings. Analogously, the case does not fall within the scope of the third sub-ground for refusal either, as it requires a third EU Member State's final decision preventing further proceedings.

Conversely, pursuant to the second sub-ground in Art. 4(3), the enforcement of an EAW may be refused when the executing judicial authorities have decided to halt proceedings in respect of the offence on which the EAW is based. The bulk of the ECJ's reasoning and the most illuminating part of its interpretation of the *ne bis in idem* revolve around this matter, which leans decidedly towards a subjective conception of such principle. The judgment follows two lines of argumentation:[26]

First, the ECJ observes that the wording of the second sub-ground refers solely to the offence, not to the requested person. However, pursuant to Art. 1(1) FD EAW, the EAW is a judicial decision issued for an offence against a specific person. Sharing the Commission's argumentation, the Court concludes that an interpretation of this second sub-ground, according to which the execution of an EAW could be refused *"*where that warrant concerns the same acts as those that have already been the subject of a previous decision, without the identity of the person against whom criminal proceedings are brought being considered relevant would be manifestly too broad..." In the present case, an investigation was conducted against an unknown person; therefore, the decision which terminated that investigation was not taken in respect of *AY,* who was not involved in the criminal proceedings in the sense of the first paragraph of Art. 4(3) FD EAW. This means that no decision not to prosecute or halt proceedings has been taken in relation to him."[27]

Second, the Court makes supplementary considerations that relate to the insertion of the provision in the mutual cooperation system within the AFSJ. The Court has continuously held that the grounds for non-execution provided for in the FD EAW must be interpreted strictly.[28] Following the doctrine

in *Kossowski*, the ground for refusal provided for in Art. 4(3) is not intended to prevent a person from having to submit to successive investigations for the same acts in several Member States. In conclusion, the refusal of the EAW cannot rely on the second sub-ground for non-execution laid down in Art. 4(3) FD EAW.

3. Comparison between the Views of the AG and the ECJ

AG *Spunzar's* opinion and the final judgment of the ECJ in AY triggers some interesting discussion points:

First, the AG's opinion gives a divergent interpretation of the provisions at issue. As regards Art. 3(2) FD EAW, it submits that it does not apply to *AY* since his participation in the proceedings was solely as a witness. The AG, therefore, advocates a subjective concept of the *ne bis in idem* principle (within the meaning of Art. 3(2)), which can be characterised as not being broad enough to include the position of an individual neither investigated nor accused in the criminal proceedings as giving rise to the EAW. As regards Art.4(3) FD EAW, the AG concludes that the essential issue for application of this article is not the investigation or accusation of the person concerned but rather his/her possible connection with the offence examined in detail in these proceedings. This latter interpretation introduces an important nuance, without departing from a subjective perspective on the construction of the *ne bis in idem* principle.[29]

We should bear in mind that the nature of the grounds for refusal in both articles is different. On the one hand, Art. 3(2) FD EAW is a mandatory ground for refusal; it concerns the requested person, depends on the action of a third EU Member State, and is linked to the termination of criminal proceedings by a final decision. On the other hand, the first and second sub-grounds for refusal in Art. 4(3) FD EAW are optional; they relate to the offence and not to the person, are dependent on the actions of the executing State itself, and are linked to the decision not to prosecute or halt proceedings for the offence on which the EAW is based. Nevertheless, the third ground in this provision, despite also being optional, is close to Art. 3(2) FD EAW, since the factual assumption is that a Member State has passed a final decision on the requested person concerning the same acts, thus preventing further proceedings.

Therefore, we could argue that the most logical way of giving sense to the AG's approach is the differentiation of two situations. The first situation is foreseen in Art. 3(2) FD EAW, whose application necessarily requires that the requested person has the status of an accused person, because, without it, he/she could hardly have been finally judged. In contrast, the second situation is related to Art. 4(3) FD EAW, where the *ne bis in idem* principle is articulated if the executing State decided not to prosecute or to halt proceedings. However, this approach (i.e., not strictly requiring the person sought to have been accused or investigated) only applies to the first and second sub-grounds of Art. 4(3) FD EAW, where decisions not to prosecute or to halt proceedings have been adopted. As for the third sub-ground, where a final judgment has been passed, the consistent construction should be equivalent to that for Art. 3(2) FD EAW, i.e., to require the person sought to have the status of accused because otherwise, it would not be possible to deliver a final judgment concerning him or her.

Second, the AG's view does not appear to match the ECJ's judgment as to the subjective spectrum of *ne bis in idem*: While the AG admits that Art. 4(3) FD EAW could apply even if the requested person has not been investigated or accused, the position of the judges in Luxembourg seems to be contrary. For application of the second sub-ground for refusal of Art. 4(3), the ECJ is more restrictive in this regard. The Court does not explicitly require that the requested person has been investigated or accused in the proceedings motivating the EAW issuance. However, the judgment states that application of this provision requires that the EAW concern the same acts as those that had already been the subject of a previous decision and that the identity of the person against whom criminal proceedings are being brought are considered relevant. Although both positions are not so far apart, the ECJ's position is more restrictive. The ECJ declares Art. 4 (3) inapplicable if *AY* was interviewed as a witness only, without criminal proceedings having been brought against him and if the decision terminating the investigation was not taken in respect of that person. Conversely, the position of *AY* in the criminal proceedings should have been similar, if not identical, to that of an investigated or accused person in order to make Art. 4(3) FD EAW applicable.

V. Concluding Remarks

The ECJ's judgment in *AY* (case C-268/17) is important in several ways:

- It outlines the vast scope of the preliminary ruling reference, conceding that the reference may be raised by the issuing authority of a European Arrest Warrant, even when much of its content may refer to application of the law of the executing Member State.
- It unequivocally establishes the obligation of an EU Member State to rule on an EAW received.
- It clearly defines an openly "subjective *ne bis in idem*" approach. Key elements to be assessed are the nature of inserting the requested person into the proceedings that give

rise to an EAW and determining his/her possible link to the committed offence in the proceedings.
- The case fueled a wider debate in which the positions of the AG and the judges in Luxembourg clashed as well as complemented and enriched each other, opening up an interesting field of study in the area of ne bis in idem.

However, the reader should bear in mind: AY was, in fact, never surrendered to Croatia.[30] This brings us back to the question of the weakening of the principles of mutual recognition and mutual trust and it leads to the question of the way forward in terms of strengthening cross-border cooperation mechanisms within the AFSJ.

