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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

Focus: Individual Rights in the Area of Freedom, Security and Justice
Dossier particulier: Les droits individuels dans l'espace de liberté, de sécurité et de justice
Schwerpunktthema: Individualrechte im Raum der Freiheit, der Sicherheit und des Rechts

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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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* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage www.mpicc.de/eucrim/search.php and then entering the ID-number of the link in the search form.

Guest Editorial

Dear Readers,

As a practising lawyer specialised in the field of criminal law and criminal procedure who is also involved in international cases – and as an enthusiastic European – I feel that we need a new and strong commitment to "our" Europe in these anxious times. We need to strengthen the EU as a guarantor for peace, our common values, human and fundamental rights, and the rule of law in our common area of freedom, security, and justice.

Since the Amsterdam Treaty and the Tampere Council in 1999, the legal principle of mutual recognition of judicial decisions has been continually established, ultimately fixed in the Lisbon Treaty in Art. 67, 82. Mutual recognition as a generally recognised legal principle in the field of criminal matters requires mutual trust. This was clearly expressed in 2009 by the Stockholm Programme and the "first" Roadmap on procedural safeguards. Nobody in Europe can disavow or ignore the political success story in this field since the adoption of the "first" Roadmap. The mission to achieve mutual trust has not been completed, because partial distrust still obviously exists between EU Member States and from the EU citizens' view. Therefore, we must carefully observe the implementation process of all the Directives that were adopted in conjunction with the Roadmap and the additional Directive (EU) 2016/343 on presumption of innocence and the right to be present at the trial. I would like to express my expectation that ECBA and CCBE will be part of the compliance process directed by the Commission regarding the implementation of EU legislation at the national level.

However, there is still much work to be done. Effective legislative measures at the EU level are lacking in important areas, such as pre-trial detention or conflicts of jurisdiction, an area that certainly relates to issues of *ne bis in idem* where we still identify many practical problems despite a precise legal framework and jurisprudence. Important components of criminal proceedings in the EU Member States, in particular the entire trial phase or legal remedy (appeal) guarantees, including the right to be heard, are also not sufficiently protected by concrete minimum standards. Witnesses' rights (e.g., access to a lawyer, the right to silence, legal privileges, confiscatory bans) and other evidentiary issues (e.g., the admissibility or exclusion of evidence, the right of the defence to gather or to ask for evidence, recording of police interviews) need certain minimum rules alike. All these issues are essential in order to establish the required mutual trust in the EU.

Holger Matt

The longstanding discussion on a Regulation for the establishment of a European Public Prosecutor's Office (EPPO) – ongoing since 2013 – and the many different interim drafts have further demonstrated that new, additional measures are necessary in the field of procedural safeguards at the EU level (see also the contribution by *François Faletti* in this eucrim issue). To give one example: although the current draft EPPO Regulation establishes rules on compensation (cf. Art. 69), it does not cover compensation for damages after unlawful deprivation of liberty or other unlawful coercive measures, or for legal fees in cases of acquittal etc. or after miscarriage of justice (cf. Art. 14 par 6 ICCPR). The European legislator should close this gap.

Action should continue to be taken at the EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings. This initiative will ultimately lead to the strengthening of the legal principle of mutual recognition and its underlying part: mutual trust. The ECBA suggests the initiative "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards," which would include legislation on Directives or Regulations (cf. Art 82 TFEU) on the following:

- Measure A: Pre-Trial-Detention, including the European Arrest Warrant
- Measure B: Certain Procedural Rights in Trials
- Measure C: Witnesses' Rights and Confiscatory Bans
- Measure D: Admissibility and Exclusion of Evidence and other Evidentiary Issues
- Measure E: Conflicts of Jurisdiction and *ne bis in idem*
- Measure F: Remedies and Appeal
- Measure G: Compensation

Let us promote this idea of an Agenda 2020 on procedural safeguards and a new Roadmap together!

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News

Actualités / Kurzmeldungen

European Union*

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

Foundations

Fundamental Rights

CJEU: Conditions for Rejection of Refugee Status in Terrorism Case

On 31 January 2017, the CJEU delivered a judgment in a preliminary ruling proceeding that dealt with the rejection of an application for asylum because the asylum seeker had participated in the activities of a terrorist network (Case C-573/14, *Lounani*).

The preliminary ruling was brought to the CJEU by the Belgian Conseil d'État. In the case at issue, a Moroccan national, Mr. *Mostafa Lounani*, applied to the Belgian authorities for refugee status in 2010. He claimed that he feared persecution in the event of being expelled to Morocco because of the likelihood that he would be regarded as a radical Islamist and jihadist by the Moroccan authorities. Indeed, Mr. *Lounani* had been convicted by a Belgian criminal court in 2006 on counts of participating in the activities of a terrorist group (namely the Belgian cell of the Moroccan Islamic Combatant Group, "MICG") as a member of its leadership, criminal conspiracy, use of forged documents, and illegal residence. The criminal court considered it proven that Mr. *Lounani* had provided logistical support to the group, in particular by engaging in forgery and fraudulent transfer of passports in connection with sending volunteers to Iraq.

The Belgian administration and the Belgian courts, which decided on the recognition of Mr. *Lounani's* asylum status, quarrelled over the required degree of gravity of the offence in order for it to be categorized as "acts contrary to the purpose of principles of the United Nations" within the meaning of Art. 12 para. 2 lit. c) Directive 2004/83. The directive lays down minimum standards for the definition and content of refugee status as a guideline for the competent national bodies of EU Member States in their application of the Geneva Convention relating to the Status of Refugees of 1951. Art. 12 of that directive especially lays down the grounds for exclusion from qualification as a refugee.

As a prerequisite for exclusion from refugee status, the Belgian court of first instance, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, "CCE") held that the person concerned must have committed terrorist offences as such, i.e., committing or participating in a terrorist act, both of which were not the case here.

After an administrative appeal on a point of law against that decision, the Belgian Conseil d'État referred the legal question to the CJEU and asked for interpretation of Art. 12 para. 2 lit. c) Directive 2004/83.

The CJEU answered that it is not a ground for exclusion from refugee status that an applicant should have been convicted of one of the terrorist offences referred to in Art. 1 para. 2 of the Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

The CJEU stated that acts constituting participation in the activities of a terrorist group, such as those of which Mr. *Lounani* had been convicted, may justify exclusion from refugee status in the meaning of Art. 12 para. 2 lit. c) Directive 2004/83, even if it is not established that the person concerned committed, attempted to commit, or threatened to commit a terrorist act. For the purposes of the individual assessment, the CJEU further noted that the administrative courts can rely on the criminal court's conviction and do not need to establish that that person himself/herself instigated a terrorist act or otherwise participated in it. (TW)

➤**eucrim ID=1701001**

* If not stated otherwise, the news reported in the following sections cover the period 15 December 2016 – 15 March 2017.

Area of Freedom, Security and Justice

2017 EU Citizenship Report

On 24 January 2017, the European Commission published its third EU Citizenship Report. The report takes stock of progress made since 2014 and identifies priorities to make sure that EU citizens can fully enjoy their rights in connection with their EU citizenship. The report is based on Eurobarometer surveys about citizens' knowledge of/ opinion on EU citizenship and their electoral rights, a public consultation conducted in 2015, and direct feedback from citizens. The following summarizes the main results of the four areas dealt with in the report as well as the main actions that the Commission intends to take in these areas in the future.

(1) *Strengthening security and promoting equality.*

The vast majority of Europeans believe more common EU action is needed to address security threats. They also think that free movement within the EU is closely linked to the necessity for measures to secure the external borders and to combat and prevent crime. EU citizens and their family members living or travelling in the EU still sometimes encounter problems when using their identity cards and/or residence documents.

Almost all Europeans (96%) feel that domestic violence against women is unacceptable, but it still occurs widely.

Plans of the Commission:

- Finalise and – in view of possible legislative actions – evaluate a study on EU policy options to improve the security of EU citizens' identity cards as well as the residence documents of EU citizens residing in another Member State and those of their non-EU family members;
- Assess how to modernise the rules on emergency travel documents for unrepresented EU citizens;
- Carry out, in 2017, a campaign on violence against women, actively support the accession of the Union to the CoE "Istanbul Convention" and present proposals to address the challenges of the work-life balance for working families;
- Act to improve the social acceptance of LGBTI people across the EU.

(2) *Promoting EU citizenship rights and EU common values.*

The report states that 87% of Europeans are aware of their status as EU citizens, which is more than ever before, but they are often not aware of the rights that come with EU citizenship, in particular the right to consular protection.

Plans of the Commission:

- Conduct an EU-wide information and awareness-raising campaign on EU citizenship rights in 2017 and 2018;
- Encourage young Europeans to volunteer with the European Solidarity Corps by 2020;
- Produce, in 2017/2018, a report on national schemes granting EU citizenship to investors.

(3) *Promoting and enhancing citizens' participation in the democratic life of the EU.*

The report observes that EU citizens do not exercise their right to vote in European and local elections as fully as they could; 21% of EU citizens experienced difficulties in exercising their right to vote in EP elections.

Plans of the Commission:

- Intensify Citizens' Dialogues and encourage public debates to improve public understanding of the impact of the EU on citizens' daily lives;
- Report, in 2017, on the implementation of EU law on local elections;
- Promote, in 2018, best practices that help citizens vote and stand for EU elections.

(4) *Simplifying EU citizens' daily lives.*

The level of free movement within the EU remains very high, and free movement is seen as the EU's most positive achievement. Nevertheless, a lot of EU citizens find it difficult to move or live in another EU country.

Plans of the Commission:

- Propose a "Single Digital Gateway" to give citizens easy online access to information on a wide range of administrative questions;
- Facilitate and promote EU-wide multimodal travel.

Background: Since 2010, the European Commission reports every three years on the main initiatives taken to promote and strengthen European citizenship. The 2017 EU Citizenship Report is accompanied by a technical report on the legislative developments and jurisprudence on EU citizenship in the period from 1 January 2013 to 30 June 2016. The latter report is foreseen in Art. 25 TFEU. (TW)

➤eucrim ID=1701002

2017 Justice Programme

On 6 March 2017, the European Commission adopted a financing decision and the work programme for 2017 that paves the way for implementing the Justice Work Programme and EU funding on several initiatives in the justice area.

The maximum Union contribution for the implementation of the financial programme for the year 2017 is set at €52,631,000. In 2017, the Commission will continue to support activities and actions initiated and developed by public authorities, universities, NGOs, and other organisations in the following fields:

- Judicial cooperation in civil and criminal matters;
- Judicial training;
- Access to justice, including rights of victims of crime, and rights of the defence;
- Drug initiatives.

In addition, funds are foreseen to financially support studies, the monitoring of legislation, information campaigns, and the exchange of good practices. (TW)

➤eucrim ID=1701003

Reform of the European Union

Political Reflections on the Future of the European Union

After UK citizens voted for the UK to leave the European Union, the leaders of the EU Member States started reflec-

tions on the future of the EU among the 27 EU Member States. The main starting point was the Declaration of Bratislava adopted by the heads of state or government on 16 September 2016. The leaders diagnosed together the present state of the European Union and gave first incentives for a discussion on the EU's common future. They agreed on the following general principles for future common action:

- Focusing on citizens' expectations and serving better their needs;
- Improving communication and cooperation among Member States and European institutions;
- Delivering on promises and making the EU 27 a success.

In addition, the Bratislava Declaration contains a roadmap that sets out objectives to be achieved in the various EU policy areas in the upcoming months. As regards internal security, for instance, the roadmap declares that everything necessary should be done to support Member States in ensuring internal security and fighting terrorism. The following concrete measures were agreed on:

- Intensified cooperation and information-exchange among security services of the Member States;
- Adoption of the necessary measures to ensure that all persons crossing the Union's external borders, including nationals from EU Member States, will be checked against the relevant databases, which must be interconnected;
- Set-up of a Travel Information and Authorisation System (ETIAS) to allow for advance checks and, if necessary, deny entry to visa-exempt travellers;
- Systematic efforts against radicalisation, including expulsions and entry bans where warranted as well as EU support for Member States' prevention actions.

The Bratislava Declaration gives guidance on reflections on the future of the EU. First conclusions in this regard were adopted in Rome on 25 March 2017, on the occasion of the celebrations of the 60th anniversary of the Rome Treaties. The following news items report on the Rome Declaration of 25 March 2015 and subsequently provide an overview of the main recent inputs towards these conclusions. The following links in the eucrim-ID lead to the EU's homepage, which accompanies the policy debate on the EU's future. (TW)

➤**eucrim ID=1701004**

Rome Declaration

Meeting without Britain, the heads of state/government of the 27 EU Member States and the three European Institutions – the European Council, the European Parliament, and the European Commission – endorsed the Rome Declaration at the celebration of the 60th anniversary of the Treaties of Rome, which were signed on 25 March 1957. The Rome Declaration highlights the EU's past achievements, present challenges, and the Rome Agenda. The latter sets common action in the following key policy areas in which the Member States have pledged to work together for the benefit of citizens in the coming years:

- A safe and secure Europe;
- A prosperous and sustainable Europe;
- A social Europe;
- A stronger Europe on the global scene.

As regards the policy area of a safe and secure Europe, the Rome Agenda says: "a Union where all citizens feel safe and can move freely, where our external borders are secured, with an efficient, responsible and sustainable migration policy, respecting international norms; a Europe determined to fight terrorism and organised crime."

The key message of the Rome Declaration is "unity" and "solidarity." Both are considered the only viable way to make the EU stronger and more resilient. In this context, the Rome Declaration delivers the following message: "Taken individually, we would be sidelined by global dynamics. Standing together is our best chance to influence them, and to defend our common interests and values."

Although not mentioned explicitly, the Declaration also addresses the current discussion on a multi-speed Europe, which was opposed to by several eastern, ex-communist countries in the run-up to the Rome summit (see further news items below). The compromise text now reads as follows: "We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later." This indirectly paves the way for those EU Member States who would like to make headway with faster and more European integration in certain policy fields than others.

Background: The Rome Declaration marks a first milestone in further collecting ideas on the changes to the EU after the UK leaves the Union as well as in giving EU citizens back the feeling that the EU has achieved a lot. It accentuates that only a united, undivided, and indivisible Europe can guarantee peace, freedom, and prosperity in the future. In this context, reference was often made to the historical event that took place 60 years ago on 25 March 1957, when the leaders of six European states (Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany) signed the founding treaties establishing the European Economic Community (TEEC) and the European Atomic Energy Community (TEAEC) at the Palazzo dei Conservatori on Capitoline Hill in Rome. The treaties entered into force on 1 January 1958. With the TEEC, the states promised to progressively reduce customs duties and create a customs union. Furthermore, it was agreed to establish a common market where people, goods, services, and capital can move freely. Other common policies were also created. The TEAEC regulates the civil use of nuclear energy. The Treaties of Rome meant that the Member States gave up national sovereignty rights in certain sectors and that they committed themselves to objectives beyond what was politically imaginable at that time. (TW)

➤**eucrim ID=1701005**

White Paper on the Future of Europe

On 1 March 2017, the European Commission presented a "White Paper on the Future of Europe." The White Paper sets out the main challenges and opportunities for Europe in the coming decade. In a first part, the White Paper analyses the driving forces of Europe's future. In a second part, it presents *five scenarios* for how the Union could evolve *by 2025,* depending on how it chooses to respond to the challenges.

The White Paper attempts to carve a vision of an EU with 27 Member States after the UK's Brexit. It is designed to provoke thought and does not detail concrete actions or policy prescriptions. In setting out the different scenarios, the authors of the White Paper envision the impacts on various EU policies, including internal security, Schengen cooperation, and European criminal law. In this context, they also provide illustrative snapshots on how the European world may look like in future. The following summarises the findings in context:

■ *Scenario 1 "Carrying on."*

This means that the European Union of 27 Member States focuses on delivering its positive reform agenda in the spirit of the Commission's New Start for Europe from 2014 and of the Bratislava Declaration agreed on at the summit of the European Council on 16 September 2016. For the future of European criminal law, this could mean that coordination on security matters has been improved. The fight against terrorism has been stepped up in line with the willingness of national authorities to share intelligence. Europeans are mostly able to travel across borders without having to stop for checks.

■ *Scenario 2 "Nothing but the Single Market."*

According to this scenario, the EU27 is gradually re-centred on the single market, as the 27 Member States are not able to find common ground on an increasing number of policy areas.

By 2025, this could mean: Coordination on security has been dealt with more or less bilaterally. Internal border controls are more systematic because of insufficient cooperation on security and migration matters. Citizens experience the lack of harmonised sanctions among the EU27, e.g., airspace violations or large-scale cyber-attacks.

■ *Scenario 3 "Those Who Want More Do More."*

This is a model of "coalitions of the willing**."** The EU27 would proceed as today but allow willing Member States to do more together in specific areas, including internal security or taxation matters. For the future of European criminal law, this could mean: A group of countries deepen their cooperation in security or justice matters. Thanks to a joint public prosecutor's office, they collectively investigate fraud, money laundering and the trafficking of drugs and weapons. Security information is immediately exchanged within this group of countries as databases are fully interconnected. Criminal evidence produced in one country is automatically recognised in the others.

■ *Scenario 4 "Doing less more efficiently."*

Here, the EU27 focuses on delivering more and faster results in selected policy areas, while doing less where it is perceived not to have an added value. The EU27 could step up its work in fields such as security, migration, the management of borders, and defence.

This essentially means that cooperation on counter-terrorism matters, border management, and migration and asylum policies becomes systematic. By 2025 this could mean: A new European Counter-terrorism Agency has helped to deter and prevent serious attacks in European cities by the systematic tracking and flagging of suspects. National police authorities had easy access to European databases containing the biometric information on criminals.

■ *Scenario 5 "Doing much more together."*

In this scenario, Member States decide to share more power, resources, and decision-making across the board. Decisions are agreed at a faster rate at the European level and rapidly enforced.

As in the scenario "Doing less more efficiently," cooperation on counter-terrorism matters, border management, and migration and asylum policies has become systematic. Cooperation in security matters is routine. As an illustrative snapshot, the White Paper sets out in this context that citizens travelling abroad receive consular protection and assistance from EU embassies, which in some parts of the world have replaced national ones. Non-EU citizens wishing to travel to Europe can process visa applications through the same network.

The Commission's White Paper on the Future of Europe was designed to be a fundamental contribution to the Rome Summit of 25 March 2017 when the heads of state or government intended to formulate a clearer vision on how the EU can overcome its present problems and what the EU might look like in future (see news item above).