Dr. Florentino-Gregorio Ruiz Yamuza
Senior Judge of the Appeal Court of Huelva (Spain). Member of the Spanish Judicial Network for International Cooperation (REJUE), Criminal Division

1 Opinion of Advocate General Szpunar, delivered on 16 May 2018, Case C-268/17, Ured za suzbijanje korupcije i organiziranog kriminaliteta v AY, paras. 22–33.
2 Citing AG opinions in C-497/12, case *Gullotta y Farmacia di Gullotta Davide & C*; C-165/14 and C-304/14, case *Rendón Marín and CS*; see also C. Naômé, Le renvoi préjudiciel en droit européen-Guide pratique, 2nd edition, 2010, pp. 85 and 86.
3 Opinion of Advocate General Szpunar, *op. cit.* (n. 1), paras. 30, 31.
4 Opinion of Advocate General Szpunar, *op. cit.* (n. 1), para. 34.
5 ECJ, judgment of 25 July 2018, Case C-268/17, AY, paras. 24–30.
6 Reference is made to ECJ, 12.10.17, case C-278/16, Sleutjes (para. 22 and case law cited there).
7 ECJ, 23.01.2018, case C-367/16, Piotrowski, para. 50.
8 Opinion of Advocate General Szpunar, *op. cit.* (n. 1), paras. 35 to 39.
9 ECJ, 25.7.2018, C-268/17, *op. cit.* (n. 5), paras. 33 to 36.
10 Opinion of Advocate General Szpunar, *op. cit.* (n. 1), para. 39 in fine.
11 ECJ, 25.7.2018, C-268/17, *op. cit.* (n. 5), para. 32.
12 Ibid., paras. 33 to 36.
13 The ECJ reiterated in several judgments that grounds for refusal of EAWs shall be interpreted in a restrictive way. See, among others, judgments of 10.08. 2017, case C-270/17 PPU, Tupikas or 25.07.2018, case C-216/18 PPU LM.
14 The original wording of the third question was as follows: "Does the decision to terminate an investigation in which the requested person did not have the status of a suspect but was interviewed as a witness constitute, for the other Member States, a ground not to act on the [EAW] which has been issued in accordance with Article 3(2) of Framework Decision [2002/584]?" The terminology is worth clarifying here: An investigation carried out by the police or directed by the prosecutor is not equivalent to criminal proceedings.
15 The AG reverses the order of the questions and starts his examination with questions 3 and 4, which refer to Art. 3 (2) FD EAW.
16 ECJ, 16.11.2010, case C-261/09, *Mantello*.
17 ECJ, 22.12.2008, case C-491/07, *Turanský*.
18 ECJ, 29.06.2016, case C-486/2014, *Kossowski*.
19 ECJ, 29.06.2017, case C-579/15, Poplawski, point 21 "…where a Member State chose to transpose that provision [Art. 4(6) FD EAW] into domestic law, the executing judicial authority must, nevertheless, have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW. In that regard, that authority must take into consideration the objective of the ground for optional non-execution set out in that provision…"
20 As the AG, the ECJ starts with answering the questions on the interpretation of Art. 3(2) FD EAW. Cf. ECJ, 25.7.2018, C-268/17, *op. cit.* (n. 5), paras. 37–46.
21 For a holistic overview, see D. Sarmiento, "Ne Bis in Idem in the Case Law of the European Court of Justice", in B. van Bockel (ed.), Ne Bis in Idem in EU Law, Cambridge University Press, 2016, pp. 103 et seq.
22 This follows from the ECJ's decision in Kossowski, *op. cit.* (n. 20), para. 39 and case law cited there. Judicial authority and judicial decision are autonomous concepts of EU law, the first one including, under certain circumstances, the prosecutors; therefore, the decisions resolving a case and emanating from them might well be considered judicial decisions. Cf., among others, ECJ, 29.05.2019, Case C509/18, PF; ECJ, 12.12.2019, Case C-625/19 PPU, XD; ECJ, 12.12.2019, Case C-627-19 PPU, ZB; ECJ, 12.12.2019, Joined Cases C-566/19 PPU and C-626/19 PPU, JR-YC.
23 ECJ, Mantello, *op. cit.* (n. 16), para. 45 with further references to the ECJ's case law.
24 ECJ, 05.06.2014, case C-398/12, *M.*
25 ECJ, 28.09.2006, case C-467/04, *Gasparini.*
26 ECJ, 25.7.2018, C-268/17, *op. cit.* (n. 5), paras. 50–60.
27 The Court bases this interpretation on the antecedent of the first part of Art. 4(3), which is Art. 9 of the European Convention on Extradition signed in Paris on 13 December 1957. According to this provision, it allows "extradition refusal when the authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences. The explanatory report to the Convention states that the provision covers the case of a person 'in regard to whom' a decision has been taken precluding proceedings or terminating them."
28 ECJ, 23.01.2018, case C-367/16, *Piotrowski*, para. 48 and the case law cited there.
29 In this context, the AG's opinion follows the subjective approach but not necessarily requiring that the person has acquired the formal status of accused or investigated. Contrarywise, according to the AG's position, it would be enough for invoking the ne bis in idem, as reflected in Art. 4(3) EAW FD, if the involvement of the person in the crime committed has been scrutinised in depth.
30 In September 2018, the Hungarian Ministry of Justice informed the Zagreb county court that the EAW had been refused based on the ECJ's doctrine in case C-216/18 PPU, LM, because his fundamental rights being endangered if surrendered to Croatia. The Ministry also reported that Art. 4(3) FD EAW was applicable to criminal proceedings being conducted in Hungary against AY as an accused person.

The ECtHR Judgment in *Tsonyo Tsonev* and Its Influence in Bulgaria

The Application of the *ne bis in idem* Principle in Bulgaria in Cases of Administrative and Criminal Proceedings for the Same Illegal Act

Galina Zaharova

This case annotation on the judgment of the European Court of Human Rights of 14 January 2010 in *Tsonyo Tsonev v. Bulgaria* (No. 2 – application No. 2376/03) reveals that the case entails several significant and sensitive issues of fundamental importance, greatly exceeding the dimensions of the specific legal dispute:

- **The enforcement of the final judgments of the European Court of Human Rights (ECtHR) against Bulgaria;**
- **The application of the *ne bis in idem* rule;**
- **The interplay between criminal and administrative penal liability of the same person for the same act;**
- **The role of the interpretative activity of the General Assembly of the Criminal Chambers (GACC) of the Supreme Court of Cassation (SCC) of the Republic of Bulgaria.**

This article discusses these items and introduces the reader to the mechanisms in Bulgaria for following up ECtHR judgments, as well as a new approach to the application of the *ne bis in idem* principle in cases of duplicative administrative and criminal proceedings.

I. Facts of the Case

The applicant, *Tsonyo Tsonev*, was born in 1977 and lived in the town of Gabrovo, Republic of Bulgaria. On the evening of 11 November 1999, he and his friend, Mr D.M., after consuming alcoholic beverages, went to Mr G.I.'s apartment with the intention of collecting Mr D.M.'s ex-girlfriend's belongings that were left in Mr G.I.'s home. A fight ensued, in which the victim G.I. lost two teeth. Neighbours alerted the police about the quarrel, and the applicant and Mr D.M. were arrested.

On 12 November 1999, a police officer prepared a report on the events of the previous night. Based on the information contained in the report, the mayor of the town of Gabrovo recognized that the applicant, Mr Tsonev, had violated Art. 2, para. 1 of Ordinance No. 3 for the preservation of public order on the territory of the municipality of Gabrovo, and issued an administrative penal decree (dated 19 November 1999), which imposed a fine of BGN 50 (an amount equal to USD 26.28 at the then applicable exchange rate[1]). The penal decree was motivated by considerations that the applicant's actions in breaking down the door of Mr G.I.'s apartment and the assault constituted a breach of public order and a clear manifestation of disrespect for society, for which reason the applicant had to face an administrative sanction.

Following the entry into force of the administrative penal decree issued against Tsonev, the prosecution service brought charges against him and the defendant Mr D.M. as his accomplice for causing average bodily injury to Mr G.I. in the form of the loss of two teeth as a result of the fight on 11 November 1999 – a crime under Art. 129, para. 1 of the Criminal Code of the Republic of Bulgaria, as well as for using force to enter the victim's home – a crime under Art. 170, para. 2 of the Criminal Code.

Based on the indictment filed against the applicant, court proceedings were initiated before the Gabrovo District Court. By judgment of 14 November 2001, the court found the defendant Tsonev guilty of causing average bodily harm to Mr G.I. and sentenced him to eighteen months imprisonment; he was acquitted of the offences of acting in complicity with the defendant Mr D.M. and using force to enter the victim's home (the offence under Art. 170(2) Criminal Code). The applicant appealed this sentence before the Gabrovo Regional Court, which upheld the first-instance judgment by decision of 9 April 2002. Upon appeal by the defendant Tsonev, a cassation proceeding was instituted and conducted before the SCC, which also upheld the decision of the district court by decision of 22 October 2002.

Tsonev lodged an application before the ECtHR alleging a violation of his right to a fair trial due to the SCC's refusal to appoint *ex officio* counsel and a violation of the *ne bis in idem* rule, as criminal proceedings had been instituted and conducted against him after he had already been sanctioned

for the same act as a result of an administrative proceeding. The Strasbourg Court upheld both objections and concluded violations of Art. 6(1) and (3) lit. c) ECHR, and of Art. 4 of Protocol No. 7 to the ECHR.

With regard to the violation of Art. 4 of Protocol No. 7 to the ECHR, the ECtHR held in particular that, by its nature, the act, for which an administrative sanction (the fine of BGN 50 by the mayor of Gabrovo on the basis of Ordinance No. 3 for the preservation of public order in the Gabrovo municipality) had been imposed upon the applicant, falls within the scope of the term "criminal proceedings" within the meaning of Art. 4 of Protocol No. 7 (§ 50 of the ECtHR judgment). The applicant had been "convicted" in an administrative proceeding, which could be compared to a "criminal proceeding" in the autonomous sense of the term under the Convention, according to the criteria set out in the judgments of the Court in *Sergey Zolotukhin v. Russia, Lauko v. Slovakia, Kadubec v. Slovakia, Öztürk v. Germany,* and *Lutz v. Germany*. Accordingly, the criminal proceedings against the applicant were initiated and conducted for acts factually identical to those for which he had already been sanctioned by a valid decision of the administrative sanctioning body (the mayor of the municipality of Gabrovo), which constituted a violation of the *ne bis in idem* rule, enshrined in Art. 4(1) of Protocol No. 7 to the ECHR.

II. Mechanisms for the Effective Application of the ECHR in Bulgaria

At the time the decision convicting Tsonyo Tsonev was issued, Bulgaria had mechanisms in place for the actual and effective application of the Convention's provisions.

1. The position of the ECHR in the Bulgarian legal order

Art. 5, para. 4 of the Constitution places the Republic of Bulgaria among the states that recognize the primacy of international legal norms over national ones and thus contributes to reinforcing the role of international law. Accordingly, international treaties ratified in accordance with the Constitution and promulgated and entered into force on the territory of the Republic of Bulgaria, form an integral part of national law and prevail over conflicting provisions of the domestic legislation. This means that not all sources of international obligations into which Bulgaria has entered are integrated into the national legislation. Only if international treaties have been ratified and entered into force can they become part of domestic law without the need to adopt a special act for their implementation. By an interpretative decision in 1992,[2] the Bulgarian Constitutional Court introduced the need for promulgation as another requirement limiting the scope of international agreements that could be integrated into the domestic legal order without an act of transposition.[3]

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed by Bulgaria on 7 May 1992 and ratified by a statute adopted by the National Assembly on 31 July 1992.[4] It has been in force since 7 September 1992 and was promulgated in the State Gazette, issue 80 of 2 October 1992. Consequently, the Convention forms part of Bulgarian national law, as its provisions prevail over conflicting domestic legislation. With the ratification of the Convention by the national parliament, the mandatory jurisdiction of the European Court of Human Rights in Strasbourg was expressly recognized. Protocol No. 7 to the ECHR was signed by Bulgaria (without reservations) on 3 November 1993 and ratified by a statute adopted by the National Assembly on 12 October 2000.[5] It has been in force since 1 February 2001 and was promulgated in the State Gazette, issue 76 of 30 September 2011. Pursuant to Art. 5, para. 4 of the Constitution, the Protocol also forms part of domestic law and prevails over conflicting domestic provisions.

The constitutionally determined relationship between international and domestic law shows unequivocally the importance the Bulgarian Constitutional Court gives to international commitments, especially in the field of human rights protection. This further proves the pan-European and civilizational significance of the Convention for the national legal order. The interpretation of constitutional norms in the field of human rights should be in line with the highest human rights standards of the ECHR. In turn, the approach taken by the Constitutional Court strongly encourages and stimulates national courts to take into account the original meaning of the provisions of the Convention and to comply with ECtHR decisions. In addition to the direct repercussions of ECtHR decisions in the field of public international law, the ECtHR's interpretative acts are directly applicable, have immediate effect, and are mandatory, as the Convention is an integral part of Bulgarian domestic law. The direct applicability of the provisions of the Convention is indisputable, and especially since the 1990s, the Constitutional Court has had ample reason to uphold this understanding in a number of its judgments.[6]

2. The enforcement of ECtHR decisions in Bulgaria

The binding nature of the decisions of the ECtHR with regard to the convicted State also requires unconditional implementation of its final decisions. It is common ground that the ECtHR does not rule on the substance of the domestic law dispute in the context of which the infringement was committed. If a

violation is found, the convicted State is obliged to remedy the defective legal relationship under national law by:

- Terminating the wrongful conduct;
- Restoring the situation that existed before the violation;
- Compensating for all consequences of the violation; and
- Providing compensation and guarantees against repetition of the violation.

It is well known that the ECHR's principle of subsidiarity confers on the State the responsibility to ensure the effective exercise of the rights and freedoms enshrined in the Convention, giving the State sovereign competence to decide how to implement the guarantees of the Convention in its own legal system.

The principle contained in Art. 46 ECHR obliges Member States to take all necessary measures to comply with and enforce the ECtHR's final judgments against them. This obligation is by no means limited only to the payment of the awarded compensation and costs to the individual applicant. In the event of a violation of the Convention, the State also has an obligation

> "to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment."[7]

With regard to the obligation of the Republic of Bulgaria to take general measures to implement the final decisions of the ECtHR against Bulgaria, the Committee of Ministers held on 30 November 2010 at its 1100th meeting that, in the case of *Tsonyo Tsonev v. Bulgaria*, the Bulgarian authorities were invited to "submit an action plan / report on the implementation of this decision."[8] Despite the reminder, effective measures to implement the decision in Tsonev were not taken until more than five years after its date of issuance.