The Commission also emphasised that the White Paper is a starting point for further pan-European public discussion on the reform of the European Union. The Commission plans to table further reflection papers on specific topics, such as the development of the social dimension of Europe, harnessing globalisation, or the future of EU finances.

A series of "Future of Europe Debates" across Europe's cities and regions will be launched, hosted by the European Commission together with the European Parliament and interested Member States.

The ideas expressed in these public debates may be included in Commission President *Juncker's* State of the Union speech in September 2017 and influence conclusions to be drawn at the December 2017 European Council. (TW)

➤eucrim ID=1701006

Leaders of the "Big-Four" Endorse Multi-Speed Europe Concept

A first reaction to the White Paper on the Future of Europe (see news item above)

came from the leaders of four big EU countries French President *François Hollande*, German Chancellor *Angela Merkel*, and the Prime Ministers of Italy and Spain, *Paolo Gentiloni* and *Mariano Rajoy* – who met in the Palace of Versailles on 6 March 2017 and reflected on Europe's future before the Rome summit on 25 March 2017. They favoured the concept of a dynamic, multi-speed Europe, in which a group of countries can deepen their integration further and faster than others.

Angela Merkel said: "We should have the courage to allow some countries to move ahead, to advance more quickly than others. Cooperation can be kept open to those that have fallen behind."

Mariano Rajoy supported the fourth scenario of the Commission White Paper (see news item above). However, Chancellor *Merkel* left open whether Germany would stand behind this position since the scenario would entail a revision of the Lisbon Treaty, something that France and Germany have been reluctant to do to date. (TW)

➤eucrim ID=1701007

European Council Divided on Multi-Speed Scenario

The different scenarios on the possible common future of the EU were also on the agenda of the summit of leaders/heads of state or government in Brussels on 10 March 2017. In particular, the concept of a multi-speed Europe as also put forward by the leaders of the big four EU countries France, Germany, Italy, and Spain at a meeting in Versailles shortly before the summit (see news item above) was heavily debated.

"Some expect systemic changes that would loosen intra-EU ties and strengthen the role of nations in relation to the community. Others, quite the opposite, are looking for new, deeper dimensions of integration, even if they would apply only to some Member States," concluded *Donald Tusk*, President of the European Council, after the meeting. He called upon politicians to follow the main objective of strengthening mutual trust and unity among the EU27 when discussing the various scenarios for Europe. (TW)

➤eucrim ID=1701008

Letter by *Donald Tusk* Feeds Discussion on Future of EU

In a letter entitled "united we stand, divided we fall" and addressed to the 27 EU heads of state or government on the eve of the summit of the European Council in Malta on 3 February 2017, *Donald Tusk*, President of the European Council, contributed to the reflections on the future of Europe among the 27 EU Member States. The letter was also a preparatory document for the Rome Summit on 25 March 2017 when the 60th anniversary of the signature of the Rome Treaties was celebrated (see news item above).

In his letter, *Donald Tusk* identified three main threats, which currently challenge the EU and are seen by him as more dangerous than ever before since the signature of the Treaty of Rome:

- *New geopolitical situation.* An increasingly assertive China, Russia's aggressive policy towards Ukraine and its neighbours, wars, terror and anarchy in the Middle East and in Africa (with radical Islam playing a major role), and worrisome declarations by the new American administration all make Europe's future highly unpredictable. For the first time in history, in an increasingly multipolar external world, many are becoming openly anti-European or Eurosceptic at best;
- *Internal situation.* A rise in nationalist and increasingly xenophobic sentiment in the EU itself. As a consequence, national egoism is becoming an attractive alternative to integration, and centrifugal tendencies feed on mistakes;
- *State of mind of the pro-European elites.* Decline of faith in political integration, submission to populist arguments, and doubt about the fundamental values of liberal democracy are all becoming increasingly visible.

Tusk called upon state leaders to reiterate the two basic "truths" in Rome: first, "united we stand," and second, living in peace during the European unity. He urged the leaders to "take assertive and spectacular steps that would change the collective emotions and revive the aspiration to raise European integration to the next level." In order to do this, he advocated a restoration of the sense of external and internal security as well as socio-economic welfare for European citizens. According to the letter, this requires, *inter alia*, a "definitive reinforcement of the EU external borders; improved cooperation of services responsible for combating terrorism and protecting order and peace within the border-free area." (TW)

➤eucrim ID=1701009

Schengen

EDPS Critical on ETIAS

On 7 March 2017, the European Data Protection Supervisor (EDPS) issued a critical opinion on the proposal for a European Travel Information and Authorisation System (ETIAS). ETIAS was proposed by the Commission in November 2016 (see eucrim 4/2016, p. 155). ETIAS is designed to gather data on visa-exempt third-country nationals prior to their arrival at the Schengen borders to determine whether or not the person poses a risk that should hinder him/her from entering into the EU.

The EDPS stressed that visa-exempt travellers will actually undergo a risk assessment with respect to security, irregular migration, and public health risks prior to their arrival. The data processing via ETIAS will result in granting or denying automated authorisation to enter the EU.

The EDPS uttered several concerns about the proposal. Essentially, he questions the necessity of establishing such a new system and criticises the lack of a thorough (data protection) impact as-

sessment. In detail, he identified the following main concerns:

- The ETIAS proposal follows a recurring trend in EU legislation to address migration and security problems jointly. The EDPS advises that border management and law enforcement must be substantially distinguished, however, since they have different implications for data protection and privacy;
- An assessment would have to take into account all existing measures at the EU level involving data processing for migration and security objectives. Against the background of the principle of proportionality, an in-depth analysis must determine whether ETIAS is truly necessary;
- In view of the purpose limitation principle and given the consequences of ETIAS for an individual (i.e., denial of entry), EU law must clearly define what the risks are and which reliable methods are used to determine the cases in which the risks exist;
- ETIAS would establish screening rules that may not be in line with the EU Charter of Fundamental Rights. The EDPS stresses that such profiling techniques raise serious technical, legal, and ethical questions. He calls on the Commission to produce convincing evidence supporting the necessity of using profiling tools for the purposes of ETIAS. He further encourages the EU legislator to reconsider the use of profiling;
- The relevance and efficiency of collecting and processing health data is also questioned by the EDPS. The EDPS also suggests reconsidering the necessity of processing such data because of the limited link between health risks and visa-exempt travellers;
- The EDPS further calls for establishing convincing evidence on the necessity of law enforcement and Europol access to ETIAS data. An assessment would need to take into account the already existing large-scale IT systems in the EU and specifically the case of third-country nationals who are legally visiting and entering the EU;
- The EDPS ultimately calls for a better justification of the chosen data retention period.

The opinion of the EDPS also contains several recommendations, addressing the roles and responsibilities of the EU bodies involved as well as the architecture and security of the ETIAS.

The opinions of the EDPS have become increasingly influential. It remains to be seen whether the EDPS' opinion can influence the EU legislators, i.e., the European Parliament and the Council. On the critical assessment by the FRA as regards the reform of the Eurodac system, see below under "Data Protection." (TW)

➤eucrim ID=1701010

Evaluation Report on SIS II

On 21 December 2016, the Commission tabled a report on the evaluation of the second generation of the Schengen Information System (SIS II) – Europe's most important large-scale, centralised information system that supports checks at the external Schengen borders and improves law enforcement and judicial cooperation in 29 European countries.

The report is the result of a comprehensive evaluation carried out in 2016 by the Commission's service DG HOME and eu-LISA, the EU's new agency responsible for the operational management of SIS. The report concludes that SIS is operating effectively and confirms the overall outstanding operational and technical success of the system. No other law enforcement cooperation system generates as many positive outcomes or can handle as much information flow in real time, with the result that, year on year and in all alert categories, hits have increased. However, the evaluation also found that operational and technical improvements could be made in some areas. These will be implemented by a set of legislative proposals that were put forward by the Commission on the same day the evaluation report was published (see next news item). (TW)

➤eucrim ID=1701011

Commission Makes Schengen Information System Fit for New Security Challenges

On 21 December 2016, the Commission tabled several legislative proposals that intend to strengthen the operational effectiveness and efficiency of the second generation of the Schengen Information System (SIS II). The proposals were made on the basis of an evaluation of SIS II (see aforementioned news item). They also refer to the Communication of 20 April 2016 setting out the way forward towards the achievement of an effective and sustainable EU Security Union and the Commission's initiative of 6 April 2016 on starting a process of reflection on "Stronger and Smarter Information Systems for Borders and Security."

One legislative proposal deals with the use of SIS II for purposes of police and judicial cooperation. First, it consolidates the content of the existing legal instruments on SIS II and, second, it adds new provisions to achieve the following:

- Better harmonise national procedures for the use of SIS, in particular with regard to terrorism-related offences as well as children at risk of parental abduction;
- Extend the scope of SIS by introducing new elements of biometric identifiers to existing alerts;
- Introduce technical changes to improve security and help reduce the administrative burden by providing for compulsory national copies and common technical standards for implementation;
- Address the complete end-to-end use of SIS, covering not only the central and national systems, but also ensuring that end-users receive all necessary data to perform their tasks and that they comply with all security rules when processing SIS data.

A second legislative proposal relates to the use of SIS II for purposes of border checks of third-country nationals. A third one concerns the use of the system for the return of illegally staying third-

country nationals. The latter supplements the proposal for border management and complements the provisions contained therein. It establishes a new alert category and contributes to the implementation and monitoring of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.

The three separate legal instruments do not touch upon the comprehensive operation and use of SIS II but were considered necessary because of the distinct EU Member States' participation in EU policies in the Area of Freedom, Security and Justice – the so-called variable geometry. (TW)

➤eucrim ID=1701012

Further Prolongation of Internal Border Controls

On 7 February 2017, the Council – following a corresponding recommendation of the European Commission – adopted an implementing decision that allows Austria, Germany, Denmark, Sweden, and Norway to prolong temporary internal border controls for another three months. For the background and mechanism of these prolongations in the Schengen area, see eucrim 4/2016, p. 156 and eucrim 2/2016, p. 67. The reintroduction of internal border controls within Schengen states is possible in exceptional circumstances (Art. 29 of the Schengen Border Code).

Border controls must be carried out under the condition of a proportionality test. The Member States that carry out these controls should review whether they are still necessary each week and adjust them to the threat level, phasing them out whenever appropriate. They should report to the Commission and the Council every month.

The Commission emphasised that it is and remains fully committed to working with Member States in gradually phasing out temporary internal border controls and returning to a normal functioning of the Schengen area without internal border controls. However, it also had to concede that migratory pressure still justifies the persistence of exceptional circumstances to maintain internal border controls on the part of the said Schengen states. (TW)

➤eucrim ID=1701013

Legislation

Joint Declaration on EU's Legislative Priorities for 2017

In December 2016, former Parliament President *Martin Schulz*, European Commission President *Jean-Claude Juncker*, and Slovak Prime Minister *Robert Fico*, representing the then Council presidency, signed the first ever joint declaration setting out the EU's objectives and priorities for EU legislation in 2017.

It is the first time in history that the leaders of the three European institutions involved in EU law-making agreed on a limited number of initiatives of major political importance that should be given priority treatment in the legislative process in 2017. The joint declaration identifies six priority areas in which legislative proposals should be fast-tracked.

Regarding the issue of security, the Entry-Exit System, Smart Borders, and the European Travel Information Authorisation System (ETIAS), the control of firearms, instruments to criminalise terrorism, money laundering and terrorist financing, and the European Criminal Records Information Systems (ECRIS) are mentioned.

Other priority areas include:

- Jobs, growth, and investment, e.g., strengthening the European Fund for Strategic Investment (EFSI 2.0), modernising the Trade Defence Instruments, and improving the Banking Union;
- EU's social policy, notably the enhancement of the Youth Employment Initiative;
- Migration policy, e.g., reform of the Common European Asylum System (including the Dublin mechanism);
- Digital Single Market, which encompasses the completion of the work to modernise the EU's common data protection rules;
- Energy Union and climate change policy.

In addition, the three EU leaders highlighted four fundamental issues needing particular attention and further progress in 2017:

- Commitment to common European values, the rule of law, and fundamental rights;
- Tackling tax fraud, tax evasion, and tax avoidance;
- Preserving the principle of free movement of workers;
- Contributing to stability, security, and peace.

The joint declaration is an "output" from the new Interinstitutional Agreement on Better Law-Making (IIA) to improve the quality and results of European legislation – adopted in March 2016. According to the new IIA, there must be joint agreements on the key topics to be prioritised by legislators, including simplification exercises for existing laws.

The EU leaders also agreed to carefully monitor and track progress as regards the implementation of the joint declaration. At the political level, the implementation of the joint declaration will be monitored jointly and regularly through meetings of the Presidents of the three institutions in March, July, and November 2017. At the technical level, the implementation of the joint declaration will be monitored jointly and on a regular basis in the Interinstitutional Coordination Group, meeting at the senior official level (as foreseen in point 50 of the Interinstitutional Agreement on Better Law-Making). To facilitate monitoring and tracking, a working document accompanying the joint declaration sets out in detail the initiatives that are to be fast-tracked in 2017. (TW)

➤eucrim ID=1701014

European Judicial Training Report

On 23 December 2017, the European Commission published a report that

provides statistical data on training of legal practitioners in 2015. The report describes the progress made towards the target set by the European Commission in its 2011 Communication "Building trust in EU-wide justice. A new dimension to European judicial training": to ensure that half (around 700,000) of all legal practitioners in the EU are trained in EU law or in the national law of another Member State by 2020; this is equivalent to 5% (70,000) of all practitioners per year, on average.

The meanwhile fifth report on judicial training in EU law states that – in view of the developments since 2011 – the 2020 target can be achieved on average across the whole EU and legal professions if ongoing efforts are continued in the years to come. However, the report also admits that the basis of the statistical data base is not coherent; it must further be noted that considerable differences remain in the level of participation in training among Member States and among the different legal professions.

The report provides statistics and information *inter alia* on the following:

- Participation of various legal professions in trainings, e.g., judges, prosecutors, lawyers;
- Length of training on EU law;
- Range of training topics (including substantive and procedural criminal law);
- EU-funded training.

In the future, the Commission intends to increase the training of legal professionals in EU law, not only in terms of quantity but also in terms of quality. Thus, it issued (on the "e-Justice" website) advice for training providers that collects practical tips along with examples and that can be of help when conceptualising and organizing training activities. Training material on several topics (including EU criminal law) is also available on the website and ready for use by legal practitioners and/or training providers. (TW)

➤eucrim ID=1701015

Institutions

Council

Priorities of the Maltese Council Presidency

On 1 January 2017, Malta took over the rotating presidency of the Council of the EU. During its presidency, which lasts until 30 June 2017, Malta will focus on six key areas: migration, the single market, security, social inclusion, Europe's neighbourhood policy, and the maritime sector.

Concrete objectives in the area of security are:

- Continuing action on combating terrorism; taking forward the fight against serious and organised crime through the EU Policy Cycle; following up on the EU Roadmap to enhance the exchange and management of information, including interoperability solutions for databases used by national law and border management authorities; and continuing action on the fight against terrorist financing through various legislative files, including a political agreement on the fourth Anti-Money Laundering Directive;
- Achieving significant progress on current initiatives aimed at better managing the Union's external border, including the establishment of an EU system to register entry and exit of third-country nationals; the creation of an EU Travel Information and Authorisation System (ETIAS) – for the latter see above under "Schengen;"
- Taking steps to broaden consensus on the outstanding elements concerning the creation of the European Public Prosecutor's Office (see also below);
- Improving the governance of Eurojust in order to ensure more coordinated criminal justice cooperation across borders, thereby better protecting citizens against international criminal activities such as trafficking, terrorism, and money-laundering.

With the Maltese Presidency, the 18-month Programme that was established by Malta together with the Netherlands and the Slovak Republic ends. (TW)

➤eucrim ID=1701016

European Court of Justice (ECJ)

EU Courts Statistics of 2016

On 17 February 2017, the Court of Justice of the European Union released statistics concerning its judicial activity in 2016.

In 2016, the Court of Justice received the highest number of cases for a preliminary ruling in its history (470). In total, the Court received 692 cases in the course of 2016 and was able to complete 704 cases, which lead to a slight decrease in cases pending in comparison with 2015. One of the main trends was that the duration of proceedings at the Court of Justice was further reduced. In the case of references for preliminary rulings, the average duration was 15 months in 2016 – a record number, since it was the shortest duration recorded in 30 years. The Court maintains that the constant improvement in efficiency is the main reason for this development. The average duration of appeals was 12.9 months.

Statistics on the judicial activity of the General Court revealed two trends: first, an increase in the number of new cases and in the number of cases pending and, second, a reduction in the duration of proceedings. The average of duration of proceedings at the General Court fell of 1.9 months compared with 2015 and of 8.2 months compared with 2013, with an overall average for proceedings of 18.7 months. As regards the type of cases dealt with at the General Court, cases concerning restrictive measures decreased relatively in 2016 (28 cases brought before the Court), whereas intellectual property cases increased (up by 11%). Furthermore, the General Court had to cope with the transfer of actions from the EU Civil Service Tribunal whose existence ended in 2016. (TW)

➤eucrim ID=1701017

OLAF

Evaluation of OLAF Regulation

Whether the current model for OLAF, which is laid down in Regulation (EU, Euratom) No. 883/2013, works or not was discussed at a high-level conference on 1-2 March 2017 in Brussels (see also eucrim 4/2016, p. 157). The conference hosted more than 200 stakeholders, including national experts and practitioners, academics, lawyers, and EU civil servants.

The evaluation of OLAF's current legal basis is foreseen in Art. 19 of Regulation 883/2013. The Commission commissioned an external contractor to do an evaluation analysis, the preliminary findings of which were also the starting point for the conference.

The participants discussed OLAF's tasks and mandate regarding external and internal investigations, OLAF's governance as well as the future relationship between OLAF and the European Public Prosecutor's Office. OLAF Director-General *Giovanni Kessler* put forward the following issues for a possible update of the current legal basis:

- Clarified legal rules on investigative acts, such as access to bank accounts, and the clear authority to interview witnesses and enter the premises of economic operators.
- Sufficient legal basis to allow judicial authorities in all European Union Member States to use OLAF reports as evidence in trial.
- Possible new areas for OLAF's competences beyond the protection of the EU's financial interests, such as food fraud or intellectual property rights.