III. Bulgaria's Inaction in Implementing the *Tsonev* Judgment

The reasons for the continuous inaction in the enforcement of the conviction decision are multifaceted. Above all, they are rooted in the nature of the extremely sensitive issue raised in the case – the duplication of administrative and criminal proceedings and the cumulation of administrative and criminal sanctions. Although Bulgaria (like other Contracting Parties) attaches great importance to administrative sanctions, which are characterised by their efficiency and speed, there is a traditional understanding in Bulgaria that heavier criminal liability has absolute primacy over administrative liability. Therefore, there is an understandable tendency to limit the scope of the prohibition under Art. 4 of Protocol No. 7 to double prosecution, trial, and punishment in respect only of criminal proceedings and criminal offenses in accordance with the relevant national legislation.

Also important is the fact that when the established violation concerns a procedural rule that clearly contravenes the Convention, the proper synchronization with the requirements of the Convention is usually a primarily legislative task. In these cases, the judiciary often has limited leeway to apply the mandatory principles laid down by the ECtHR. The imperative nature of the procedural rules calls for their strict implementation due to the risk of distorting the proceedings from a procedural perspective. Therefore, the obligation to repeal or amend the rule in accordance with the Convention, or to fill gaps in the relevant procedural provisions, is assigned to the legislature for fear of another conviction by the ECtHR.

However, the ECtHR has skilfully identified another ground which contributed to the violation of the *ne bis in idem* rule, in particular with regard to the applicant, Mr Tsonev. In § 55 of its judgment, the Court noted:

> "…It is obvious that the courts could not terminate the criminal proceedings against him [the applicant] due to the existence of a previous sanction in the administrative proceedings, as, according to a binding interpretative decision of the former Supreme Court and the consistent jurisprudence of the Supreme Court of Cassation, the prohibition on repeating proceedings does not apply with regard to administrative proceedings."

With this remark, the Court practically discreetly suggested to the Bulgarian judiciary a way to eliminate the violation even without legislative intervention. A means for this is the interpretative activity of the SCC, which is outlined in the following section.

IV. The Interpretative Activity of the Bulgarian Supreme Court of Cassation

The interpretative activity of the Supreme Court of Cassation is a unique and specific feature of the Bulgarian legal order, intended for radically overcoming the contradictions and incorrect application of the laws by the courts. In addition to their direct judicial function, the supreme courts (Supreme Court of Cassation and Supreme Administrative Court) are entrusted with the exclusive power to exercise supreme judicial supervision over the "accurate and uniform application of the law" by all courts (Art. 124 of the Constitution). The accurate and uniform application of legal norms guarantees the principle of legal certainty of the citizens, which is an element of the criteria for rule of law. The essential aspect of the interpretative activity of the SCC is detailed in the Judiciary Act (Chapter Four, Section X, Art. 124 – Art. 131a). Interpretative

decisions are binding for all bodies of the judiciary and the executive, for the bodies of local government, and for all bodies that issue administrative acts (Art. 130, para. 2 of the Judiciary Act). Characteristic of this activity is that the respective competent General Assemblies of the departments of the SCC do not carry out judicial activity in considering and resolving a specific legal dispute, but interpret legal norms in the event of contradictory or incorrect jurisprudence. The function of the supreme courts under Art. 124 of the Constitution to ensure the uniform application of the laws by all courts through their obligatory interpretative activity is not legislative. The relevant interpretation does not create, replace, or change the interpreted legal norm. The interpretative decision of the SCC contains legal conclusions and conclusions regarding the exact meaning of the respective legal norm. The interpretation overcomes contradictions and errors in the administration of justice, aiming to achieve uniform and accurate application of the law by all courts in the country and in general. It contributes to an effective harmonized legal system.

V. Bulgaria's Past Approach to the Duplication of Administrative and Criminal Proceedings

The Bulgarian penal procedure system does not permit one and the same act to be the subject of two separate criminal proceedings or of two administrative proceedings toward the same individual. The provisions of Art. 17 of the Administrative Violations and Penalties Act state that it is forbidden for a person to be penalized for an administrative offence for which the same individual has already been punished by a penal decree which has entered into force or by a judgment of the court. Similarly, according to Art. 24, para. 1, (6) of the Penal Procedure Code, a criminal proceeding must not be instituted, and the already instituted criminal proceeding shall be discontinued, if toward the same person for the same criminal act there is either a pendent criminal proceeding, a verdict of the court that has entered into force, a decree of the prosecutor, or a discontinuance ruling of the court for termination of the case. Until 2017, neither the Administrative Violations and Penalties Act nor the Penal Procedure Code addressed the scenario in which a finally concluded administrative proceeding is conducted before the initiation or the termination of the penal proceeding toward the same person for the same criminal act. There was no regulated legal procedure for the protection of the perpetrator in the case of a penal procedure instituted in violation of the *ne bis in idem* principle toward a person who has already been the subject of an administrative proceeding for the same act.

The former Supreme Court – in a binding interpretative decision –, and later the Supreme Court of Cassation, have solved this legal loophole by construing that the Bulgarian law is not barring the opening of criminal proceedings in respect of persons who have already been punished in administrative proceedings.[9] Hence, the Bulgarian courts consistently accepted that a finally completed administrative proceeding is not a legal obstacle for a subsequent trial for the same act if it refers to the attributes of a crime, as provided in the Criminal Code.

VI. The New Approach of the Bulgarian Supreme Court of Cassation

On 22 December 2015, the General Assembly of the Criminal Chambers of the Supreme Court of Cassation pronounced Interpretative Decision No. 3/2015, which radically redefined the prevailing conception that, according to Bulgarian law, the prohibition on repetition of proceedings does not apply to administrative proceedings. The argumentation of the opposite thesis developed in this Interpretative Decision is based on the unambiguous ECtHR case-law related to the problem discussed above: When there is a conclusion that the alleged administrative violation possesses the characteristics of a criminal matter, the administrative procedure shall be equated with "criminal proceedings" within the meaning of Art. 4(1) of Protocol No. 7. In these cases, the administrative procedure conducted against the perpetrator has a *ne bis in idem* effect; therefore, the second penal procedure instituted toward him/her for the same act is inadmissible.

The content of the decision reveals an approach tending to apply in practice the provisions of Art. 5, para. 4 of the Bulgarian Constitution, and clearly illustrates what exactly it means to incorporate the regulations of an international treaty into the national law system. The matrix of the Interpretative Decision is an example of the simultaneous manifestation of the subsidiarity and the direct applicability of the provisions of the Convention to national law.

On the basis of the concept that Protocol No. 7 is an integral part of the national law of the Republic of Bulgaria, the decision of the GACC comprises an extensive review of the relevant ECtHR case-law on the application of the *ne bis in idem* rule. Conclusions are drawn on the important aspects related to the core and meaning of the *ne bis in idem* principle*;* the intensity of the protection of the right granted by Protocol No. 7; the main determinants of the applicability of the principle to procedures with a "criminal" nature according to the ECtHR and the *Engel's* test*;* the requirements for establishing the identical nature of the subject of the two penal proceedings; the final character of the legal act delivered first in time; and the assessment of the notions "the same act" and "finally acquitted/convicted" – the elements *idem* and *bis.*

The core principles for the interpretation of the Convention's provisions, including Art. 4 of Protocol No. 7, as established by the ECtHR, are entangled in the interpretation of the related national procedural provisions. As a result of this complex approach, the GACC has extracted a procedural mechanism to prevent and overcome violations of the *ne bis in idem* principle in cases of the accumulation of procedures and sanctions with a criminal character related to the same person for one and the same act.

Of particular importance for judicial activity are the clarifications of the GACC as to what is related to the notion "criminal charge." The *ne bis in idem* principle manifests its effect solely in the penal procedure. The classification of the duplicate procedures as "criminal" is, therefore, of high importance for the application of the principle. It was precisely the misunderstanding (or disregard) of the principle of autonomy in the interpretation and application of the provisions of the ECHR that was the primary reason for the numerous violations of the prohibition on "be[ing] tried or punished again" in Bulgaria up until 2015.

It is known that the legal notions "criminal accusation," "criminal procedure," "criminal sanction," etc. used by the Convention do not refer to the strict meaning of the terms under the national law. They have their own independent signification. According to the principle of autonomy, these terms must be perceived only in the light of the established principles in the case-law of the ECtHR and according to the interpretation given by the Court, regardless of the meaning incorporated in them by the national law, which may be different. In this sense, the ECtHR consistently maintains that the terms "criminal proceedings," "criminal sanction," and "penal procedure" in the text of the provisions of the Convention and the Protocols to the Convention shall be perceived in correspondence with the meaning of the notions "criminal charge," "criminal offence," and "punishment" as stipulated in Art. 6 and Art. 7 ECHR. The Court repeatedly points out in its judgments that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *ne bis in idem* under Art. 4(1) of Protocol No. 7.

An approach that defines the legal notions according to the sole will of the contracting countries would lead to results that are not compatible with the essence and goals of the Convention. The possibility that national legislation could classify procedures as administrative, disciplinary, fiscal, or "mixed," instead of penal, as well as the potential for the prosecution of perpetrators by the applicable specific national order in each country, would subjugate the effect of the fundamental requirements to each country's own will.[10] Against this background, the ECtHR always performs an independent verification of the characteristics of the procedures (regardless of the contracting countries involved) to reveal their nature in the sense of Art. 6(1) ECHR. It applies the so-called "*Engel* criteria":

- The legal characterisation of the offence according to the national law;
- The character and essence of the violation; and
- The degree of severity of the stipulated punishment.

In fact, it is not a novelty for Bulgarian jurisprudence to use the notions defined in the Convention and the case-law of the ECtHR, as well as to apply the *Engel* criteria to determine the character of procedures. Apart from the case of *Tsonyo Tsonev*, the ECtHR has dealt with the matter of the criminal nature of other finalised procedures conducted by Bulgarian national authorities in numerous other Bulgarian cases.[11]

Since the adoption of Interpretative Decision No. 3/15 of the GACC, the *Engel* criteria have become an established algorithm for verification in the Bulgarian case-law. They have been consistently examined in cases of dispute, in order to determine the criminal nature of the accusation according to the spirit of the Convention in each specific case.

In legal reality, the examination made in Interpretative Decision No. 3/15 of the GACC applies in cases of the duplication of a criminal and an administrative penal liability – cases in which the *ne bis in idem* principle may be of consequence. The Interpretative Decision of the GACC contains instructions that the *ne bis in idem* consequences of the second criminal prosecution of a person for the same act for which there is already a concluded administrative penal proceeding may be overcome by revoking any judicial acts already carried out as part of the second, uncompleted penal proceeding and by terminating the second proceeding in accordance with Art. 4(1) of Protocol No. 7 and the order of Art. 24, para. 1, item 6 of the Penal Procedure Code. In the presence of the provided legal grounds, the finalised administrative procedure with a penal character in the sense of the Convention could be re-established (reopened), the enacted acts be repealed and the administrative procedure be discontinued (terminated). After the elimination of any procedural obstacle to conducting the criminal procedure, it could be re-established (as an admissible exception according to Art. 4(2) of Protocol No. 7) and successfully finalised.

After the pronouncement of Interpretative Decision No. 3/15, this sequence of procedural steps, although complicated and prolonged, was the only option for compensating for the harmful effects of violations of the *ne bis in idem* principle that was in line with the actual Penal Procedure Code and feasible without any legislative intervention. The GACC had, there-

fore, prescribed a possible mechanism for overcoming violations of Art. 4(1) of Protocol No. 7. It simultaneously fulfilled the requirements of the ECHR and complied with the established limitations of the actual procedural norms in Bulgarian national law.

VII. Legislative Amendments in 2017

In 2017, the Bulgarian Parliament adopted amendments to the Penal Procedure Code and the Administrative Violations and Penalties Act.[12] It established a scheme to overcome and prevent violations of the *ne bis in idem* principle in the event of duplications of penal and administrative charges against the same person for the same illegal act. The amendments introduce new competences for the prosecutor and the court, and provide a new legal basis for suspension and discontinuation of the penal procedure and for the reopening of the administrative proceedings. In short, the penal proceeding shall be suspended in the event that there is a finally concluded penal administrative proceeding for the same act. In these cases, the prosecutor may submit within one month a proposal for the reopening of the administrative proceedings. If the prosecutor does not submit a proposal for the renewal of the proceedings within the stated term, or if the proposal is rejected, the penal proceeding shall be discontinued. If the court establishes during the trial that the violation is not a crime, the question of whether the act constitutes an administrative violation is examined. In these cases, the court shall dismiss the criminal charges against the defendant and impose an administrative sanction on him if the illegal behaviour is to be penalised administratively as stipulated in the special part of the Penal Code, or if it represents an administrative offence under a law or decree.

The described amendments successfully resolve the *ne bis in idem* conflict by taking into account the priority of criminal over administrative liability, and also by removing barriers to the possible direct imposition of an administrative punishment on the perpetrator in cases where it is established that the act is not a crime but an administrative offence.

VIII. Conclusion

Despite the prolonged period of uncertainty, inactivity, and disputes, the judgment of the ECtHR in the case *Tsonyo Tsonev* (No. 2) has provoked complex legislative amendments which, without a doubt, favourably contribute to the guarantees of legal security, predictability of judicial decisions, and equality before the law. The result was achieved by the interpretative function of the Supreme Court of Cassation, fulfilling its mission to develop an effective mechanism to overcome the existing legislative loopholes and imperfections as regards the juxtaposition of criminal and administrative penal proceedings. The final outcome illustrates that the execution of ECtHR judgments is a common obligation of the State represented by all its authorities, demanding cooperation and coordination between these authorities. The inaction of any authority in the implementation of the obligations undertaken by the State under Art. 46 ECHR neither presupposes nor exonerates the passivity of the others.

1 For comparison: according to CMD (Council of Ministers Decree) No. 132 / 25.06.1999, the minimum wage in the Republic of Bulgaria amounted to BGN 67, or approximately USD 35.
2 Constitutional Court of the Republic of Bulgaria, Interpretative Decision No. 7 of 2 July 1992 in constitutional case No. 6 of 1992, published in the State Gazette No. 56 of 10 July 1992.
3 International treaties not published in the State Gazette, even if they have been ratified and have entered into force, are not part of domestic law unless they were adopted and ratified before the current Constitution of 1991 and promulgation/publication in the State Gazette was not mandatory pursuant to the then applicable ratification procedure.
4 State Gazette, issue 66 of 1992.
5 State Gazette, issue 87 of 2000.
6 For example, Decision 7 of 4 June 1996; Decision No. 19 of 21 November 1997 in constitutional case No. 13/97; Decision No. 29 of 11 November 1998 in constitutional case No. 28 from 1998, etc. Since 2000, the Constitutional Court has traditionally and consistently taken into account the interpretation of the ECtHR.
7 ECtHR (GC), 22 June 2004, *Broniowski v. Poland* (application no. 31443/96), para. 192. See also ECtHR (GC), 13 July 2000, *Scozzari et Giunta v. Italie* (applications nos. 39221/98 and 41963/98), para. 249; ECtHR (GC), 29 March 2006, *Scordino v. Italy* (application no. 36813/97), para. 233.