The Commission is required to submit its evaluation report on the application of Regulation 883/2013 by 2 October 2017. It will be accompanied by an opinion of the Supervisory Committee and shall state whether there is a need to amend this Regulation.

OLAF made material on the conference as well as presentations held at the conference available on the Internet. The website includes the conference speeches and is indicated in the following eucrim-ID. (TW)

➤eucrim ID=1701018

Europol

Memorandum of Understanding with NCFTA Signed

On 15 February 2017, Europol signed a Memorandum of Understanding with the National Cyber-Forensics and Training Alliance (NCFTA), the aim being to cooperate, share best practices, and exchange statistical data and trends in the fight against cybercrime.

NCFTA is a non-profit corporation that focuses on identifying, mitigating, and neutralizing cybercrime threats globally by conducting real-time information sharing and analysis with subject matter experts in the public, private, and academic sectors. (CR)

➤eucrim ID=1701019

Memorandum of Understanding with Global Cyber Alliance Signed

On 20 January 2017, Europol signed a Memorandum of Understanding (MoU) with the Global Cyber Alliance (GCA), with the aim of decreasing systemic cyber risks and improving Internet security throughout Europe and beyond.

Under the MoU, parties will exchange information on cybercrime trends, engage in joint international projects to increase cyber-security, and develop best practice recommendations to help organisations secure their networks and domains through the Internet Immunity project. (CR)

➤eucrim ID=1701020

Memorandum of Understanding with EURid Signed

On 20 December 2016, Europol signed a Memorandum of Understanding (MoU) with EURid, the European Commission-appointed internet registry manager for .eu domains. Under the MoU, parties shall join their efforts, exchange statistical data and trends, and cooperate on projects to fight cybercrime. (CR)

➤eucrim ID=1701021

ECTC First Anniversary

On the occasion of the first anniversary of the European Counter Terrorism Centre (ECTC) in January 2017, Europol published an infographic outlining the increase in information sharing on counter-terrorism.

According to the infographic, Secure Information Exchange Network Application (SIENA) cases related to terrorism increased from 2245 cases in 2015 to 3934 cases in 2016. SIENA messages concerning terrorism increased from 56,277 messages in 2015 to 94,770 in 2016. The number of operations supported by the focal points within the ECTC increased from 86 in 2015 to 127 in 2016. (CR)

➤eucrim ID=1701022

Police2Peer Action against Child Sexual Abuse Material Online

Collecting and distributing child sexual abuse material online is considerably facilitated by the use of peer-to-peer file sharing. Hence, under the new initiative called Police2Peer, police are present and also share files that appear to be child abuse material on file sharing networks. Instead of containing child abuse material, the files inform users of the consequences of their illegal actions. Europol supports the Police2Peer action through the hosting of resources linked to the initiative on its website. The website also provides a link to help resources for persons with a problematic sexual interest in children. (CR)

➤eucrim ID=1701023

Safeguarding of Victims

From 28 January to 10 February 2007, Europol hosted its third Victim Identification Task Force (VIDTF 3) bringing together 25 experts from 16 countries and 22 agencies to identify victims of child sexual abuse and exploitation. During the meeting, 265 new contributions

and 350 additions to existing contributions were uploaded to the International Child Sexual Exploitation Database (ICSE), helping investigators to identify and safeguard respective victims. (CR)
➤eucrim ID=1701024

Cooperation to Fight Illegal Trafficking in Wild Plants and Animals

On 2 February 2017, Directors of Europol and TRAFFIC met to discuss further cooperation, thus following up the Memorandum of Understanding (MoU) signed in 2016 to fight environmental crime, particularly the illegal trafficking of endangered animal and plant species.

TRAFFIC is a non-governmental organization with the aim of ensuring that trade in wild plants and animals does not threaten the conservation of nature. (CR)
➤eucrim ID=1701025

Cooperation to Fight Wildlife Crimes

On 13 March 2017, Europol further enhanced cooperation in combating organised wildlife crimes. Europol concluded a Memorandum of Understanding (MoU) with the Wildlife Justice Commission (WJC), an independent, non-profit organisation which helps ensure that governments enforce the rule of law against perpetrators of wildlife crimes. The WJC was set up in the Netherlands in March 2015. The MoU enables both parties to share technical expertise and best practices as well as to raise awareness of environmental crimes, including trafficking in endangered animal and plant species. (TW)
➤eucrim ID=1701026

Eurojust

Final Evaluation Report on Implementation of Eurojust Action Plan against THB 2012–2016

In January 2017, Eurojust published a Final Evaluation Report, reviewing Eurojust's work in the fight against trafficking in human beings (THB) from 1 January 2012 to 31 December 2016. The report was based on Eurojust's casework in THB cases registered during the action period. Under the action plan, six priority areas were to be tackled during the action period:

- Enhancing information exchange;
- Increasing the number of detections, investigations, and prosecutions in THB cases and enhancing judicial cooperation in this area;
- Training and expertise in THB cases;
- Increasing cooperation with third states in THB cases;
- Developing multidisciplinary approaches to combating THB;
- Disrupting criminal money flows and assisting in asset recovery in THB cases.

According to the report, Eurojust managed to increase the quantity and quality of coordination meetings related to THB cases during the action period. The same development was observed regarding the involvement of Europol in the number of Eurojust's THB cases and THB coordination meetings. The number of JITs in THB cases also increased significantly. However, the number of THB-related notifications to Eurojust by the Member States remained low. Looking at the percentage of registered THB cases in relation to the total number of cases registered as well as the percentage of multilateral THB cases as opposed to bilateral cases at Eurojust, both percentages remained low during the project. While number of THB cases with third state involvement also could not be increased, Eurojust managed to appoint 13 new Eurojust Contact Points in third states in the action period and to sign three new cooperation agreements. (CR)
➤eucrim ID=1701027

Further Cooperation between Eurojust and Frontex

In light of Frontex' expanded mandate, the Executive Director of Frontex and the President of Eurojust met on 23 February 2017 to open a dialogue on new cooperation opportunities between the two EU bodies. The meeting focused on concrete measures and steps to be immediately taken in order to establish operational cooperation between Eurojust and Frontex. In parallel, a cooperation agreement is currently being developed, allowing for the exchange of operational information. (CR)
➤eucrim ID=1701028

Frontex

Risk Analysis for 2017

In February 2017, Frontex published its Risk Analysis for 2017.

According to the report, the number of illegal border crossings significantly decreased in 2016 (382,000 migrants) compared to 2015 (1,8 million illegal border-crossings) but remained higher than in 2014. Of the total number, 180,000 arrivals were reported from Italy and Greece, the latter slowing down after the EU-Turkey statement of 18 March 2017. In 2016, a record number of arrivals was also reported on the Western Mediterranean route. Looking at nationality, in 2016, persons claiming to be Syrian nationals represented the highest share of migrants illegally entering the EU (17% of total EU). The number of non-EU citizens returned to their country of origin reached 176,000. In 2016, Frontex coordinated the return of 10,700 non-EU nationals on 232 return flights compared to 3565 non-EU nationals on 66 return flights in 2015. (CR)
➤eucrim ID=1701029

Pool of Return Experts

On 10 January 2017, Frontex launched a pool of experts to support the authorities of EU Member States with the return of migrants. The pool consists of 690 return monitors, return escorts, and return specialists. The latter shall provide support regarding the identification of irregular migrants and the acquisition of travel documents, including cooperation with consular authorities of the countries of origin of returnees. Return escorts shall

support national escort officers during return operations coordinated by Frontex. And, finally, return monitors shall carry out independent monitoring of return operations in order to ensure compliance with fundamental rights. (CR)
➤eucrim ID=1701030

Agency for Fundamental Rights (FRA)

10th Anniversary of Fundamental Rights Agency

The European Union Agency for Fundamental Rights was inaugurated on 1 March 2007. On 28 February 2017, the Agency marked its 10th anniversary with a symposium held at its seat in Vienna.

Speakers at the symposium – including President of the Federal Republic of Austria, H.E. *Alexander Van der Bellen*, and Commissioner for Justice, *Věra Jourová* – reflected on the following:

- The challenges that human rights are facing at present;
- The importance of fundamental rights protection in the EU;
- The perspectives of the human rights system in future;
- The achievements and the important role of the Agency and its future tasks in delivering solid evidence-based advice in human rights matters.

Frauke Seidensticker, FRA's Management Board Chairperson, concluded that the symposium showed "we have a strong basis for human rights in the EU ... We need to speak more loudly about human rights and its successes."

The FRA is mandated to "provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights" (Art. 2 of Council Regulation (EC) No 168/2007). Since 2013, FRA has been focusing on nine thematic areas that are laid down in the Multiannual Framework for 2013-2017, including access to justice, victims of crime, and judicial cooperation. FRA's primary methods of operation are surveys, reports, the provision of expert assistance, and awareness raising on fundamental rights. The FRA is not mandated to intervene in individual cases but rather to investigate broad issues and trends concerning fundamental rights in the EU. (TW)
➤eucrim ID=1701031

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

European Public Prosecutor's Office – On the Way to Enhanced Cooperation

At its meeting on 10 March 2017 in Brussels, the heads of state or government, who convened as the European Council, paved the way for the establishment of the European Public Prosecutor's Office (EPPO) by means of enhanced cooperation. This means that a group of EU Member States can push forward with the legislative proposal, whereas others will not take part in the EPPO but have the possibility to join at a later stage. The act by the European Council emanated from the special procedure foreseen in Art. 86 TFEU if unanimity cannot be reached on a regulation for the establishment of the EPPO within the Council.

The absence of unanimity was registered by the General Affairs Council at its meeting on 7 February 2017 in Brussels. Although several delegations of the EU Member States at the working level underlined that they could agree on the negotiated text (stabilised in January 2017, see below), Sweden signalled that it will not, in any case, take part in the adoption of the EPPO. On the eve of the summit of the European Council, other governments of EU Member States also announced that they will not send their national prosecutors to be part of the EPPO, including Hungary, Poland, the Netherlands, and Malta.

The decision of the European Council that no consensus among all EU Member States could be reached on the EPPO proposal now allows the at least nine Member States to express their wish to establish enhanced cooperation on the basis of the draft regulation concerned, by accordingly notifying the European Parliament, the Council, and the Commission. This notification triggers the provisions on enhanced cooperation (Art. 20 TEU, Art. 326 et seq. TFEU).

On 3 April 2017, 16 Member States submitted this notification to the three European institutions of their intention in order to launch an enhanced cooperation to establish a European Public Prosecutor's Office (EPPO). The notification letter was signed by the following countries: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Greece, Spain, Finland, France, Lithuania, Luxembourg, Portugal, Romania, Slovenia, and Slovakia.

The Council will now resume negotiations on the basis of the latest compromise draft text of the full Regulation on the establishment of the EPPO, which was tabled by the Council Presidency on 31 January 2017 (indicated at the following eucrim-ID). The Maltese Council Presidency signalled that the intention is to quickly finalise work on the regulation. A fundamental revision of the draft text of 31 January 2017 is not expected.

The Maltese Council Presidency also expressed on 3 April 2017 that other Member States are expected to join the cooperation, which they are entitled to do at any time before or after the adoption of the EPPO. However, opinions on the current state of play of the EPPO Regulation differ. Either Member States (e.g., Poland) fear that the EPPO interferes too much in national judicial systems or they are of the opinion that the

EPPO provides no added value (e.g., Sweden). Italy described the office as modelled during the negotiations in the Council as "not very meaningful," so it is likely that Italy will not endorse the watered-down bill. A similar position has initially been taken by Cyprus. The UK, Ireland, and Denmark will not take part either, since they used their right to opt-out of the measure.

The establishment of the EPPO would be the first time that enhanced cooperation is applied to a criminal law matter. To date, enhanced cooperation has been used to establish rules in the field of cooperation in civil matters (divorce law, property regimes of international couples) and patent law (unitary patents). The establishment of a European Union financial transaction tax is currently being negotiated under the enhanced cooperation mechanism. (TW)

➤eucrim ID=1701032

PIF Directive on its Way

On 14 February 2017, the General Affairs Council reached political agreement on the text of the Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law. After several trilogue meetings last year, the Council Presidency tabled an overall compromise text on 1 February 2017, which is indicated in the following eucrim-ID.

MEPs pushed the Council to endorse this text after the Chairs of the Budgetary Control Committee (CONT) and of the Civil Liberties, Justice and Home Affairs Committee (LIBE), Ms. *Inge Gräßle* and Mr. *Claude Moraes*, addressed a letter to the President of the Permanent Representatives Committee. The letter stated that, if this text was to be transmitted formally to the European Parliament, they will recommend to the Members of the CONT and LIBE Committees and subsequently to the Plenary of the EP that the Council's first reading position be accepted without amendments in the Parliament's second reading, pending verification by the lawyer linguists of both institutions.

However, some delegations of the Member States are still not satisfied with the compromise text. The main dispute is still over the inclusion of some cross-border VAT fraud with damages over €10 million. This was agreed in the negotiations between the EP and the Council (for details, see eucrim 4/2016, p. 158-159).

The political agreement arrived at still needs to be formally endorsed by a vote in the Council and in the Parliament, respectively.

The PIF Directive aims to facilitate enforcement of the Member States' responsibilities towards revenue and expenditure of the EU's budget by harmonising fraud-related criminal offences and sanctions. It will also form the basis upon which the European Public Prosecutor's Office will exercise its competences. (TW)

➤eucrim ID=1701033

Hercule III Programme in 2017

The European Commission has earmarked a total of 14.95 million euros for the implementation of the Hercule III Programme in 2017. This is an increase of almost half a million euros for the EU's main financial support for projects dedicated to fighting fraud, corruption and any other illegal activities affecting the financial interests of the EU. The Programme is managed by the European Anti-Fraud Office (OLAF).

The Hercule Programme financially supports projects in the following three areas:

- Technical assistance measures;
- Access to specialised databases for anonymous use by national customs and tax authorities;
- Training, seminars, and conferences.

A new feature of the Hercule Programme in 2017 is a cooperation between OLAF and the European Police College (CEPOL) to organise specialized digital forensic training courses in the second half of 2017. The Programme will finance the development of a methodology to better collect information in order to measure the illicit tobacco trade from third countries into the EU.

The Commission will launch three calls for proposals under the annual work programme by mid-May 2017. One of the calls is the "law training & studies" call for proposals. The indicative budget for the latter is €500,000. Priority topics for studies and conferences are listed in the annual work programme, which can be retrieved via the link below. To process grant applications submitted to the Hercule III programme, the Commission will use the electronic grant management system that is already operational for the submission of grant applications under the Horizon 2020 Research and Development programme. Once the call for proposals has been launched, applicants can retrieve all information and submit their applications via:
http://ec.europa.eu/research/participants/portal/desktop/en/home.html

For updated information, please consult the Hercule Programme website indicated at the following eucrim-ID. (TW)

➤eucrim ID=1701034

Money Laundering

EP Committees' Amendments to Revision of 4th Anti-Money Laundering Directive

On 28 February 2017, the EP Committee on Economic and Monetary Affairs and the EP Committee on Civil Liberties, Justice and Home Affairs presented their proposed legislative amendments to the Commission's proposal amending the fourth Anti-Money Laundering Directive (COM(2016) 450, cf. eucrim 2/2016, p. 73). The proposed amendments, *inter alia*, concern the following:

- Access by EU citizens to beneficial ownership registers without having to demonstrate a "legitimate interest" in the information;

- Expansion of the scope of the new Directive concerning trusts and "other types of legal arrangements having a structure or functions similar to trusts;"
- Bringing virtual currency platforms under the same obligation to scrutinise their customers as banks and other payment institutions;
- Lowering the threshold at which identification requirements apply to (anonymously used) pre-paid cards (from 250€ to 150€).

The rapporteurs of the EP committees stressed that the main concepts of the Commission proposal can be approved and that there is a need to adopt the new legislation as soon as possible. It is now up to the plenary of the EP to adopt the amendments, which opens the way for trilogue negotiations between the EP, the Council, and the Commission. (TW)
➤eucrim ID=1701035

Roadmap on Supranational Risk Assessment of Money Laundering

On 28 February 2017, the Commission presented a roadmap that aims at leading the way to a risk assessment of money laundering and terrorist financing at the EU level. The roadmap was issued in the context of Art. 6 of the 4th Anti-Money Laundering Directive (Directive 2015/849), which requires the Commission to draw up a report identifying, analysing, and evaluating risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities at the Union level. The report should be presented by 26 June 2017. Thereafter, the Commission shall update its report at least every two years.

The report referred to shall cover at least the following:
- The areas of the internal market that are at greatest risk;
- The risks associated with each relevant sector;
- The most widespread means used by criminals to launder illicit proceeds.

Above all, the report is designed to assist the EU Member States and obliged entities in identifying, understanding, managing, and mitigating the risk of money laundering and terrorist financing. It also aims to enable other stakeholders, including national legislators, the European Parliament, the three European Supervisory Authorities (EBA, EIOPA, and ESMA – ESAs), and representatives from Financial Intelligence Units (FIUs) to better understand the risks of money laundering. The Commission will define mitigating actions, including recommendations to Member States. According to the Directive, Member States must take into account the recommendations by the Commission as to the measures suitable for addressing the identified risks.

The roadmap, in particular, sets out the methodology by which to carry out the supranational risk assessment It includes workshops with experts from the Member States and representatives of Europol, the ESAs, and the Commission services. The Commission will also consider the joint opinion of the ESAs – foreseen by Art. 6 para. 5 of Directive 2015/849 and published on 20 February 2017. The Commission will additionally discuss the results of the analysis and possible mitigating measures with the relevant Commission experts groups (FIU platform, EGMLTF). The private sector and civil society is also to be consulted during this process. (TW)
➤eucrim ID=1701036

Conference Deepens Partnership on Money Laundering with Digital Currencies

From 16 to 18 January 2017, experts involved in fighting money laundering, cybercrime, financial intelligence, and asset recovery met in Doha, Qatar at a global conference on money laundering and digital currencies. The conference was jointly organised by Europol, Interpol, and the Basel Institute on Governance. One of the focuses was the misuse of digital currencies by criminals and terrorist financiers to launder money and support other criminal activities.

The participants *inter alia* concluded the following:
- To increase information sharing in the field of money laundering and digital currencies, with particular emphasis on the exchange of suspicious Bitcoin addresses that threaten economic stability;
- To regulate digital currency exchangers and wallet providers under current anti-money laundering and counter-terrorism financing legislation, in line with obligations already pending in the financial sector;
- To take action against digital currency mixers/tumblers, designed to anonymise transactions, which burden the work of law enforcement agencies in detecting and tracing suspicious transactions.