Galina Zaharova, LL.M.
Vice-President of the Supreme Court of Cassation of the Republic of Bulgaria and Head of the Criminal Department

8 <https://wcd.coe.int/ViewDoc.jsp?id=1723105&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=ED B021&BackColorLogged=F5D383> accessed 18 January 2021.
9 тълк. реш. № 85 от 1 ноември 1966 г. по н. д. № 79/1960 г., ОСНК на ВС; реш. № 348 от 29 май 1998 г. по н. д. № 180/1998 г., ВКС, II н. о.; и реш. № 564 от 9 декември 2008 г. по н. д. № 626/2008 г., ВКС, I н. о. – cited in the ECtHR's judgment in *Tsonev* at para. 24.
10 ECtHR, 9 October 2003, *Ezeh and Connors v. the UK* (applications nos. 39665/98 and 40086/98); ECtHR (GC), 10 February 2009, *Sergey Zolotukhin v. Russia* (application no. 14939/03); ECtHR, 14 January 2014, *Muslija v.*

Bosnia and Herzegovina (application no. 32042/11); ECtHR, 13 December 2005, *Nilsson v. Sweden* (application no. 73661/01); ECtHR, 20 May 2014, *Nykänen v. Finland* (application no. 11828/11); ECtHR, 20 May 2014, *Häkkä v. Finland* (application no. 758/11).

11 For example: ECtHR, 21 December 2006, *Borisova v. Bulgaria* (application no. 56891/00); ECtHR, 23 April 2009, *Kamburov v. Bulgaria* (application no. 31001/02); ECtHR (GC), 17 January 2012, *Stanev v. Bulgaria* (application no. 36760/06). Guided by the reasoning of the ECtHR, the Constitutional Court applied the Engel's test in its Decision No. 3 of 4 May 2011 in constitutional case no. 19/2010, concluding that the dangerous act to society classified as "petty" (minor) hooliganism represents a "criminal charge" in the sense of the Convention.

12 State Gazette, issue 63 of 2017; the amendments entered into force on 5 November 2017.

Report

The Statute of Limitations as a Challenge for Cross-Border Cooperation in Criminal Matters – Development of a Harmonisation Proposal

Die Verjährung als Herausforderung der grenzüberschreitenden Zusammenarbeit in Strafsachen – Entwicklung eines Harmonisierungsvorschlags

Bericht zur Projekttagung vom 17. bis 18. September 2020

Criminal law experts from 14 countries met to discuss the harmonisation of statute of limitations in the European Union at the project conference "The Statute of Limitations as a Challenge for Cross-Border Cooperation in Criminal Matters – Development of a Harmonisation Proposal" on 17 and 18 September 2020 in Frankfurt (Oder), Germany. The conference was part of a three-year project funded by the German Research Foundation (DFG) and led by Prof. Dr. Gudrun Hochmayr, European University Viadrina Frankfurt (Oder), and Prof. Dr. Walter Gropp, Justus Liebig University Gießen. It was held as a hybrid event, allowing attendance both on site and online. The aim was to discuss the draft of a proposal for harmonisation of the statute of limitations in criminal law within the European Union. After guest lectures by Prof. Dr. Helmut Satzger and Prof. Dr. Robert Esser, the national experts were given the opportunity to comment on the proposal from the perspective of their legal system. The harmonisation proposal is expected to be published in English and German as part of a collective book on the project in 2021.

Die Projekttagung „Die Verjährung als Herausforderung der grenzüberschreitenden Zusammenarbeit in Strafsachen – Entwicklung eines Harmonisierungsvorschlags" war der bisherige Höhepunkt des gleichnamigen, dreijährigen DFG-geförderten Forschungsprojekts, das sich mit der Möglichkeit einer Harmonisierung der strafrechtlichen Verjährung innerhalb der Europäischen Union beschäftigt. Geleitet wird es von Prof. Dr. *Gudrun Hochmayr*, Europa-Universität-Viadrina Frankfurt (Oder), und Prof. Dr. *Walter Gropp*, Justus-Liebig-Universität Gießen, die Umsetzung erfolgt in Zusammenarbeit mit dem Internationalen Arbeitskreis Strafrecht sowie Landesreferentinnen und -referenten aus 14 verschiedenen Rechtsordnungen.

I.

Im Eröffnungsvortrag betonte Prof. Dr. *Helmut Satzger* (Ludwig-Maximilian-Universität München) die Aktualität und Relevanz des Projektvorhabens. *Satzger* teilte den Befund, dass der EU-Rechtsrahmen *de lege lata* eine umfassende Harmonisierung der Verjährungssysteme nicht erlaube, und bezeichnete den gewählten Weg einer Modellregelung, an der sich die Mitgliedstaaten freiwillig orientieren können, als interessante Idee, die gedanklichen Freiraum schaffe und kreative Lösungen ermögliche. Die Unverbindlichkeit der Regelung mache es umso dringlicher, eine hohe Akzeptanz bei den adressierten Staaten zu erreichen, weshalb diesen aus der neuen Regelung zumindest keine Nachteile entstehen dürften.

Danach präsentierte Prof. Dr. *Robert Esser* (Universität Passau) seine Überlegungen zur Frage, ob sich ein Menschenrecht auf Verjährung der Strafverfolgung begründen lässt. Ein denkbarer Ansatzpunkt sei Art. 6 EMRK (faires Verfahren). Ein Anspruch auf ein Ende der Strafverfolgung ließe sich eventuell darauf stützen, dass zeitbedingt keine effektive Verteidigung mehr möglich sei. Es sei jedoch zu bezweifeln, ob die gebotene Einzelfallbetrachtung sich mit starren Verjährungsregelungen vertrage. Danach widmete sich *Esser* Art. 7 EMRK und der Frage, ob die Verjährung vom Rückwirkungsverbot erfasst ist. Hervorzuheben seien in den letzten Jahren ergangene „beachtliche Sondervoten" des portugiesischen Richters *Paulo Pinto de Albuquerque*, welcher die Frage der Verjährung als im Gesetzlichkeitsprinzip des Art. 7 EMRK verortet ansehe. Sollte diese Meinung sich in Zukunft durchsetzen, dürfte nach *Esser* auch die Verlängerung von laufenden Verjährungsfristen grundsätzlich nicht mehr mit Art. 7 EMRK vereinbar sein. Zuletzt warf *Esser* die Frage auf, ob Art. 8 EMRK dazu zwinge, der Möglichkeit einer Strafverfolgung zu einem bestimmten Zeitpunkt ein Ende zu setzen, um nicht unverhältnismäßig in das Privat- und Familienleben des Tatverdächtigen einzugreifen.