The event in Doha was an outcome of the partnership launched between Europol, Interpol, and the Basel Institute on Governance in September 2016 (see eucrim 3/2016, pp. 127 f.). The conference also contributed to one of the aims of this partnership, i.e., to create a network of experts in the field of money laundering with digital currencies. (TW)
➤eucrim ID=1701037

Organised Crime

Serious and Organised Crime Threat Assessment 2017

At the beginning of March 2017, Europol published its Serious and Organised Crime Threat Assessment 2017 (SOCTA 2017). Drastic changes in some parts of the serious crime and organised crime landscape are reported, which are due to the use of new technologies. Next to the Internet, all types of technical innovations are affected, e.g., advances in drone technology, automated logistics, and advanced printing technologies. According to the report, more than 5000 Organised Crime Groups (OCGs) operating at the international level are currently under investigation in the EU. Additionally, the number of poly-criminal OCGs has increased sharply over the

last several years, at 45% in 2016 compared to 33% in 2013.

In its recommendation, the report sets out five specific crime threats to be tackled with priority, namely cybercrime; drug production, trafficking, and distribution; migrant smuggling; organised property crime; and trafficking in human beings. Furthermore, it recommends focusing on three cross-cutting threats that enable or enhance all types of serious and organised crime: criminal finances and money laundering, document fraud, and online trade in illicit goods and services.

SOCTA 2017 is based on the largest-ever data collection on serious and organised crime in the EU, relying on more than 2,300 questionnaires by Member States, operational intelligence contained in Europol's databases, Europol's institutional partners as well as operational and strategic partners outside the EU. (CR)

➤eucrim ID=1701038

Authentication and Admissibility of Electronic Evidence

A New Evidentiary Frontier for Legal Practitioners

Queen Mary University of London / Centre for Commercial Law Studies,
8–9 June 2017

The Academy of European Law (ERA), in cooperation with the Centre for Commercial Law Studies at Queen Mary University of London is organising a conference on e-evidence.

Rules governing the admissibility of electronic evidence are very diverse across Europe and are continuously challenged by the evolution of technological devices. Today, all criminal courts are confronted with the question of whether or not electronic evidence presented in criminal proceedings is admissible.

The conference aims to share advanced knowledge and promote the exchange of experience and best practice between judges, prosecutors, and lawyers in private practice who deal with criminal proceedings involving e-evidence. It will give participants insights into the strategies and techniques used in different European countries and contribute to cross-border cooperation among Member States' authorities.

Key topics are:

- Definition of "electronic evidence": practical examples of analogue and digital evidence;
- Legal implications of electronic evidence (collection, evaluation, and admissibility);
- Impact of electronic evidence on criminal proceedings;
- Insights into different national EU criminal justice systems regarding the handling of e-evidence in court.

The conference is addressed to judges, prosecutors, lawyers in private practice, and ministry officials active in the field of criminal law. It will be held in English.

For further information, please contact Mr. Laviero Buono, Head of European Criminal Law Section, ERA. e-mail: lbuono@era.int. See also: www.era.int

Cybercrime

Europol Hosts First EMPACT Crypto Currencies Workshop

On 27 and 28 February 2017, Europol organised the first EMPACT Workshop on Crypto Currencies tackling the main issues with regard to Bitcoin investigations. During the workshop, investigators and analysts put their technical skills to use and shared experiences relevant to crypto currencies. (CR)

➤eucrim ID=1701039

Procedural Criminal Law

Procedural Safeguards

FRA Report on Child-Friendly Justice

It is estimated that approximately 2.5 million children are involved in both criminal and civil judicial proceedings in the EU every year. The EU Fundamental Rights Agency (FRA), together with the European Commission, collected and analysed data to determine the extent to which international and European human rights standards for child-friendly justice are fulfilled in practice. After having conducted a study in 2015, which was based on the professionals' views, the FRA published a report taking up the perspectives and experiences of children involved in criminal or civil judicial proceedings as victims, witnesses, and parties (e.g., children suffering from domestic violence or sexual abuse, but also children in custody). The findings of the report are based on interviews with 392 children in nine EU Member States (Bulgaria, Croatia, Estonia, France, Germany, Poland, Romania, Spain, and the United Kingdom).

The report refers to the following rights and principles:

- Right to be heard;
- Right to information;
- Right to protection and privacy;
- Right to non-discrimination;
- Principle of the best interests of the child.

It states that judicial proceedings are particularly stressful for children. They often feel scared, ignored, and ill-informed. How professionals interact with children is crucial for determining child-friendly proceedings. FRA collected a number of promising practices already in use in the researched EU Member States. It also proposes solutions on how existing barriers – from the perspective of children – could be overcome, e.g.:

- Professional training on how to work with children as well as clear rules and

guidelines on the treatment of children during proceedings;
- Minimising the risk of contact with defendants or their families by using, for instance, video links or admitting pre-recorded evidence or even providing settings that put children at ease;
- Continuously informing children about what is happening, which may include using age-appropriate language to describe their rights and the latest developments in the proceedings, or using a single person as a point of contact who children trust.

The report also contains two checklists to help Member States make proceedings more child-friendly or to standardise the procedures across regions. Checklist 1 identifies key conditions necessary for ensuring that proceedings are child-friendly. In the event that these are not in place, Checklist 2 proposes corrective actions. (TW)

➤eucrim ID=1701040

Data Protection

FRA Calls for Better Protection of Children in Recast of Eurodac

On 22 December 2016, the EU Agency for Fundamental Rights (FRA) presented a report containing 14 opinions on how the recast of the Eurodac Regulation could be improved in view of better protecting the rights of migrant children.

Eurodac stands for European Dactyloscopy and is the EU's central large-scale IT system to date for storing fingerprints. It is designed to help determine which Member State is responsible for examining an asylum application. Together with the "Dublin Regulation" it makes up the so-called "Dublin System," which lays down the rules on how asylum claims are managed and handled among the EU Member States. Amendments to the Eurodac Regulation in 2013 introduced the possibility for national law enforcement authorities and Europol to access data in the system for the prevention, detection, and investigation of terrorist offences and other serious criminal offences.

Due to the migration and refuge crisis in 2015, some EU Member States were overwhelmed with fingerprinting, and a lot of migrants have remained invisible in Europe. As a consequence, the Commission proposed reinforcing the current Eurodac system in May 2016. The main proposed changes are:
- Expansion of the purpose of Eurodac so that it can be used to control irregular immigration and secondary movements within the Union;
- Longer retention of personal data, i.e. five years for persons who do not apply for international protection;
- Lowering the age of children from whom biometric data can be processed from 14 to 6 years of age;
- Introduction of the obligation to take an additional biometric identifier beside fingerprints (e.g., a facial image) plus expansion of personal data that can be entered into the system, including name, nationality, place and date of birth, and travel document details;
- Permission to compare all three categories of data.

The FRA report now examines how these and other changes affect children and also analyses possible modifications in relation to the access of law enforcement authorities to Eurodac. The report touches upon the following rights:
- Dignity, liberty, and physical integrity;
- Rights of the child
- Right to asylum;
- Respect for private life, data protection, and access to justice.

FRA *inter alia* suggests:
- Avoiding force when taking fingerprints, which should also be carried out in a child-friendly and gender-sensitive manner;
- Adequately informing children in an age-appropriate manner;
- Adding the aim of identifying and protecting trafficked and missing children to the proposal;
- Capturing information on family links to support family reunifications;
- Maintaining existing (proportionality) rules that restrict access for law enforcement authorities;
- Strengthening safeguards when sharing Eurodac data with non-EU countries;
- Improving accuracy and avoiding mismatches by including the possibility to amend and correct data as part of regular data review;
- Carefully evaluating how the processing of facial images impacts fundamental rights and reliability (in particular as to children) before introducing facial recognition technology;
- Assessing the added value of extending the aim of Eurodac to include controlling irregular immigration, in light of other existing and planned IT systems that also pursue such objectives.

The opinion of the FRA was requested by the European Parliament. The FRA opinions influenced the report of the EP's responsible rapporteur on the legislative dossier, *Monica Macovei*, who tabled her amendments on 2 February 2017. The recast of the Eurodac Regulation is decided by the ordinary legislative procedure (ex-codecision procedure).

For a critical data protection assessment on the planned new database ETIAS by the European Data Protection Supervisor (EDPS), see above under "Schengen". (TW)

➤eucrim ID=1701041

Commissioners Stress EU Commitment to Personal Data Protection

On the eve of the European Data Protection Day, annually celebrated on 28 January, Commission Vice-President *Andrus Ansip* (responsible for Digital Single Market), and Commissioner *Věra Jourová* (responsible for Justice, Consumers and Gender Equality) mentioned in a joint statement that personal data protection "is part of the European DNA and deserves the highest protection standards." Besides pointing out the historic data protection reform of 2016,

the statement also stressed the need for strong data protection standards when it comes to data exchanges between police and judicial authorities at the European and international levels. (TW)
➤eucrim ID=1701042

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Victim Protection

European Commission Initiates Consultation for EU-Wide Whistleblower Protection

On 26 January 2017, the European Commission tabled a roadmap containing the next steps for an impact assessment on the protection of whistleblowers. The main aim of the roadmap is to find out whether legislative EU instrument(s) are appropriate or necessary in order to guarantee a more effective protection of persons who expose wrongdoings in the public or private sector.

The roadmap outlines a 12-week open public consultation, which is designed to feed this assessment. The public consultation was launched on 3 March 2017. Its objective is to collect information, views, and experiences on the following issues:

- Benefits and drawbacks of whistleblower protection;
- Elements that are important for effective whistleblower protection;
- Problems arising both at the national and EU levels from gaps in and weaknesses of existing whistleblower protection and from diverging protection across the EU;
- Necessity of minimum standards of protection.

The consultation procedure aims to involve the broadest possible public. Stakeholders and civil society have until 29 May 2017 to give their statements. A questionnaire is available online, with access to translated versions in the EU languages.

The question of whether further EU action for the protection of whistleblowers is needed has been tackled several times in the past. The Commission refers *inter alia* to the 2014 "Recommendation on Protection of Whistleblowers" in which the Council of Europe suggests to its Member States "hav[ing] in place a normative, institutional and judicial framework to protect individuals who, in the context of their work based relationship, report or disclose information on threats or harm to the public interest."

The European Parliament also called for a horizontal instrument providing comprehensive protection of whistleblowers at the EU level several times (see also in this context the Greens' initiative on a whistleblower directive, eucrim 2/2016, p. 80). The Council encouraged the Commission to explore the possibility for future action at the EU level in its conclusions on tax transparency of 11 October 2016. In October 2016, a coalition of trade unions and NGOs launched a platform calling on the Commission to propose an EU-wide protection of whistleblowers. For the guidelines on whistleblowing procedures proposed by the EDPS, see eucrim 3/2016, p. 130.

The main problem is currently that the protection of whistleblowers is very uneven across the EU Member States. Only a few Member States have comprehensive – or at least substantial – whistleblower protection rules at present. In its roadmap, the Commission identifies the pros and cons of legislative or non-legislative action at the EU level. In case of legislative action, the Commission notes that either a horizontal instrument or the strengthening of (partly already existing) sector-specific provisions might be the right option. The public consultation launched may provide input in this regard. (TW)
➤eucrim ID=1701043

EP Calls for EU Programme for Protection of Whistleblowers

On 14 February 2017, the plenary of the European Parliament adopted a non-legislative resolution on the role of whistleblowers in the protection of the EU's financial interests. The EP deplores the fact that the Commission has so far failed to submit any legislative proposals aimed at establishing a minimum level of protection for European whistleblowers. It urges the Commission to immediately submit a legislative proposal establishing an effective and comprehensive European whistleblower protection programme. The programme should include mechanisms for companies, public bodies, and non-profit organisations

In particular, MEPs further call on the Commission to submit a legislative proposal by the end of this year to protect whistleblowers as part of necessary measures in the prevention of and fight against fraud affecting the financial interests of the Union − with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices, and agencies.

Other suggestions by the EP in its resolution include *inter alia*:

- Setting up an independent EU body, with offices in EU Member States, to help internal and external whistleblowers use "the right channels to disclose their information on possible irregularities" affecting the EU's financial interests;
- Establishing a special unit within the European Parliament with a reporting line and dedicated facilities (i.e., hotlines, websites, and contact points) to receive information relating to the EU's financial interests from whistleblowers;
- Launching a website where complaints can be submitted;
- Setting up a whistleblower scheme as part of the mandate and working process of the yet to be established European Public Prosecutor's Office;
- Draft (at present, preferably by OLAF) of an annual report to evaluate the protection of whistleblowers in the European Union.

The resolution of the EP is not binding. It was approved by 607 votes to 16, with 70 abstentions. The text of the resolution was prepared by Dutch MEP *Dennis de Jong* (GUE/NGL). For planned legislative action by the Commission at

the EU level, see the above news item. For the Greens initiative on a whistleblower directive, see eucrim 2/2016, p. 80. (TW)
➤eucrim ID=1701044

Cooperation

European Arrest Warrant

CJEU Gives Guidance on Surrender Procedure in the Event of "*force majeure*"

The CJEU had to deal with a reference for a preliminary ruling concerning the very last phase of surrender of a person sought by a European Arrest Warrant (EAW).

In the case at issue (Case C-640/15), Mr. *Vilkas* had to be surrendered from Ireland to Lithuania; however, two attempts to bring him on board of a commercial flight failed because Mr. *Vilkas* put up resistance. The Irish High Court refused to give authorisation to the Irish Minister for Justice to start a third attempt for Mr. *Vilkas'* surrender because of lack of jurisdiction to hear this application; the High Court ordered Mr. *Vilkas'* release. Upon appeal, the Irish Court of Appeal referred two questions to the CJEU about the interpretation of Art. 23 of the Framework Decision on the European Arrest Warrant (FD EAW).

Art. 23 regulates the procedure and time limits for the actual surrender of a person after the European Arrest Warrant had been granted by the executing authorities. The main issue concerned the interpretation of Art. 23 para. 3 FD EAW, which stipulates that the executing and issuing judicial authorities are to agree on a new surrender date if surrender of the requested person within the 10-day period (as laid down in Art. 23 para. 2) is prevented by circumstances beyond the control of any of the Member States. Of particular interest is the link of Art. 23 para. 3 with Art. 23 para. 5 FD EAW, which requires that the person be released from custody if the time limits as referred to in the foregoing paragraphs expired.

In its response, the CJEU first stated that Art. 23 para. 3 FD EAW also applies in cases in which a first surrender date failed. Second, the CJEU examined the conditions of Art. 23 para. 3 and identified that the various language versions of the provision diverge. Whereas some language versions (e.g., French, Italian) make application of the rule conditional on the impossibility of carrying out the surrender by reason of a case of *force majeure* in one of the Member States concerned, other language versions (e.g., German, English, Spanish, Polish, Swedish) refer instead to the impossibility of carrying out the surrender "on account of circumstances beyond the control of the Member States concerned." In this context, the CJEU clarified that EU legislation follows the concept of *force*

The 2017 Conference on International Extradition and the European Arrest Warrant

University of Oxford/Worcester College, 4-5 September 2017

In 2016, experts and interested persons convened in Oxford/UK for the first conference on international extradition and the European Arrest Warrant (see eucrim 3/2016, pp. 132/133). Criminal defence lawyers, federal and state judges, prosecutors, public servants of law enforcement agencies, academics as well as other lawyers with an interest in criminal justice, human rights, and comparative law now have the opportunity to convene in Oxford for a two-day seminar (4-5 September 2017) to learn more about the most interesting issues of extradition. The conference will cover the following:

- Basics of EU law and ECHR law;
- Bilateral extradition treaties v. the "European Arrest Warrant" system;
- Comparative extradition law;
- Domestic and international case law on the EAW;
- How to challenge an extradition request and the rights of fugitive suspects;
- Famous extradition cases (Assange, Polanski, Pinochet, etc.) ;
- Unlawful and disguised forms of extradition (i.e., extraordinary rendition, expulsion of aliens).

The objective is that participants can bring home:

- In-depth knowledge of extradition and EAW law;
- Review of recent developments in extradition case law (ECJ, ECHR, and selected domestic Supreme Courts);
- A set of skills for extradition cases;
- A set of "lines of argument" for extradition cases;
- Useful extradition material, including cases, literature, and samples of authentic EAWs;
- Networking with colleagues and experts in extradition-related matters.

The Oxford program consists of a series of closed-door seminars held by international extradition experts – including renowned British solicitors and barristers. Seminars are conducted through an innovative learning-by-doing style, which encourages group discussions and simulations of extradition and EAW proceedings. They also include the sharing of experiences, the viewing of mini-videos, and the review of famous extradition cases.

An optional visit to legal London (Inns of Court, Old Bailey, Supreme Court, etc.) will be arranged on the following Wednesday and Thursday (6-7 September 2017) for those interested.

Programme fee: €435

For enrolment and further information please contact:
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majeure and defined this legal notion. In sum, the CJEU replied to the Irish Court of Appeal as follows: Art. 23 para. 3 FD EAW must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities agree on a new surrender date under that provision where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proves impossible on account of the repeated resistance of that person, in so far as, on account of exceptional circumstances, that resistance could not have been foreseen by those authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities, which is for the referring court to ascertain.

If the Irish Court is going to conclude that the repeated resistance of Mr. *Vilkas* cannot be classified as a case of *force majeure*, the CJEU reiterated that the FD EAW (Arts. 15 and 23) require that the authorities involved are obliged to agree on a new surrender date if the time limits prescribed in Art. 23 FD EAW have expired. The CJEU further stated, however, that, in such a situation, it nonetheless follows from Art. 23 para. 5 FD EAW that, on account of the expiry of the time limits prescribed in Art. 23, the requested person must be released if he is still being held in custody. (TW)

➤eucrim ID=1701045

European Investigation Order

Status of Transposition

The deadline for the transposition of Directive 2014/41/EU regarding the European Investigation Order in criminal matters (EIO Directive) into national law ends on 22 May 2017. The EJN Secretariat provides information on the status of transposition on its website in the "Judicial Library" section, where a table on the implementation status is available.

The German law implementing the EIO Directive was published in the Bundesgesetzblatt (Federal Law Gazette) Teil I Nr. 2 of 10 January 2017, p. 31. It will enter into force on 22 May 2017. (TW)

➤eucrim ID=1701046

Transfer of Sentenced Persons

CJEU Gives Guidance on Double Criminality Test

On 11 January 2017, the CJEU delivered an important judgment on interpretation of the requirement of double criminality, which may hinder the mutual recognition of judicial decisions in other Member States (Case C-289/15, *Grundza*). The case concerned the interpretation of the double criminality requirement in Art. 7 para. 3 and Art. 9 para. 1 lit. d) of Council Framework Decision 2008/909/JHA of 27 November 2008 "on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union."

In the case at hand, the Czech authorities had requested the Slovak authorities to enforce a custodial sentence imposed by a Czech court on Mr. *Joszef Grundza*. The sentence was *inter alia* based on breaching a temporary driving ban that had been imposed on Mr. *Grundza* by a Czech administrative authority.

According to the referring Slovak court, the offence at issue in the main criminal proceedings is subject to a double criminality test which – in case of a negative result – may be a ground for the Slovak court to refuse enforcement of the sentence against Mr. *Grundza* on the basis of said Articles of FD 2008/909/JHA. The Slovak court was of the opinion that double criminality is not given by arguing that the corresponding offence in Slovak criminal law – "thwarting the implementation of an official decision" – refers only to decisions of "Slovak" authorities which are enforceable on "Slovak" territory. The Slovak court wanted to know from the CJEU whether it is obliged to equate the interest of the legal system of the issuing state (here: Czech Republic) with an interest protected under the legal order of the executing state (here: Slovak Republic). The Slovak court refers in this context to a common distinction in legal literature as regards the methodology of carrying out the double criminality test and thus asked the CJEU whether this test must be carried out *in concreto* or *in abstracto*?

The CJEU did not directly answer this question but reformulated it by arguing that the notions "*in concreto*" and "*in abstracto*" are understood differently in the EU Member States and are not mentioned in the FD. In essence, the CJEU gives the following guidelines for assessing double criminality:

- The wording and context of Art. 7 para. 3 FD 2008/2009 militate in favour of verifying whether the factual elements underlying the offence at issue are congruent with the definition of the offence in the law of the executing state;
- When assessing double criminality, the competent authority of the executing state must not ascertain whether an interest protected by the issuing state has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing state, it would be found that a similar interest, protected under the national law of that state, had been infringed;
- The executing state is thus required to ascertain whether, in the event that those factual elements – here: the driving of a motor vehicle despite the existence of a ban imposed by an official decision – were present in the territory of the executing state, they would be subject to a criminal penalty under the domestic law of that state. If this is the case, it must be concluded that the condition of double criminality has been met.

In conclusion, the CJEU clarified that the condition of double criminality, as

an exception to the general rule of recognition of judgments and enforcement of sentences, must be interpreted strictly in order to limit cases of non-recognition and non-enforcement. Although the case concerned a matter of enforcing foreign judgments, the reasoning of the CJEU can be transferred to the interpretation of very similar rules in other mutual recognition instruments on judicial cooperation. (TW)

➤eucrim ID=1701047

CJEU Rules on Applicability of Transitional Rules of FD 2008/909

The CJEU had to deal with a case (C-582/15) referred to it by the Rechtbank Amsterdam on interpretation of the transitional periods of Council Framework Decision (FD) 2008/909/JHA of 27 November 2008 "on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union."

In accordance with Art. 28 para. 2, in the first sentence of this FD, the Netherlands declared that it will not apply its implementation law to judicial decisions which became final before 5 December 2011. In this case, the traditional mutual legal assistance instruments on the transfer of sentenced persons continue to apply.

In the case at issue, the Rechtbank Amsterdam was asked by Belgium to enforce a three-year custodial sentence against Mr. *Gerrit van Vemde* in the Netherlands, which had been imposed by the Court of Appeal of Antwerp, Belgium, on 28 February 2011 and confirmed by the Belgian Court of Cassation on 6 December 2011, dismissing the appeal in cassation against that first decision. The question now arose as to whether Art. 28 para. 2 FD 2008/2009/JHA was to be interpreted as covering judgments issued before the date specified in the Dutch declaration or as covering judgments which became final before the date specified. In other words, it was a question of whether one must resort to the judgment of the Court of Appeal of Antwerp or that of the Belgian Court of Cassation. The latter decision marked the date when the sentence against Mr. *Van Vremde* became final *(res iudicata)*.

The CJEU examined the wording, the context, and the teleological purpose of Art. 28 and clarified that Art. 28 para. 2 FD 2008/909/JHA must be interpreted as meaning that it covers only judgments which became final before the date specified by the Member State concerned. In the case at issue, this means that the decision of the Court of Cassation of 6 December 2011, which was made one day after the date of the transitional period as declared by the Netherlands, is decisive, and therefore the new EU rules on the transfer of sentenced persons and the mutual recognition of final judgments apply. (TW)

➤eucrim ID=1701048

Law Enforcement Cooperation

Joint Investigation Teams Practical Guide Published

On 23 February 2017, Eurojust published the Joint Investigation Teams (JITs) Practical Guide. The guide enhances the previous JITs Manual in light of practical experience acquired. The objective of the practical guide is to provide information, guidance, and advice to practitioners on the formation of JITs.

It is categorized into four main chapters, that explain the following:

- Concept of JITs and legal framework;
- Setting up of a JIT;
- Operation of the JIT;
- Closure and evaluation of a JIT.

Furthermore, the guide includes the following new features:

- List of frequently asked questions regarding JITs;
- Specific developments on OLAF's involvement in a JIT;
- Revised annex on operational planning.

The guide also contains the updated JIT model agreement and a checklist for the planning and coordination of operational activities. It was developed by the JITs Network in cooperation with Eurojust, Europol, and OLAF. The JITs Network is an EU-wide network of national experts with expertise in JITs. It was established in 2005 to promote the use of JITs by practitioners. Each Member State has appointed one or more national experts who represent both the judicial (judges, prosecutors, Ministries of Justice) and law enforcement (police officers, Ministries of Interior) dimensions of a JIT. At national level, the experts act as contact points that practitioners willing to set up a JIT can address for advice. (CR)

➤eucrim ID=1701049

European Network of Law Enforcement Specialists on CGN Launched

On 31 January 2017, Europol launched a European Network of Law Enforcement Specialists on Carrier-Grade Network Address Translation (CGN). CGN, also known as Large Scale NAT (LSN), enables Internet Service Providers (ISPs) and carriers to overcome the problem of increasingly scarce IP addresses over the last decade. However, it makes record-keeping for law-enforcement operations more difficult.

The initiative started by Europol is a reaction to the increasing problem as regards CGN technologies used by ISPs to simultaneously share one single IP address among multiple subscribers. As a result, Internet service providers are no longer technically able to comply with legal orders to identify individual subscribers.

The network will systematically document cases of non-attribution related to CGN, share existing best practices to overcome CGN-related attribution problems, and contribute to engaging with Internet service providers and content providers in order to improve the traceability of the IP addresses behind CGN. (CR)

➤eucrim ID=1701050

Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

ECtHR: Court Publishes 2016 Annual Report

On 26 January 2017, the Court released its annual activity report and statistics for the year 2016. The annual table of violations by country shows that the states with the highest number of judgments against them, with at least one violation of the ECHR, were Russia (228 judgments), Turkey (88), Romania (86), Ukraine (73), Greece (45), and Hungary (41).

At the end of 2016, there were 79,750 cases pending before the Court. Though this figure is a considerable increase of up to 23% compared to the end of 2015, it is still a far cry from the 160,000 cases that were pending in 2011. On 31 December 2016, the majority of pending cases were against Ukraine (22.8%), Turkey (15.8%), Hungary (11.2%), Russia (9.8%), and Romania (9.3%). Half of the priority cases concerned Ukraine. While single-judge cases have been virtually eliminated, Chamber cases remain a challenge, as they currently total almost 28,500, including 6000 priority cases.

The report points out that the number of applications allocated increased by more than 30% in 2016. The increase is related to systemic problems in various Member States and to the ongoing crises. A high number of these cases are related to systematic problems with regard to conditions of detention. Although these cases concern only a limited number of countries, they are regarded as a priority since they fall under Article 3 ECHR. Another factor that has had an impact on the number of cases is the ongoing crises in Europe, especially in three countries: Hungary and Romania, for complaints about detention conditions, and Turkey, particularly since the attempted coup d'état in July 2016.

The report underlines the importance of networks. The network for the exchange of information on the case law of the ECHR between the Court and the highest national courts (the Superior Courts Network, or SCN) was launched in 2015. After an initial test period, 23 Superior Courts from seventeen states have now joined the Network. The ECtHR also maintains a regular dialog with other networks, such as the Network of the Presidents of the Supreme Judicial Courts of the EU, and it hosted the biennial meeting of the highest-ranking courts in Germany, Austria, Switzerland, and Liechtenstein. This meeting was also joined by the President of the CJEU, which signaled the resumption of meetings between the two European courts for the first time since November 2013.

In 2016, the Court continued to publish factsheets on its case law, including the subject matters of *ne bis in idem*, gender equality, austerity measures, mass surveillance, and surveillance in the workplace. The Court also produced four new case-law guides and launched – in cooperation with FRA – a fifth European law handbook, relating to access to justice.

In addition, in the sphere of communication, the Court completed its four-year project to translate key case law into select languages. When added to the translations obtained from Member States and other sources, some 20,000 texts in over thirty languages other than English and French are now available in the HUDOC database.

➤eucrim ID=1701051

Human Rights Issues

Commissioner's Statement on Non-Implementation of ECtHR Judgment in Russia

In his statement on 20 January 2017, the CoE Commissioner for Human Rights, *Nils Muižnieks*, expressed his concerns over human rights protection in Russia and elsewhere in Europe following the decision of the Constitutional Court of the Russian Federation in the *Yukos* case.

The Commissioner urged the Russian government and parliament to change the federal law that enables the Constitutional Court to prevent the implementation of judgments of the ECtHR. Preventing the implementation of a judgment of the ECtHR weakens the safeguards for individuals and companies against possible state abuses and against the system and integrity of the ECHR.

In conjunction with the subject matter, the Council of Europe's Steering Committee on Human Rights (CDDH) has previously published a report in December 2015 on the longer term future of the system of the ECHR, which pointed two main challenges: the Member States' responsibility to implement judgments of the Court and the danger of certain direct attacks on the Court's authority.

➤eucrim ID=1701052

* If not stated otherwise, the news reported in the following sections cover the period 15 December 2016 – 15 March 2017.

Specific Areas of Crime

Corruption

GRECO: Declaration of Commitment by PACE After Corruption Allegations

In 2012, the European Stability Initiative (ESI) published a report on how Azerbaijan unduly influenced Council of Europe activities on human rights issues. Following the disappointing official reactions, ESI published a second report on 17 December 2016 that further describes how the country unduly influenced, over many years, Council of Europe activities in human right issues, including by allegedly transferring huge sums of money and other favours to key PACE parliamentarians in order to buy votes. On 26 January 2017, the Committee on Rules of Procedure, Immunities and Institutional Affairs of the Parliamentary Assembly of the Council of Europe (PACE) unanimously adopted a declaration stating that, due to recent allegations of corruption against some of its members, it intends to send a clear message of zero tolerance towards all forms of corruption. This includes tightening up the rules of conduct and mechanisms currently in force if they do not seem to be efficient enough. The committee also called on the Bureau of the Assembly to set up an independent external investigation body to assess the functioning of the Assembly to identify hidden practices favoring corruption.

In his statement on 26 January 2017, the recently elected President of GRECO, *Marin Mrčela*, welcomed the commitment of PACE to provide for the same level of integrity in the Council of Europe's institutions as that required by the GRECO Member States in their evaluations.

➤eucrim ID=1701053

GRECO: Fourth Round Evaluation Report on Georgia

On 17 January 2017, GRECO published its Fourth Round Evaluation Report on Georgia. This latest evaluation round was launched in 2012 in order to assess how states address corruption prevention in respect of Members of Parliament (MPs), judges, and prosecutors (for more recent reports, see eucrim 3/2014, p. 83; 4/2014, pp. 104-106; 1/2015, p. 11; 2/2015, pp. 43-45; 3/2015, pp. 87-88; 1/2016, pp. 20-22; 2/2016, pp. 82-83; 3/2016, pp. 134-135; 4/2016, pp. 168-169).

The report acknowledged the considerable progress made in reducing corruption in Georgia. Among the positive developments, GRECO noted the introduction of a monitoring mechanism for the submission of asset declarations by public officials, including parliamentarians, judges, and high-level prosecutors. The report calls for an extension of the rules to all prosecutors, their efficient application, and constant review.

In order to enhance transparency of the legislative process, GRECO recommends the publication of all draft legislation and the development of an enforceable code of conduct.

GRECO stressed adoption and implementation of the pending law related to the reform of the judiciary. The report recommends in particular the reform of the recruitment, promotion, and transfer of judges; the introduction of an objective and transparent system for the allocation of cases; more precise definition of disciplinary offences; and limitation of the immunity of judges to activities related to their functions.

GRECO welcomed the efforts to depoliticize the prosecution service and stressed the effective implementation of the reform in order to reduce the influence of the government and parliamentary majority on the appointment procedure of the Chief Prosecutor and on the activity of the Prosecutorial Council. The recruitment and promotion of prosecutors as well as case management and the disciplinary procedures also need further review.

➤eucrim ID=1701054

GRECO: Fourth Round Evaluation Report on the United States of America

On 17 January 2017, GRECO published its Fourth Round Evaluation Report on the United States, which joined GRECO in 2000 and has been subject to the first three evaluation rounds. GRECO acknowledges the United States' solid legal, ethical, and institutional framework to prevent and fight corruption but drew attention to some areas that could be further improved.

In respect of Members of Congress, GRECO acknowledges the solid statutory framework regulating the legislative process within the Congress but stresses that the "pre-legislative" phase could benefit from more transparency. The report calls for additional measures regarding Congress Members' interactions with lobbyists as well as their possibilities for employment as lobbyists after leaving Congress ("revolving doors"). GRECO takes the view that, besides potential conflicts of interest, unforeseen situations ("*ad hoc* disclosure") should also be disclosed.

GRECO acknowledges that the principle of judicial independence is a fundamental feature of the US, manifested, *inter alia*, through the life tenure of federal judges. However, GRECO suggests reconsidering the current situation of two categories of federal judges, bankruptcy and magistrate judges that are not protected to the same extent, as they are subject to re-appointments. Although a code of ethics for federal judges is in place, GRECO recommends that justices of the Supreme Court should also be asked to adhere to this Code.

GRECO notes that the U.S. prosecution service, the Department of Justice (DOJ), which is part of the executive branch of government, is subject to numerous checks and balances and that the prosecutorial work is largely carried out by professional career prosecutors. Nevertheless, it calls for further safeguards (like justifying decisions in writing) due to the strong hierarchical structure of the service and its broad discretion-

ary powers (e.g., not to prosecute or to remove prosecutors from a case). Ultimately, GRECO calls for the assessment of complaints against prosecutors to be examined by entities enjoying sufficient autonomy and for the transparency of such offences.
➤eucrim ID=1701055

GRECO: Fourth Round Evaluation Report on Italy

On 19 January 2017, GRECO published its Fourth Round Evaluation Report on Italy.

The report praised the achievement of recent years in addressing the pervasive phenomenon of corruption in the country. GRECO acknowledged the determined leadership and proactive role of the Anticorruption Authority (ANAC), the recent adoption of a code of conduct on lobbying by the Chamber of Deputies, and recognized the undisputed reputation, professionalism, and commitment of individual judges and prosecutors.

The report nonetheless calls for reinforced measures to prevent conflicts of interest in parliament and the judiciary. GRECO calls for an overhaul of the current system, for more efficient mechanisms of control and accountability, and for compliance with the adopted laws. It is no rare occurrence that corruption prosecution becomes time barred. Therefore, lawbreakers should be brought to justice in a timely manner as a matter of credibility of the whole system. Additionally, integrity tools in fiscal courts need to be strengthened, given the latest allegations of wrongdoing in this sector. Ultimately, GRECO also warned of the possible chilling effects on the independence of the judiciary by any politicization of the profession. Therefore, the issue of the political activity of magistrates should be dealt with in all its aspects at the legislative level.
➤eucrim ID=1701056

GRECO: Fourth Round Evaluation Report on Austria

On 13 February 2017, GRECO published its Fourth Round Evaluation Report on Austria. Despite commendable progress in domestic anti-corruption policies, the report identified important shortcomings, especially as regards MPs. The poor public perception of elected officials could be improved by rules on how to manage conflicts of interest and by implementing a code of conduct. There are criminal provisions in place as regards the bribery of parliamentarians. Nevertheless, there are no preventive or administrative rules to prohibit or restrict MPs from accepting gifts and other advantages or on reporting and authorizing undesired or unacceptable benefits.

The public's perception of the subject matter, however, gives reason for concern as well. According to a recent poll, 30% of the respondents consider it acceptable to offer a gift or a favor in order to obtain something from the public administration or a public service. This percentage is significantly higher than the EU average. The report also calls for tighter restrictions for MPs concerning contact with third parties who may try to influence their decisions.

The report acknowledged the steps taken to improve independence in the judiciary. However, the role of the executive branch in selecting and appointing judges and prosecutors should be reduced. The report recommends "more broadly" involving the staff panels, which select ordinary and administrative court judges, in the selection process. To encourage the perception of impartiality, the report calls for clearer distinctions between official legal work and other functions, for instance by regulating and restricting the simultaneous holding of the offices of judge and member of a federal or local executive or legislative body.
➤eucrim ID=1701057

Money Laundering

MONEYVAL: Fifth Round Evaluation Report on The Isle of Man

On 27 January 2017, MONEYVAL presented its Fifth Round Evaluation Report on the Isle of Man. The fifth evaluation round builds on previous MONEYVAL assessments by strengthening the examination of how effectively member states prevent and combat ML and the financing of terrorism and proliferation (see eucrim 1/2016, p. 23; 2/2016, pp. 83-84; 4/2016, p. 169)

The report praised the Isle of Man's legal system, especially the good coordination of policies related to ML and the financing of terrorism on the island as well as the authorities' thorough understanding of the institutional and legal vulnerabilities in these areas and the sectors most at risk.