In der anschließenden Diskussion ging es unter anderem um Parallelen des Projektvorhabens zu einem kürzlich abgeschlossenen Forschungsprojekt von Helmut Satzger (H. Satzger [Hrsg.], Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union, 2020) sowie die Frage einer europaweiten *ne bis in idem*-Wirkung nationaler verfahrensbeendender Entscheidungen wegen Verjährung. Die EuGH-Ent-

scheidung in der Rechtssache *Gasparini* (Urt. v. 28.9.2006 – Rs. C-467/04) zeige, dass ein wegen Verjährung ergangener Freispruch bereits vor Ablauf der in anderen Staaten geltenden Verjährungsfristen dortige Strafverfahren verhindern könne.

II.

Prof. Dr. *Gudrun Hochmayr* präsentierte die wichtigsten Erkenntnisse ihrer rechtsvergleichenden Analyse der Landesberichte aller 14 beteiligten Staaten. Sie identifizierte trotz vieler Unterschiede auch bedeutende Gemeinsamkeiten zwischen den Verjährungssystemen, die als Ausgangspunkt für einen Harmonisierungsvorschlag in Betracht kämen. Das divergierende Verständnis der Rechtsnatur der Verjährung stehe einer Rechtsangleichung nicht entgegen, da die angenommene Rechtsnatur nur geringen Einfluss auf die Ausgestaltung der Verjährung habe. Zu beachten seien aber die Wechselwirkungen zwischen den Verjährungsregelungen und dem Prozessrecht, wie der Geltung des Opportunitätsprinzips.

Im Anschluss beleuchtete ihre Mitarbeiterin *Magdalena Pierzchlewicz*, wie trotz nationaler Unterschiede bei den Strafdrohungen eine möglichst einheitliche Zuordnung zu den Fristst ufen eines unionsweiten Verjährungsmodells erfolgen könnte.

Prof. Dr. *Walter Gropp* berichtete vom methodischen Vorgehen bei der Erarbeitung des Harmonisierungsvorschlags. Die verschiedenen – in den Landesberichten und dem rechtsvergleichenden Querschnitt zu Tage getretenen – Regelungsoptionen waren mit Blick darauf gegeneinander abgewogen worden, inwiefern sie sich mit drei entwickelten Kernkriterien für ein akzeptables Verjährungsmodell vertragen. Im Vordergrund zu stehen hätten die *Transparenz und Vorhersehbarkeit* des Modells bzw. des Verjährungseintritts, eine *möglichst breite Verwurzelung* in den bestehenden Systemen und die *Vereinbarkeit* mit den Legitimationstheorien zur Verjährung.

Sein Mitarbeiter *Thomas Kolb* präsentierte schließlich den auf der Tagung zur Diskussion stehenden Entwurf des Harmonisierungsvorschlags. Neben Regelungen zur Unverjährbarkeit, den Verjährungsfristen und dem Verjährungsbeginn enthielt der Entwurf drei Optionen, wie eine laufende Frist durch die Strafverfolgungsbehörden modifiziert werden könnte.

Im Folgenden wurde diskutiert, auf welchem Weg der Harmonisierungsvorschlag den EU-Staaten unterbreitet werden könne.

III.

Anschließend stellten die Landesreferentinnen und -referenten Besonderheiten ihrer Verjährungssysteme vor und nahmen zum Entwurf des Harmonisierungsvorschlags Stellung.

Prof. Dr. *Samantha Halliday* (Universität Durham, UK) schilderte, dass in England und Wales gemäß der dort geltenden Maxime *nullum tempus occurit regi* zumindest grundsätzlich keine Regelungen zur Verjährung existieren. Das Fehlen von Verjährungsfristen habe im Kontext der "MeToo-Bewegung" die Verfolgung lange zurückliegender Sexualstraftaten ermöglicht. *Halliday* begrüßte daher das Vorhaben, bestimmten Sexualstraftaten gegenüber Minderjährigen auch im Harmonisierungsvorschlag eine Sonderrolle zukommen zu lassen.

Prof. Dr. *Stephen Thaman* (Universität St. Louis, USA) erläuterte, dass mit Ausnahme von vier Bundesstaaten die USA eine lange Tradition an Verjährungssystemen aufweise. Die vergleichsweise kurzen Fristen seien möglicherweise damit zu erklären, dass in einem kontradiktorisch ausgestalteten Strafverfahren der zeitbedingte Schwund von (Entlastungs-) Beweisen eine gravierende Schwächung der Verteidigungsposition bedeute. Dennoch registrierte *Thaman* den Trend, Verjährungsfristen zu verlängern und die Unverjährbarkeit auszuweiten. Eine Besonderheit stelle zudem die Möglichkeit dar, durch die Anklage eines unbekannten Täters (sog. *John Doe*-Fälle) oder sogar durch die Anklage einer nicht zugeordneten DNA-Spur ein Ruhen der Verjährung herbeizuführen.

Prof. Dr. *Zsolt Szomora* (Universität Szeged, Ungarn) richtete sein Augenmerk auf die Rechtssicherheit als den in Ungarn vorherrschenden Legitimationsgrund für die Verjährung. Er wies darauf hin, dass bei einer Beschränkung auf diesen Begründungsansatz kein Raum für eine – in Ungarn jedoch existierende – Unverjährbarkeit von Straftaten verbliebe. Die Rechtssicherheit könne nur einen von vielen Legitimationsaspekten darstellen; die ihr im ungarischen Strafrecht für die Verjährung zugeschriebene Bedeutung sei überdimensioniert.

Prof. Dr. *Arndt Sinn* (Universität Osnabrück) beschäftigte sich mit der Unverjährbarkeitsregelung des Entwurfs. Er sah große Akzeptanzprobleme darin, dass aufgrund der abschließenden Natur der Regelung bei deren Umsetzung in einigen Staaten bestehende Unverjährbarkeitsregelungen zurückgenommen werden müssten. Durch die Aufnahme des Wortes „mindestens" könne man dem entgegenwirken und voraussichtlich die Akzeptanz des Vorschlags erhöhen.

Das erörterte Problem beträfe wohl am stärksten die Niederlande. Prof. Dr. *Michael G. Faure* (Universität Maastricht, Niederlande) berichtete von einigen tiefgreifenden Gesetzesänderungen Anfang des 21. Jahrhunderts, welche die unter die Unverjährbarkeit fallenden Straftaten massiv ausdehnten. *Faure* kritisierte dies als Symbolpolitik. Nach seiner Ansicht sei es bei den Reformen nur um die Entlastung politisch Verantwortlicher und nicht darum gegangen, tatsächlich mehr Ermittlungen durchführen zu können.

In der folgenden Diskussion wurde bezweifelt, dass die Ausdehnung der Unverjährbarkeit überhaupt geeignet sei, ein zu ihrer Begründung angeführtes gesellschaftliches Bedürfnis nach Strafe zu befriedigen, da viele Verfahren in lang zurückliegenden Fällen mit niedrigen Strafen endeten oder sogar aus Mangel an Beweisen eingestellt werden müssten. Auch aus DNA-Spuren könnten nur sehr begrenzt Rückschlüsse auf das tatsächliche Tatgeschehen gezogen werden.

IV.