At the same time, MONEYVAL also expressed a number of practical concerns. The report states that there is not sufficient understanding of the risks involved when financial institutions work with intermediaries and where risk assessment information is passed on through "information chains." Additionally, the number of "higher risk" customers seems to be relatively low, given the type of business carried out in or from the Isle of Man. Furthermore, ML convictions are rather limited when compared to its risk profile, and the overall value of confiscations remains extremely low.
➤eucrim ID=1701058

Articles

Articles / Aufsätze

File Rouge

Until the entry into force of the Lisbon Treaty, and apart from considering the adoption of the Charter of Fundamental Rights, the Union had failed to provide any piece of legislation aimed at reinforcing the protection of the rights of the defense. Despite the overwhelming number of instruments adopted during the first decade of the new century in the area of police and judicial cooperation to facilitate prosecution and provide a higher level of safety for citizens, the Council never reached an agreement on the proposal for a Council framework decision on certain procedural rights in criminal proceedings, which had been presented by the Commission in 2004 already, after its 2003 "Green paper" on the same subject. The Council also never approved the proposal presented by the Greek Presidency in 2003 on double jeopardy.

It was only on 30 November 2009, on the eve of the entry into force of the new Treaty of Lisbon, that the Council finally endorsed a "Roadmap" for strengthening the procedural rights of suspected or accused persons in criminal proceedings, calling for specific actions in this field to ensure the fairness of criminal proceedings. The Roadmap was then welcomed by the European Council (in the aftermath of the entry into force of the Lisbon Treaty) and became part of the "Stockholm Programme," which can now be considered the "swan song" for action plans within the justice and home affairs area. Indeed, after the "Golden Age" of Tampere (1999), the Hague (2004), and Stockholm (2009), the European Council appears to have substantially abdicated its role in defining strategic guidelines for legislative and operational planning, despite its unequivocal mandate in Art. 68 TFEU. The unprecedented "vagueness" of the most recent conclusions, insofar adopted in June 2014, provides incontestable evidence of this development.

Since then, the EU seems to have reacted more than acted, mostly legislating on the wave of events, such as terrorist attacks or illegal immigration than on the basis of a coherent programme of action. As a possible reaction against such uninspiring policy, the quite successful implementation of the 2009 Roadmap, which boasted the adoption of six new directives, may motivate the adoption of a new and more ambitious thematic programme to further strengthen procedural rights in criminal proceedings, which should now go beyond the "basic" level of protection conceived in 2009. The editorial by *Holger Matt* already puts forward concrete and very stimulating ideas for the possible content of such a new strategic document. These proposals are complemented in other articles by *F. Faletti*, *F. Gros*, and *G. Bana* (together with *L. Camaldo* and *M. Troglia*). The latter article also introduces the specific subject of defense investigations and the need for the approximation of their regimes at the EU level in order to provide a level playing field for defense lawyers. *S. Cras* subsequently deals with an important issue of the "old roadmap" in his description and analysis of the genesis and contents of the recent Directive 2016/1919 on legal aid. Ultimately, *R. Garcimartin* reflects on the conflict between the necessary respect for fundamental rights and the importance of achieving swiftness and effectiveness in criminal investigations in the Directive on the European Investigation Order.

In the wake of the eucrim issue dedicated to the costs of "non-Europe" (2/2016) and remaining well conscious of the need to provide concrete results and added value to all EU citizens and residents, the present issue of eucrim not only aims to open the debate about a new Roadmap on procedural/defense rights but also to provide food for thought as regards a renovated and more ambitious agenda in the EU criminal law area – against the background of the 60th anniversary celebrations of the Treaty of Rome this year.

Lorenzo Salazar, Deputy Prosecutor General in Naples, Editorial Board Member of eucrim

The European Public Prosecutor's Office and the Principle of Equality

François Faletti

I. Introduction

After years of negotiations, the adoption of the Regulation on the establishment of the European Public Prosecutor's Office (hereinafter EPPO) is near. Even if no unanimity can be reached in the Council of the European Union, there seems to be a strong political will amongst most Member States to set up the EPPO, if necessary through an enhanced cooperation procedure.[1] The current draft Regulation already provides insight into how the EPPO would take shape.[2]

The Regulation foresees that the EPPO will be a European prosecution office that is in many ways subject to national courts and legislation. Nevertheless, the principle of equality of all suspects has to be safeguarded wherever the investigations and prosecutions take place in the EU.[3] This may raise problems in ensuring equal procedural rights for suspects (II) and equal handling of cases (III) in EPPO proceedings.

II. Ensuring Equal Rights for Suspects in EPPO Proceedings

1. Uniform protection levels of suspects under national legislations

Besides applying the Regulation itself, the EPPO will apply the national criminal procedure of the Member State where it conducts its investigation or prosecution. Consequently, there could be a risk of breach of equality for suspects if the procedural safeguards they are granted in the various Member States differ. In order to ensure common minimum standards across the EU and to remain in line with the so-called Stockholm Programme of 2010,[4] the EU adopted a set of directives harmonising the rights of suspects in criminal proceedings.[5] The EPPO, any national prosecuting authority, will also be bound by these common rules wherever the investigations and prosecutions take place in the EU.[6]

This is the reason why only a few special rules relating to the rights of suspects are set out in the draft Regulation itself. The rights of suspects are limited to those provided for under the national legislations and secured by the minimum standard prescribed by the directives. For example, the right not to incriminate oneself will apply to suspects, but perhaps not to witnesses in some Member States.[7] Full access to the file will be granted, but perhaps only at the end of the investigation.[8] Broadening the scope of these rights for cases handled by the EPPO could lead to a breach of equality to the detriment of suspects in non-EPPO proceedings. However, the draft Regulation endeavours a level of protection to some degree, which goes beyond the requirements of the directives: for example, the EPPO will have to conduct investigations impartially,[9] and suspects will be allowed to apply for and present evidence.[10]

2. Nationally organised defence lawyers facing a European prosecution

If the EPPO is set up, the prosecution would be at an advantage compared to national bar associations on account of the EPPO's European organisation. Although the EPPO would be a foreign element to the national legal systems, it would be able to be active in all participating Member States and have its acts recognised by their courts. Lawyers are not granted such a level of European mobility. In principle, they are allowed to work in another Member State under the professional title they acquired in their home Member State.[11] However, for all activities relating to the representation or defence of a client in legal proceedings and when the assistance of a lawyer is compulsory under the law of the host Member State, they have to work in conjunction with a lawyer having the professional title of that State.[12] That is to say that, in cross-border cases handled by the EPPO, the suspect could often be obliged to hire an additional lawyer in each country in which the investigations and prosecutions take place (establishment of "double or multiple defence"). This will inter alia create higher costs. As a result, the balance of power between the prosecution and the defence could become distorted in cross-border cases, which, in turn, could result in a breach of equality between suspects who are prosecuted by the EPPO and those who are not.

Nevertheless, it must be strongly advocated that this problem is minimised. We have to ensure that, in application of the recent EU directives on the rights of suspects, the latter will be

granted the same access to a lawyer and to legal aid across the EU no matter where the prosecutions and investigations take place. Creating a special European regime for lawyers of suspects in EPPO proceedings would be a breach of equality to the detriment of suspects in criminal proceedings which do not fall within the competence of the EPPO. The creation of the EPPO could, however, be seen as a chance for lawyers willing to engage more in European activity. Indeed, it will drive law firms to strengthen their links with counterparts in other Member States acting as correspondents or associated lawyers and to improve good practices.

III. Ensuring Equal Handling of Cases in EPPO Proceedings

1. Coping with the risk of forum shopping

As the competence of the EPPO will not be limited to a single country, this raises the unprecedented question of *forum shopping* by a prosecuting authority. Concerns have been voiced about the EPPO spontaneously choosing to bring cases to courts in Member States that provide the most severe criminal sanctions, leading to a breach of equality in comparison to suspects facing national prosecution. However, this assumption is unfounded. The Regulation imposes mandatory criteria for allocating cases. In principle, cases have to be initiated by the European Delegated Prosecutor (EDP) in the Member State that was the focus of the criminal activity or where the bulk of the offenses were committed. A different decision can only be taken on substantial and legally defined grounds by the competent Permanent Chamber, whose members come from various Member States.[13] In any event, the allocation of the case is subject to judicial review.

2. Involvement of national courts in European proceedings

Judicial review of procedural acts of the EPPO will fall within the jurisdiction of the competent national courts.[14] The European Court of Justice (ECJ) will maintain its competence for interpreting and controlling the application of EU law.[15] Consequently, it will be for the national courts of the Member State of the EDP handling the case to assess whether the allocation of the case was correct or not. It might have been preferable that the ECJ be competent in this matter, because national courts are unlikely to waive their own jurisdiction and to refer the case to a jurisdiction in another Member State. However, the ECJ may not yet be ready to handle the quick and systematic review of the EPPO's decisions on jurisdiction, especially if one keeps in mind that strict time limits linked to the detention of suspects will have to be met. National courts seem to be better suited for this task, as they will have full access to the case file, including the evidence on the basis of which the EPPO chose to prosecute in the said state. This seems also right if one considers that national courts would be bound by the interpretation of the Regulation by the ECJ, as a result of which they might not properly apply the allocation rules and take the risk of having cases quashed.

IV. Conclusion

The EPPO will have to ensure that the principle of equality is fully respected in its activities when it comes to the rights of suspects. The Council decided to resort to using national laws and courts in order to enable the EPPO's operability and smooth integration into national systems. Even under these circumstances, the ongoing harmonisation of national criminal legislations pursuant to recent Union law and their control by the ECJ should prevent breaches of equality among suspects in EPPO proceedings. Practice will show how the EPPO will achieve uniformity in investigations and prosecutions across the European Union.

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1 The adoption of the EPPO under enhanced cooperation is foreseen by Art. 86 (1) TFEU. On 7 February 2017, the General Affairs Council decided to register the lack of unanimity and to refer the draft regulation to the European Council in March 2017.
2 Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Draft Regulation, Council doc. 5766/17, Interinstitutional File: 2013/0255 (APP), 31 January 2017.
3 Art. 35 (1) of the Draft Regulation, *op. cit.* (n. 2), together with Art. 20 of the Charter of Fundamental Rights of the European Union.
4 European Council, The Stockholm Program – An open and secure Europe serving and protecting citizens, O.J. C 115, 4 May 2010, 1, point 2.4.
5 Directive (EU) 2010/64 on the right to interpretation and translation, O.J. L 280, 20. October 2010, 1; Directive (EU) 2012/13 on the right to information, O.J. L 142, 22 May 2012, 1; Directive (EU) 2013/48 on the right of access to a lawyer and the right to communicate with thirds, O.J. L 294, 22 October 2013, 1; Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial, O.J. L 65, 9 March2016, 1; Directive(EU) 2016/1919 on legal aid, O.J. L 297,

4 November 2016. For an explanation of these Directives see also Cras/De Matteis, (2010) eucrim, 153; Cras/De Matteis, (2013) eucrim, 22; Cras, (2014) eucrim, 32; Cras/Erbežnik, (2016) eucrim, 25; and Cras in this issue.
6 Art. 35 (2) of the Draft Regulation, *op. cit.* (n. 2).
7 Art. 7 of Directive (EU) 2016/343, *op. cit.* (n. 5).
8 Art. 7 (3) of Directive (EU) 2012/13, *op. cit.* (n. 5).
9 Art. 5 (4) of the Draft Regulation, *op. cit.* (n. 2).
10 Art. 35 (3) of the Draft Regulation, *op. cit.* (n. 2).
11 Articles 2 to 5 of Directive (EC) 98/5 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, *O.J.* L 77, 14 March 1998, 36.
12 Art. 5 (3) of Directive (EC) 98/5, *op. cit.* (n. 11) as interpreted by ECJ, 25 February 1988, case 427/85, *Commission v. Germany.*
13 Art. 22 (4) of the Draft Regulation, *op. cit.* (n. 2).
14 Art. 36 (1) of the Draft Regulation, *op. cit.* (n. 2).
15 Art. 36 (2-8) of the Draft Regulation, *op. cit.* (n. 2).

The EU Directives on the Rights of Suspects

State of Transposition by France

Félix Gros

I. Introduction

The suspect is the key figure in procedural criminal law. To some extent, he is the reason for being of all criminal procedure, since the latter aims at setting up rules in order to protect him from unfounded accusations and arbitrariness. In line with the Stockholm Programme of 2010, the last few years have seen the EU strengthening the rights of suspects and accused persons.[1] It adopted a number of directives with the purpose of providing suspects with the means to understand, participate in, and complain about criminal proceedings, so that they are able to defend themselves effectively, in accordance with the right to a fair trial.[2] Although the directives entail minimum rules to which each Member State is free to give a broader scope, they sometimes have a deep impact on legal traditions. This is especially so in France.

The protection of suspects in French criminal procedure was not found to meet European standards and hence needed to keep on reforming so as to comply with the requirements of the directives. Indeed, initially, criminal procedure in France used to be based on an inquisitorial model in which suspects were hardly given a chance to defend themselves before their case was brought to court for judgment. It has nevertheless gradually turned into a mixed model including strong adversarial features. In France, investigations of serious or complex offenses are supervised by so-called "investigative judges." (*juges d'instruction*)[3] As soon as these judicial investigations have been launched, the suspects and their lawyers are granted the right to participate broadly in the investigations. But in cases in which no judicial investigations are launched or no investigative judge is appointed to the case in the first place, investigations are carried out exclusively by the police, under the supervision of the prosecutor.[4] They remain within a legal framework in which suspects are granted few rights. As a result, the protection of suspects is unbalanced, as it depends on the procedural stage in question.

Therefore, the need for transposition of the directives was unequal and mainly concerned police investigations. France has adopted laws just before the deadline for the purpose of compliance.[5] The changes regarding how suspects are handled during criminal proceedings are now evident. However, it is arguable that the transposition by France did not go far enough. There are some misgivings as to whether France has transposed the directives in a way that respects both their wording and their spirit. Although French legislation now enables suspects to participate more actively (below II.), the recent reforms may have failed to provide them with the means to defend themselves effectively at every stage of the criminal proceedings (below III.) .

II. Implementing the Right of Suspects to Participate in Criminal Proceedings

French criminal procedure has fully incorporated a cornerstone of the adversarial system: the participation of the suspect into the criminal proceedings. For suspects, when they are summoned to appear before a Court and become accused persons, participation means physical attendance at their trial (below1), but also having the capacity to understand the proceedings and to express themselves (below 2).

1. The right of accused persons to attend their trial

The EU legislator intended to strengthen the right of accused persons to be present at their trial in the Member States and laid down the framework for "trials in absentia". Directive 2016/343 imposes on Member States the obligation to ensure that the accused persons are informed about the upcoming trial and that they have the right to attend it. In absence of the accused, a valid trial can only take place when he has been unsuccessfully summoned or when he is duly represented by a lawyer.[6] Otherwise, the imposed sentence is challengeable and the accused person has the right to a new trial.[7] This is the case, for example, when a fugitive is sentenced *in absentia* while he is on the run and later caught.

The current French legislation was already in compliance with these requirements even before the directive was adopted. However, that has not always been the case. The ECtHR very much influenced the development of French legislation. The Strasbourg court held that the former French legislation, which denied an absent accused person the right to be represented by a lawyer, contradicted the right to a fair trial, despite the fact that the absent convict had the possibility to apply for a retrial anyway.[8] The legislation was modified in 2004 by a law that repealed the old "*contumace*" procedure.[9] Today's legislation corresponds both to the requirements of the directive and to ECtHR case law. Indeed, a trial is only valid in the absence of a person accused of a general offense ("*délit*") if he is represented by a lawyer or if he has been correctly summoned.[10] Otherwise, he is sentenced in default and has the right to a new trial.[11] When the accused is tried for a serious offense ("*crime*") before an Assize Court, the provisions of French legislation even go beyond the requirements of the directive, as even the person represented by a lawyer is granted the right to a retrial in any case.[12]

2. The right of suspects to understand the proceedings and to express themselves

In order for suspects to be involved in the proceedings, they must be given the opportunity to understand what charges they are facing and to be heard. This objective is targeted by two directives that have, on the whole, been implemented properly by France: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU on the right to information.

Directive 2012/13/EU foresees that suspects should be promptly provided with two types of information: information about their procedural rights and information about what accusations are being made against them. First, suspects are to be informed about their rights in the criminal proceedings.[13] Although the obligation for the investigators to notify the suspects about their rights was already provided for in French criminal procedure, this obligation has been reshaped and extended in order to match the requirements of the directive.[14] The scope of the notification now notably includes the right to be assisted by a lawyer, the right to interpretation, and the right to communicate with third parties.[15] As required by the directive, the arrested person is to be given a letter of rights, which he is allowed to keep throughout the time he is deprived of liberty.[16] Furthermore, all suspects, are now to be notified of their procedural rights.[17] Under the former legislation, only suspects in custody were. Secondly, suspects are to be informed about the accusations.[18] Here again, the transposition of the directive only led to minor changes. Such an obligation on the part of investigators already existed under the French Code of Criminal Proceedings. The transposition of the directive only made this obligation more precise, as the suspect is now to be told the place, the time, and the legal classification of the offense he is suspected of.[19]

Directive 2010/64/EU aims at giving foreign suspects or suspects with hearing or speech impediments the opportunity to participate effectively in criminal proceedings. Member States shall ensure that, when suspects appear before investigative and judicial authorities, they are provided with interpretation "of a quality sufficient to safeguard the fairness of the criminal proceedings" without delay.[20] Suspects are also to be provided with a written translation of "essential documents" within a reasonable period of time.[21] As a result, appropriate measures have been taken in French law. Indeed, the right to interpretation and to translation of essential documents for the duration of the proceedings is solemnly granted at the very beginning of the French Code of Criminal Proceedings.[22] The description of the obligations with respect to the scope and timing of the interpretation and translation meets European requirements.[23] However, one negative point must be highlighted. According to the directive, Members States are required to set up a mechanism or a procedure in order to assess whether the person needs an interpreter or not.[24] Such a mechanism is not provided for in French law. When the authorities have doubts about whether the person understands and speaks French, they merely have to "verify" this "by all means."[25]

By way of guaranteeing their presence or representation at trial, making sure they know what they are accused of and enabling them to overcome the barrier of language, French criminal procedure undoubtedly gives suspects the means of participating in the proceedings. However, we will now see that formal participation of the suspects is useless if they are not able to defend themselves effectively.

III. Implementing the Right of Suspects to Defend Themselves Effectively in Criminal Proceedings

The implementation of the right of suspects to defend themselves effectively must be examined at two crucial phases of the criminal proceedings: during police investigations (below 1.) and in the trial phase (below 2).

1. The right of suspects to defend themselves during police investigations

At the first stage of the criminal proceedings, when the investigations are still in the hands of the police and the prosecution, decisive evidence might be collected because the facts are fresh and persons may have been caught in the act. In the eye of the European legislator, suspects must already be given the ability to defend themselves on this occasion by way of access to a lawyer and to the materials of the case.

Directive 2013/48 states that suspects shall have the right of access to a lawyer "in such time and in such manner so as to allow (them) to exercise their rights of defence practically and effectively."[26] Even though this access is facilitated by the fact that suspects can apply for, and benefit from, legal aid in a way which fits the requirements of Directive 2016/1919 on legal aid,[27] it appears that France has shied away from ambitiously transposing the right of access to a lawyer during police investigations. According to Directive 2013/48, the moment at which a lawyer is allowed to intervene is, in principle, immediately after a person has been notified that he is suspected of having committed an offense, without undue delay.[28] France, however, was compelled to grant access to a lawyer at an even earlier time in order to comply with ECtHR case law. Indeed, according to the ECtHR, the assistance of a lawyer has to be provided "as from the first interrogation of the suspect by the police."[29] The French legislation was thus recently changed so as to allow a suspect to be assisted by a lawyer from this moment on.[30] However, if the suspect is not detained, the assistance of a lawyer is granted under the condition that the alleged offense is punishable by imprisonment. Furthermore, the suspect who is not detained has no right to a private meeting with the lawyer before the hearing.[31] When the suspect is detained in police custody, this private meeting cannot last more than 30 minutes, and the intervention of the lawyer can be postponed up to 24 hours in "exceptional circumstances," with approval of the judiciary.[32]

Further to this, Directive 2012/13 on the right to information in criminal proceedings notably imposes on Member States the obligation to ensure that all suspects are given access "at least to all material evidence in the possession of the competent authority (…) in order to safeguard the fairness of the proceedings and to prepare the defence."[33] This has to happen at the latest "upon the submission of the merits of the accusation to the judgment of a court." A special regime applies to the detained suspect, who is allowed access to all documents that are essential to effectively challenging the lawfulness of the detention.[34] In this respect, the requirements of EU law may be inferior to those set out by the ECtHR. The latter holds that any person charged with an offense has to be given access to the material enabling him to prepare his defence. According to the ECtHR, a person is considered charged as soon as he is arrested, as he is officially notified that he will be prosecuted, or at the moment when preliminary investigations are opened.[35] In contrast, French legislation gives the accused persons access to all materials, at the latest when the case is brought before the criminal court for judgement. Therefore, even if it may not comply with ECtHR case-law, it still complies with the minimum standards imposed by the EU directive as regards suspects who are not detained. It remains, however, that the requirements of the directive are surely not met as to detained suspects. Indeed, as soon as they are detained by the police, the suspects and their lawyers are only allowed access to the records of the notification of rights, the medical examination, and the hearings.[36]

2. Respect for the presumption of innocence at trial

The EU legislator adopted Directive 2016/343, which aims at strengthening certain aspects of the presumption of innocence. Of course, this core principle of all liberal criminal procedures has been, on the whole, properly applied by France for a long time. It holds a constitutional rank[37] and plays a guiding role in the Code of Criminal Proceedings.[38] Any person violating the presumption of innocence may be held liable under civil[39] and criminal law.[40] Nevertheless, the directive contains certain aspects of this principle, with which French criminal law does not entirely comply.

One such aspect is the right not to incriminate oneself.[41] This right is closely linked to the right to have the assistance of a lawyer, and part of the lawyer's mission is to prevent suspects from making self-incriminating statements. This is why the ECtHR holds that any use of such statements to justify a conviction, even together with other admissible evidence, amounts to a violation of the right to a fair trial.[42] The Preliminary Article of the French Code of Criminal Proceedings is not as demanding, when it states that "no one can be sentenced on the mere ground of declarations they made without having been able to communicate with a lawyer and to be assisted by him." *A contrario*, the Code seems to allow the use of self-incriminating evidence in part, together with other integral evidence. This is also the interpretation chosen by the

highest French jurisdiction and is reflected in current case law. Indeed, the High Court refuses to review judgments in which the convict "was not sentenced exclusively and essentially on the mere ground of self-incriminating statements."[43] Although this solution is not expressely prohibited by the Directive, it seems however to be in discordance with ECtHR case law.

IV. Conclusion

France transposed the EU directives on the rights of suspects and accused persons in criminal proceedings literally. However, there are a lot of aspects which do not correspond to the spirit of the Directives. On the one hand, all provisions that were missing in French law have now been provided for in the French Code of Criminal Proceedings. On the other hand, however, the exercise to comply with European standards transposition was not carried out in an ambitious manner. Provisions on the right of access to a lawyer and to the materials of the case were transposed while using the full extent of the derogations allowed by the relevant provisions of the directives. This lack of a strong will to extend the rights of suspects in criminal proceedings could be interpreted as disinterest in the issue at a time when the political emphasis is quite set on the security and efficiency of criminal proceedings instead of protecting the individuals' rights. Furthermore, one must consider that the EU's influence could lead the current French procedural model to collapse along with its key figure: the investigative judge. The protection of suspect's rights can be seen as a reason for the existence of judicial investigations in the French procedural model. If broad rights are granted to suspects from the moment the police investigations are initiated, supporters of the abolition of investigative judges may hence argue that maintaining a separate procedural framework of judicial investigations is now superfluous.

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1 European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, *O.J.* C 115, 4 May 2010, 1.
2 Directive (EU) 2010/64 on the right to interpretation and translation, *O.J.* L 280, 20. October 2010, 1; Directive (EU) 2012/13 on the right to information, *O.J.* L 142, 22 May 2012, 1; Directive (EU) 2013/48 on the right of access to a lawyer and the right to communicate with thirds, *O.J.* L 294, 22 October2013, 1; Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial, *O.J.* L 65, 9 March 2016, 1; Directive(EU) 2016/1919 on legal aid, *O.J. L* 297, 4 November 2016. For an explanation of these Directives see also Cras/De Matteis, (2010) *eucrim*, 153; Cras/De Matteis, (2013) *eucrim*, 22; Cras, (2014) *eucrim*, 32; Cras/Erbežnik, (2016) *eucrim*, 25; and Cras in this issue.
3 Articles 79 to 230 of the French Code of Criminal Proceedings (CPP).
4 A criminal case usually starts with police investigations. The appointment of an investigative judge comes at a later step. However, all criminal cases are not managed by an investigative judge. Cases considered as minor only lead to police investigations.
5 Law No 2013-711 of 5/08/2013 along with decree No 2013-958 of 25/10/2013 and law No 2014-535 of 27/05/2014.
6 Art. 8 Directive (EU) 2016/343, *op. cit.* (n. 2).
7 Art. 9 Directive (EU) 2016/343, *op. cit.* (n. 2.).
8 ECtHR, 13 February 2001, *Krombach v. France,* Appl. no. 29731/96; the Court concluded that there was a violation of Art. 6 (1) taken in conjunction with Art. 6 (3 lit.c) ECHR.
9 Law No 2004-204 of 09/03/2004.
10 Art. 411 CCP.
11 Articles 412 together with 487 and following CCP.
12 Articles 379-2 and following CCP.
13 Which, according to Art. 3 Directive (EU) 2012/13, *op. cit.* (n. 2), include the right of access to a lawyer, the possibility of applying for legal aid, the right to know about the accusation, the right to interpretation and translation, and the right to remain silent.
14 Law No 2014-535 of 27/05/2014, *op. cit.* (n. 4).
15 Articles 61-1, 63-1, 113-4, and 116 CCP.
16 Articles 63-1 and 803-6 CCP.
17 Art. 61-1 CCP.
18 Art. 6 Directive (EU) 2012/13, *op. cit.* (n. 2).
19 Articles 61-1, 63-1, 113-4, and 116 CCP.
20 Art. 2 Directive (EU) 2010/64, *op. cit.* (n. 2).
21 Art. 3 Directive (EU) 2010/64 *op. cit.* (n. 2).
22 Preliminary article, III CCP.
23 Articles D594 and following CCP.
24 Art. 2 (4) Directive (EU) 2010/64, *op. cit.* (n. 2).
25 Articles 803-5 and D 594-1 CPP.
26 Art. 3 (1) Directive 2013/48/EU, *op. cit.* (n. 2).
27 Directive (EU) 2016/1919, *op. cit.* (n. 2), whose requirements are to my mind sufficiently fulfilled by law No 91-647 of 10/07/1991 and decree No 91-1266 of 19/12/1991.
28 Art. 2 (1) together with Art. 3 (2) Directive (EU) 2013/48.
29 ECtHR, 27 November 2008, *Salduz v. Turkey,* Appl. no. 36391/02.
30 Art. 63-3-1 CCP, created by law No 2011-392 of 14/04/2011 and Art. 61-2, created by law No 2014-535 of 27/05/2014.
31 Art. 61-2 CCP.
32 Articles 63-4 and 63-4-2 CCP.
33 Art. 7 (2-3)Directive (EU) 2012/13, *op. cit.* (n. 2),.
34 Art. 7 (1) Directive (EU) 2012/13, *op. cit.* (n. 2),.
35 ECtHR, 27.06.1968, *Neumeister v. Austria*, Appl. no. 1936/63; ECtHR, 27.06.1968; *Wemhoff v. Germany,* Appl. no. 2122/64; ECtHR, 16.07.1971; *Ringeisen v. Austria,* Appl. no. 2614/65; together with ECtHR, 09.05.1977, *X v. Belgium,* Appl. no. 2614/65.
36 Art. 63-4-1 CCP.
37 Art. 9 of the 1798 Declaration on the Rights of Man and of the Citizen.
38 Preliminary article III of the CCP.
39 Art. 9-1 of the French civil code.
40 Art. 29 of the Law on the freedom of the press of 29 July 1881 and Art. 226-10 of the Criminal Code.
41 Art. 7 (2) Directive (EU)2016/343, *op. cit.* (n. 2).
42 ECtHR, 27.11.2008, *Salduz v. Turkey*, Appl. no. 36391/02.
43 Cour de cassation, criminal chamber, 06.12.2011, No 11-80326; 20.03.2012, No 11-83638.

Feuille de route et droits de la défense

Les enquêtes défensives à l'étranger

Avv. Giovanni Bana, Prof. Avv. Lucio Camaldo et Avv. Marina Troglia

The Italian criminal law system, unlike the systems in many other European countries, allows the defense to carry out defensive investigations on behalf of his/her client. In this contribution, the shortcomings of the recent European legislation on the matter are analyzed, as well as the issue of the validity in Italian criminal proceedings of defensive investigations conducted by the defense council abroad. The admissibility in the criminal case of defensive investigations conducted abroad by an Italian defense lawyer was, in fact, already rejected ten years ago by the Italian Court of Cassation. The Court stated that the official state instruments of international mutual legal assistance in criminal matters must be used if investigations are carried out abroad. The authors argue in this contribution that this position cannot be upheld in a unified Europe and deserves fundamental reconsideration. They also advocate a European solution of defensive investigations abroad – a possible topic for a new EU roadmap on defensive rights.

I. La feuille de route

La Résolution du Conseil du 30 novembre 2009[1] et ensuite le Programme de Stockholm[2] ont invité les États membres de l`Union européenne à entreprendre une action commune, visant à renforcer les droits procéduraux des suspects et des personnes poursuivies dans le cadre des procédures pénales, notamment en adoptant une feuille de route. Celle-ci prévoit l'adoption de plusieurs mesures – dont l'ordre de mise en œuvre est indicatif – en matière de traduction et d'interprétation (mesure A), des informations relatives aux droits et à l'accusation (mesure B), à l'assistance d'un conseiller juridique et aide juridictionnelle (mesure C), à la communication avec les proches, les employeurs et les autorités consulaires (mesure D), aux garanties particulières pour les suspects ou les personnes poursuivies qui sont vulnérables (mesure E), et, enfin au livre vert au sujet de la détention provisoire (mesure F).

Bien que ce parcours tourne maintenant vers sa fin, par l'adoption de directives de l'Union européenne qui sont actuellement en voie de transposition dans les différents Pays membres, il ne semble pas que ce cheminement soit entièrement achevé En effet, quant à la mesure C, concernant, plus en général, les droits de la défense, sont désormais adoptées la directive 2013/48/UE relative au droit d'accès à un avocat,[3] la directive 2016/800/UE[4] relative à la mise en place de garanties procédurales en faveur des enfants qui sont des suspects ou des personnes poursuivies et, enfin, la directive 2016/1919/UE.[5] Aucune de ces trois mesures, toutefois, ne touche le thème des enquêtes de la défense qui sont même interdites dans certains pays de l'Union européenne. Ce profil a en particulier émergé lors d›une récente conférence, qui a eu lieu au Tribunal de Milan le 23 Septembre 2016, dans laquelle, cependant, le Conseil de l'Ordre des Avocats de Milan et le Conseil du Barreau de Dijon ont signé un Protocole de coopération visant à promouvoir, parmi d'autres, l'échange des informations et des bonnes pratiques.[6]

Par ailleurs, le thème des enquêtes de la défense ne semble pas avoir été tout à fait abordé et ce même dans le contexte d'autres directives, parmi lesquelles la directive 2014/41/UE du 3 avril 2014 concernant la décision d'enquête européenne en matière pénale[7] qui ne semble pas avoir prévu un véritable pouvoir de la défense de mener des enquêtes à l'étranger.

II. Les enquêtes de la défense en Italie

Le thème des enquêtes défensives est certainement très délicat et représente un instrument nouveau aussi pour l'Italie, où le défenseur peut mener ses propres enquêtes depuis l'adoption de la loi du 7 Décembre 2000, n. 397, qui a introduit des dispositions correspondantes dans le Code de procédure pénale italien,[8] à l'origine réformé en 1988.[9]

La nécessité d'inclure la possibilité pour l'avocat de se défendre tout en présentant ses propres preuves descend directement du modèle accusatoire, selon lequel les parties se trouvent sur un plan d'égalité face au juge, et aussi de la Constitution italienne, qui prévoit l'application du principe du contradictoire dans la formation de la preuve, permettant, donc, de voir les enquêtes défensives comme une déclinaison de l'égalité des armes. L'introduction de cette discipline a représenté pour

l'Italie un changement culturel, avant même d'être un changement juridique, de sorte qu'on y est parvenu après des nombreux débats .[10]

Actuellement, en Italie, le défenseur dispose de certains moyens d'enquête, qui rendent plus concret et vraiment efficace le droit à la défense de l'avocat. Parmi ceux-ci sont les possibilités du défenseur:

- d'effectuer des rencontres non documentés ;
- d'écouter des personnes informées sur les faits ;
- de recueillir des déclarations écrites par ceux-ci ;
- de demander des documents et des informations à l'administration publique ;
- d'effectuer des accès aux lieux publics ou privés (dans le cas de l'accès aux lieux privés, il nécessite d'une autorisation préalable de la magistrature, même si cet acte est le fait de son initiative) ;
- de demander des conseils aux témoins experts.

Les moyens sont disponibles même pendant l'enquête «préventive», c'est-à-dire dans le cas où il n'existe pas encore, au niveau formel, une affaire pénale.[11]

Tout cela vaut aussi longtemps que l'on reste sur le territoire italien. Quant au déroulement de ces opérations défensives à l›étranger – qui pourraient aussi avoir une importance décisive pour démontrer l'innocence de la personne assistée – la jurisprudence italienne a montré une certaine résistance relative à leurs légitimité. Le seul cas dans lequel elle a pris une position à ce sujet a été décidé il y a désormais dix ans. Les thèses de la jurisprudence italienne sont présentées sous titre III suivi par un avis critique sur cette position. .

III. La position de la jurisprudence italienne au sujet des enquêtes défensives à l'étranger

Le thème des enquêtes défensives à la territoire étranger n'a pas été particulièrement approfondi dans la jurisprudence italienne en fait, parce que – comme l'on a vu – l'introduction des enquêtes de la défense est assez récente, et il n'y a donc eu une augmentation progressive de leur utilisation dans les procès que depuis ces dernières années, et ce soit parfois en raison d'un manque de compétence de la part des avocats mêmes, soit par manque de confiance dans les résultats possibles face à la justice.

La Cour de Cassation n'a pris une position formelle qu'une seule fois et cela il y a plusieurs années.[12] Ses arguments n'ont pas tout à fait convaincu une partie de la doctrine italienne. De nombreux auteurs, en effet, ont considéré les thèses de la Cour sur la possibilité des enquêtes défensives à l'étranger comme superficielles et, désormais anachroniques. Dans le cas examiné la Cour a considérée comme inutilisable une déclaration recueillie sous la forme d'enquête défensive en Bulgarie, car elle était prive des formes que toute activité à l'étranger doit être exercée avec l'utilisation de l'instrument des commissions rogatoires internationales.[13] Concrètement, se poser la question de savoir si l'on pouvait considérer comme existant, en Italie, une interdiction explicite d'effectuer une enquête de la défense de façon indépendante à l›étranger, étant aussi empêchée la possibilité, pour le même défenseur, d'accéder, de façon indépendante, à la procédure des commissions rogatoires, réservée aux magistrats. Le défenseur, donc, serait dans la situation de devoir forcement s'adresser à la magistrature, de sorte que celle-ci initie directement la procédure prévue aux articles 723 du Code de procédure pénale italien, avec la conséquence de pouvoir subir un rejet et d'être forcé de montrer ses cartes trop tôt, avec le risque d'avoir retrouvé une preuve *contra reum*. En effet, confier à la seule magistrature la possibilité de demander aux autorités étrangères de procéder avec une commission rogatoire signifierait tout à fait lui consigner le monopole sur les enquêtes défensives, tout en confiant un choix très délicat à la discrétion d'un organe qui, après avoir effectué la commission rogatoire,[14] devrait nécessairement déposer la preuve aux actes du procès. Le défenseur, donc, devrait décider s'il souhaite demander l'intervention de la magistrature «dans le noir» ou pas, tout en risquant d'acquérir une preuve à charge pour la personne assistée[15].