Die letzten drei Vorträge des ersten Tages beschäftigten sich mit dem Verjährungsbeginn. Ass.-Prof. Dr. *Theodoros Papakyriakou* (Universität Thessaloniki, Griechenland) erörterte, dass der Verjährungsbeginn in Griechenland an den Abschluss des tatbestandsmäßigen Verhaltens durch den Täter anknüpfe. Taten könnten daher noch vor Erfolgseintritt verjähren. Für Bauregelverstöße, die erst nach Jahrzehnten den Tod oder die Verletzung eines Menschen bewirkten, gebe es daher die Sonderregelung, dass in solchen Fällen

die Verjährung erst mit Schadenseintritt beginne. Um das Prinzip der Verjährbarkeit nicht vollkommen auszuhöhlen, trete jedoch spätestens 30 Jahre nach dem Täterverhalten Verjährung ein. *Papakyriakou* sprach sich für eine absolute Frist bei Spätschadensfällen auch im Harmonisierungsvorschlag aus.

Ass.-Prof. Dr. Dr. *Julien Walther* (Universität Metz, Frankreich) berichtete von der französischen Sonderregelung für den Verjährungsbeginn bei verborgenen und versteckten Straftaten. In diesen Fällen sei nicht die Tatbegehung, sondern die Entdeckung der Straftat maßgebend für den Verjährungsbeginn, der maximal um 12 Jahre bei Vergehen und um 30 Jahre bei Verbrechen verschoben werden könne.

Prof. Dr. *Lyane Sautner* (Universität Linz, Österreich) legte dar, dass der österreichische Gesetzgeber einen Mittelweg bei der Festlegung des Verjährungsbeginns wählt. Im Grundsatz werde an den Abschluss des mit Strafe bedrohten Verhaltens angeknüpft. Der Fristablauf sei jedoch gehemmt, bis entweder auch seit Erfolgseintritt die Frist verstrichen oder seit Verjährungsbeginn das 1,5-fache der Frist, mindestens aber 3 Jahre, verstrichen seien. *Sautner* warf die Frage auf, ob die in der Union verbreitete und auch im Harmonisierungsvorschlag gewählte strikte Anknüpfung an die Deliktsvollendung bei Spätschadensfällen (unter spezialpräventiven Gesichtspunkten) nicht zu unbilligen Ergebnissen führen würde.

In der anschließenden Diskussion wurde eine Sonderregelung nach dem französischen Modell für den Harmonisierungsvorschlag einstimmig abgelehnt. Es sei der Verjährung gerade immanent, dass sie dann eintrete, wenn eine Straftat bis zum Ablauf der Verjährungsfrist nicht entdeckt worden ist. Die Aufnahme einer Sonderregelung für Spätschadensfälle wurde kontroverser diskutiert, im Ergebnis jedoch ebenfalls verworfen.

V.

Am zweiten Tag ging es um Modifikationsmöglichkeiten einer laufenden Verjährungsfrist. Zu Beginn wurden das schweizerische und polnische Modell vorgestellt. Beide Staaten kennen lange Grundverjährungsfristen, die jedoch nicht (Schweiz) oder nur einmalig (Polen) verlängert werden können.

Prof. Dr. *Victor Gómez Martín* (Universität Barcelona, Spanien) präsentierte das spanische Modell. Der Lauf der dort geltenden – im europäischen Vergleich mittellangen – Verjährungsfristen wird vorläufig abgebrochen, sobald ein Verfahren gegen die betreffende Person eingeleitet wird, und beginnt erst dann erneut zu laufen, wenn das Verfahren stillsteht oder ohne Verurteilung endet. Ein Verjährungseintritt im laufenden Verfahren ist hiernach grundsätzlich nicht möglich.

Ein vergleichbares Modell gibt es in Schweden. Wie Prof. Dr. *Rita Haverkamp* (Universität Tübingen) ausführte, ist der Abbruch der Verjährung dort jedoch an die Verhaftung des Täters oder die Zustellung der Anklage, also einen tendenziell späteren Zeitpunkt, geknüpft. Dies berge das Risiko, dass ein den Behörden bereits bekannter Täter einen Abbruch der Verjährung verhindern könne, indem er sich einer Zustellung der Anklage entziehe.

Prof. Dr. *Renzo Orlandi* (Universität Bologna, Italien) stellte schließlich die italienische Rechtslage und aktuelle Gesetzesreformen vor, bevor Prof. Dr. *Luigi Foffani* (Universität Modena, Italien) auf die berühmten *Taricco*-Entscheidungen des EuGH (Urt. v. 8.9.2015, Rs. C-105/14 u. Urt. v. 5.12.2017, Rs. C-42/17) einging. Die beiden Landesreferenten erläuterten, dass Italien zwar viele Verlängerungsmöglichkeiten für die Verjährungsfrist kenne, die Verlängerung jedoch zeitlich begrenzt sei. Dass es in der Vergangenheit zu zahlreichen Verfahrensbeendigungen wegen Verjährung sogar nach einer erstinstanzlichen Verurteilung gekommen war, sei einer der Auslöser für die aktuellen Reformen gewesen.

GStA Dr. *Andres Parmas* (Generalstaatsanwaltschaft Tallinn, Estland) und Prof. Dr. *Jaan Sootak* (Universität Tartu, Estland) berichteten vom estnischen Verjährungssystem mit relativ niedrigen Grundverjährungsfristen. *Parmas* bemerkte, dass diese trotz existierender Verlängerungsmöglichkeiten für die meisten Wirtschaftsstraftaten zu kurz seien.

In der anschließenden Diskussion wurde den Möglichkeiten einer Verjährungsverlängerung übereinstimmend die Funktion zugeschrieben, ein Verfahren ohne Zeitdruck zum Abschluss bringen zu können. Die Möglichkeit einer missbräuchlichen Verhinderung der Verlängerung, wie sie in Schweden bestehe, sei für den Harmonisierungsvorschlag ebenso auszuschließen wie ein Verjährungseintritt im laufenden Verfahren oder sogar im Rechtsmittelverfahren wie früher in Italien.

VI.

Zum Abschluss der Tagung wurden im Plenum die einzelnen Komponenten des Entwurfs diskutiert und zur Abstimmung gebracht. Der Harmonisierungsvorschlag soll nach Einarbeitung der Ergebnisse im kommenden Jahr in deutscher und englischer Sprache veröffentlicht werden.

Thomas Kolb
Wissenschaftlicher Mitarbeiter des Projekts „Die Verjährung als Herausforderung der grenzüberschreitenden Zusammenarbeit in Strafsachen – Entwicklung eines Harmonisierungsvorschlags“, Franz von Liszt Institut für internationales Recht und Rechtsvergleichung (Prof. i.R. Dr. *Walter Gropp*) an der Justus-Liebig-Universität Gießen.

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Tel: +49 (0)761 7081-0
Fax: +49 (0)761 7081-294
E-mail: public-law@csl.mpg.de
Internet: https://csl.mpg.de

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For further information visit our website: https://eucrim.eu
or contact:
Thomas Wahl
Max Planck Institute for the Study of Crime, Security and Law
Guenterstalstrasse 73,
79100 Freiburg i.Br./Germany
Tel: +49(0)761-7081-256 or +49(0)761-7081-0 (central unit)
Fax: +49(0)761-7081-294
E-mail: info@eucrim.eu