Au-delà du fait, par conséquent, d'une disparité évidente entre l'accusation et la défense, la présence d'une preuve sur territoire étranger ne peut certainement pas avoir des conséquences négatives sur la défense de l'accusé.[16] Ce thème se croise, toutefois, avec le respect de la souveraineté nationale et des intérêts publics de chaque État. Vu que l'exercice de la compétence pénale serait l'une des expressions de la souveraineté d'un État – avec le résultat qu'un autre pays ne serait pas libre d'effectuer sur le territoire du premier des actes qui soient l'expression de domination ou de contrainte. La mise en place de tout acte de procédure sur un autre territoire serait au moins nécessaire, sous peine de rompre les relations diplomatiques, de trouver un consensus avec le pays titulaire.[17] Mais à ce sujet l'on doit donc se demander si un acte d'enquête mis en place par le défenseur peut vraiment être considéré comme un acte de domination. En droit italien, en fait, le défenseur qui effectue des enquêtes privées n'a pas un rôle de nature publique, mais procède tout simplement à des activités,[18] dans lesquelles les organes judiciaires ne sont pas impliqués. Dans les faits, il n'est jamais investi ni de pouvoirs publics ni de coercition, en agissant uniquement sur la base du consensus et en se fondant sur la coopération du sujet visé par l'enquête, tout en étant obligé de s'adresser au procureur et au juge en cas d'absence de consentement du titulaire du droit impliqué.[19] Face à cela, il n'est pas obligé au dépôt de ses propres actes d'enquête auprès du tribunal.[20]

IV. Conclusions

L'approche, avec laquelle la Cour de Cassation italienne en fait renvoie le défenseur italien à la procédure des commissions rogatoires s'il veut effectuer des enquêtes défensives à l'étranger (v. III) remonte à dix ans et ne semble plus vraiment compatible avec la réalité qui entoure désormais l'Europe, de sorte que la solution semble devoir être recherchée au niveau du législateur européen, plutôt que dans chaque juridiction. Comment les droits procéduraux des suspects et des personnes accusées peuvent-ils être vraiment protégés si l'avocat qui les représente ne dispose pas de moyens d'action vraiment pratiques et efficaces? L'innocence d'un homme ne peut certainement pas se limiter à la compétence territoriale, même face à l'évolution du rôle du défenseur, de plus en plus «enquêteur».

En outre, toutes insuffisances du modèle de la commission rogatoire sont maintenant bien connues en Europe, parce que cet instrument semble encore trop lié à des contraintes formelles et bureaucratiques excessives, par rapport aux exigences de vitesse de la procédure.[21] Il ne s'agit pas d'un hasard si l'on a recherché des solutions alternatives, visant à une plus grande efficacité. Ce sont précisément la lenteur et les difficultés de ces instruments, qui ont conduit à la recherche de nouvelles initiatives transnationales visant à encourager la circulation des mesures de dialogue direct entre les autorités, sur la base de la confiance mutuelle dans le système juridique d'un autre État membre de l'Union européenne.[22] Même la directive 2014/41/UE n'exprime pas tout à fait clairement les prérogatives dont disposerait le défenseur, avec une référence particulière au droit de se défendre tout en apportant ses propres preuves.[23] Dans les faits, il ne semble pas s'être encore réalisé – sous le profil que l'on analyse – un vrai pas en avant, car il est prévu que la demande de l'avocat devrait avoir lieu, une fois de plus, conformément à la loi et à la procédure pénale nationale, revenant donc au point de départ. Il est peut-être temps de dépasser une interprétation obsolète et anachronique, tout en acceptant l'idée d'un avocat de plus en plus dynamique et pluridisciplinaire, pas limité aux frontières territoriales et spatiales, opérant ainsi un changement décisif des mentalités de la part de tous les praticiens du droit.[24]

1 Résolution du Conseil du 30 novembre 2009 « relative à la feuille de route visant à renforcer les droits procéduraux des suspects ou des personnes poursuivies dans le cadre des procédures pénales », J.O. C. 295 du 4.12. 2009,
2 Programme de Stockholm – « Une Europe ouverte et sûre qui sert et protège les citoyens », J.O. C 115 du 4.5.2010.
3 J.O. L 294 du 6.11.2013,
4 J.O. L 132 du 21.5.2016, V. L. Camaldo, "Garanzie europee per i minori autori di reato nel procedimento penale: la direttiva 2016/800/Ue in relazione alla normativa nazionale", *Cass. pen.*, 2016, 12, 4572.
5 J.O. L 297 du 4.11.2016, p. 1; V. L. Camaldo, "La direttiva 2016/1919/UE sul gratuito patrocinio completa il quadro europeo delle garanzie difensive nei procedimenti penali", *Diritto Penale Contemporaneo*, 13.12.2016 ; S. Cras, The Directive on the Right to Legal Aid in Criminal Proceedings and in European Arrest Warrant Proceedings, présenté dans ce numéro.
6 À ce propos, à la fin du Congrès e été adoptée une recommandation adressée aux Institutions de l'Union européenne, pour que dans les mesures de la feuille de route soient aussi incluses des dispositions concernant les enquêtes de la défense à l'étranger.
7 J.O. L 130 du 1.5.2014, p. 1. V. L. Camaldo et F. Cerqua, "La direttiva sull'ordine europeo di indagine penale: le nuove prospettive per la libera circolazione delle prove", *Cass. pen.*, 2014, 10, 3511.
8 Il s'agit du Titre VI *bis* du livre cinquième du Code de procédure pénale italien. Le code de procédure pénale ne représente pas la seule source en matière d'enquêtes de la défense; en effet le thème touche aussi la déontologie de l'avocat et les données personnelles, dont le défenseur peut prendre connaissance tout en faisant des actes d'enquête. Parmi les sources il faut donc mentionner les *Règles de comportement du pénaliste dans les enquêtes défensives* – c'est un texte approuvé par l'Union des Chambres Pénales le 14 juillet 2001, ensuite modifié en 2007 – et le *Code de déontologie de l'avocat*, approuvé par le Consiglio Nazionale Forense le 31 janvier 2014. Enfin il y a aussi des dispositions dans le « *privacy code* », c'est-à-dire le Decreto Legislativo 196/2003 et le *Code de déontologie et de bonne pratique pour le traitement des données personnelles dans les enquêtes de la défense*.

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9 Decreto del Presidente della Repubblica 22 septembre 1988, n. 447, suppl. ord. n. 92 à *Gazzetta Ufficiale* , Serie gen. N. 250 du 24 octobre 1988. Il faut aussi mentionner la loi constitutionnelle du 23 novembre 1999, n. 2 (in *G.U.* 23.12.1999 n. 300) qui a effectué des modifications à l'article 111 de la Constitution italienne, pour le rendre plus compatible avec les principes de l'article 6 CEDH.
10 La nécessité d'une loi qui autorisait le défenseur à effectuer des actes d'enquête avait été aussi soulignée dans les travaux préparatoires du nouveau code de procédure pénale et cela en raison du fait qu'un système qui s'inspire au modèle accusatoire ne pouvait pas ignorer ce thème. La première solution adoptée voyait l'introduction d'un article *extra codicem*, c'est-à-dire l'article 38 du Decreto Legislativo 271/1989 qui fut considérée inapproprié et la disposition fut après supprimée en 2000.
11 L'article 327 *bis* du Code de procédure pénale permet d'effectuer les enquêtes de la défense à partir du moment de l'assomption du mandat de la part du défenseur, dans chaque moment du procès, dans la phase de l'exécution et aussi pour promouvoir le jugement de révision. Donc dans toutes les situations dans lesquelles il serait nécessaire de rechercher des éléments de preuve dans l'intérêt de la personne assisté.
12 Cour de Cassation italienne, Sez. I., 29.05.2007 (dep. 19.06.2007), Giur. It., 2008,4, 986.
13 Cour de Cassation italienne, *op. cit.* (n. 12).
14 Il faut aussi préciser qu'il ne semble pas exister aucune possibilité de recours vers cette décision de rejet de la part du magistrat concernant la possibilité de procéder à la commission rogatoire. V. C. Angeloni, "L'inammissibilità di investigazioni difensive all'estero: una ricostruzione plausibile?", *Riv. It. dir. pen. proc.*, 2008, 1391.
15 G. Biondi, "La giurisprudenza in tema di investigazioni difensive, con particolare riferimento all'attività di assunzione di informazioni", Giur. Mer., 2008, 26 ; V. D. Curtotti Nappi, "I nuovi orizzonti investigativi del difensore: le informazioni assunte all'estero", *Giur. It.*, 2008, 4, 987.
16 M. Bordieri, "Brevi note sull'inutilizzabilità di atti di investigazione svolti all'estero dal difensore dell'imputato senza passare attraverso una rogatoria internazionale", *Cass. Pen.*, 2009, 5, 2035.
17 M. Bordieri, *op. cit.* (n. 17), 2035.
18 M. Marchetti, "*L'assistenza giudiziaria internazionale*", Milano, 2005, p. 128.
19 A. Mangiaracina, "Ancora zone d'ombra in tema di ammissibilità della revisione e indagini difensive svolte all'estero",*Giur. it.,* 2009, 1244 (1249).
20 G. Biondi, *op. cit.* (n. 16), 26.
21 F. Albano, Sui limiti territoriali delle indagini difensive: note a margine di una discutibile pronuncia, CP 2008., 4708 (4710).
22 A. Gualazzi, "Lineamenti europei del diritto di difesa", in : "*La circolazione investigativa nello spazio giuridico europeo: strumenti, soggetti, risultati*" (a cura di) L. Filippi, P. Gualtieri, P. Moscarini, A. Scalfati, *Cedam*, 2010, p. 203.
23 F. M. Grifantini, "Ordine europeo di indagine penale e investigazioni difensive", *Proc. Pen. e Giust.*, 2016, 6, 6.
24 G. Biondi, *op. cit.* (n. 16), 30 ; V. Gualazzi, , *op. cit.* (n. 23), p. 211.

The Directive on the Right to Legal Aid in Criminal and EAW Proceedings

Genesis and Description of the Sixth Instrument of the 2009 Roadmap

Steven Cras*

I. Introduction

On 26 October 2016, the European Parliament and the Council adopted Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings. The Directive is the sixth legislative measure that has been brought to pass since the Council adopted its Roadmap on procedural rights seven years ago.

The Directive, which completes the roll-out of the Roadmap,[1] was a difficult measure to negotiate in view of its potentially considerable financial implications. The final text of the Directive has been welcomed by practitioners, academics, and other interested parties. This article describes the genesis of the Directive and provides a description of its main contents.

II. Genesis of the Directive

1. Roadmap for strengthening procedural rights

On 30 November 2009, on the eve of the entry into force of the Lisbon Treaty, the Council (Justice and Home Affairs) adopted the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[2] The Roadmap provides a step-by-step approach[3] – one measure at a time – towards establishing a catalogue of procedural rights for suspects and accused persons in criminal proceedings. The Roadmap pursued the following aims:

- Strengthen mutual trust between the judicial authorities in the Member States of the European Union (EU), by setting minimum rules on procedural rights across the EU;
- Foster the application of the principle of mutual recognition

of judicial decisions, in accordance with Art. 82(2) of the Treaty on the Functioning of the EU (TFEU), for example in the context of the Framework Decision on the European Arrest Warrant (EAW)[4] and the Directive on the European Investigation Order.[5]

- Improve the balance between the measures aimed at facilitating prosecution and sentencing, on the one hand, and the protection of procedural rights of the individual, on the other.

The Roadmap calls on the Commission to submit proposals for legislative measures on various procedural rights (measures A to E). Subsequent to its adoption, the Roadmap has been gradually rolled out. By 25 October 2016, five measures had been adopted: Directive 2010/64/EU on the right to interpretation and translation,[6] Directive 2012/13/EU on the right to information,[7] Directive 2013/48/EU on the right of access to a lawyer,[8] Directive (EU) 2016/343 on the presumption of innocence,[9] and Directive (EU) 2016/800 on procedural safeguards for suspected or accused children.[10]

2. Split of measure C

Measure C as foreseen in the Roadmap addressed two issues: legal advice and legal aid. The short explanation in the Roadmap provided that "the right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice."

However, in its proposal for a Directive in relation to measure C, which the Commission presented in June 2011, the aspect of legal aid had been left out.[11] The proposal only dealt with the issue of legal advice, or, in the terms of the proposal, with the right of access to a lawyer.[12] As regards the issue of legal aid, the Commission observed that this issue warranted a separate proposal "owing to the specificity and complexity of the subject."[13]

In a ministerial letter of September 2011, five Member States[14] expressed misgivings about the fact that the Commission's proposal on the right of access to a lawyer did not set rules on legal aid. [15] According to these Member States, "[t]he two issues were joined in a single measure in the Roadmap on procedural rights, (…) reflecting that Member States envisaged these matters being dealt with jointly." They underlined that "[a]ny directive on the right of access to a lawyer should take into account the consequential costs and implications for Member States' legal aid systems."

In order to deal with the concerns of the five Member States, which were supported by some other Member States, two steps were taken in the context of the discussions on the draft Directive on access to a lawyer:

- Firstly, the text as proposed by the Commission was modified. Although the Commission's proposal for a Directive on access to a lawyer did not include (detailed) rules on legal aid, it provided that Member States should not apply less favourable conditions to legal aid covering instances where access to a lawyer was granted under the Directive, compared to instances where access to a lawyer was already available under national law.[16] Obviously, this provision could have had substantial financial implications in cases in which the Directive were to provide a wider right of access to a lawyer than already available under national law. The Council therefore decided to delete this provision. In relation to legal aid, the final text of Directive 2013/48/EU now only provides that "[t]his Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR."[17]
- Secondly, the Member States sought and obtained further guarantees from the Commission that it would indeed present a proposal on legal aid. When the Council reached a general approach on the Directive on access to a lawyer, in June 2012, several declarations were tabled. In one declaration, the Council and the European Parliament called on the Commission "to present a legislative proposal on legal aid at the earliest." The Commission replied by a separate declaration, in which it stated having "the intention to present a proposal for a legal instrument on legal aid in the course of 2013, in accordance with the Roadmap."[18] Although this guarantee was not watertight, the Member States were satisfied with it.[19]

In its declaration, the Commission purposely used the term "legal instrument" instead of "legislative proposal." Since the issue of legal aid was considered to be very sensitive and difficult, the Commission wanted to keep the possibility open of presenting a proposal for a non-legislative instrument, such as a recommendation, instead of a proposal for a directive. Although the Roadmap explicitly foresees that action on procedural rights cannot only comprise legislation but also "other measures," various stakeholders would certainly have been disappointed if the Commission had taken that line of course. Fortunately, however, this was not the case.

3. The Commission proposal – Mixed reception

On 27 November 2013, the Commission issued its "Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings."[20] The proposal was part of a package of

three legislative proposals on procedural rights,[21] and it was accompanied by a Commission recommendation.[22]

During a meeting on 10 December 2013, organised by ERA (Academy of European Law), the Commission presented its procedural rights package and discussed it with practitioners and policy stakeholders, such as the *ECBA, Fair Trials,* and *Justicia*. While the other two legislative proposals (on the presumption of innocence and on procedural safeguards for children) were generally received positively, the proposal for a Directive on legal aid got a mixed reception. There was praise for the fact that the Commission had presented a legislative proposal on this complicated issue, but various concerns were raised, such as in relation to the scope of the proposed Directive. Disappointment was also expressed over the fact that various elements had been included in the non-binding Commission recommendation, since it was felt that they belong in the binding Directive.

4. Discussions in the Council – General approach

The Member States did not discuss the Commission proposal during the first six months after its presentation by the Commission. During this period, however, Ireland and the United Kingdom indicated that they would not participate in the adoption of the Directive, in application of Protocol No. 21 to the Lisbon Treaty. Denmark did not participate either, as it never does nowadays in the area of freedom, security and justice, in accordance with Protocol No. 22 to the Lisbon Treaty.

The discussions in the Council on the proposed Directive started under Italian Presidency (second semester of 2014). The Member States quickly established "like-minded" groups, which held informal meetings to coordinate their positions. The Member States in such groups did not necessarily share the same views on all points of the proposed Directive, but they formed coalitions to support each other during the discussions.

A like-minded group of (mostly) northern Member States sought to reduce the scope of the Directive and make the text more flexible. They not only had concerns about the financial implications of the text as proposed by the Commission but also concerns of a practical and principle nature, as they felt that legal aid should not necessarily always be available in relation to minor and less serious offences, such as shoplifting of goods of little value. They therefore proposed excluding certain minor offences from the scope of the Directive and inserting a proportionality clause into the text.

While a majority of Member States supported or could accept the ideas of the group of northern Member States, these ideas were not shared by a like-minded group of (mostly) southern Member States, including Italy. Therefore, the Italian Presidency decided not to push for a general approach[23] during its term in office.

Under the Latvian Presidency (first semester of 2015), the Council quickly reached a general approach on the basis of the line advocated by the group of northern Member States.[24] At three places in the text, however, the Commission and members of the group of southern Member States[25] formally indicated that they did not agree. In a statement, seven Member States considered that the text of the draft Directive as set out in the general approach would not allow achievement of the aim of enabling all European citizens to enjoy a practical and effective exercise of the right of access to a lawyer, as enshrined in Directive 2013/48/EU. The Member States indicated, however, that they had decided not to oppose the general approach so as to allow the legislative process to go further and start discussions with the European Parliament and the Commission in the context of the trilogues.[26]

Usually in the Council, a lot of efforts are made with a view to ensuring that all Member States are able to accept EU legislative texts. This holds particularly true for the area of EU criminal law, which is considered to be very sensitive (compare the exceptions made for this area of law in the Lisbon Treaty). It was therefore quite exceptional that, in this case, a general approach was reached by overriding the strong objections of several Member States. However, this overriding of objections seemed tougher than it actually was, because the legislative process was only half way, and the Member States concerned knew perfectly well that the Commission and the European Parliament generally supported their line of thinking. Consequently, it was very likely that the text of the Directive would be modified in a way that would be more acceptable to them.

The above division between the Member States on the text of the general approach was clearly conveyed to the public, and the European Parliament was very much aware of it. This made for a curious start to the negotiations between the Council and the European Parliament.

5. Discussions in the Parliament's LIBE Committee – Orientation vote [27]

In the meantime, the LIBE Committee of the European Parliament had appointed Dennis de Jong (NL, Confederal Group of the European United Left − Nordic Green Left) as its rapporteur (first responsible Member). He had to obtain a mandate, on behalf of the European Parliament, for negotiations with the Council. This was not an easy task, since the MEPs in the

LIBE Committee, like the Member States in the Council, were rather divided on this file: while some MEPs (or political parties) took an "idealistic" approach, others preferred taking a more "realistic" one, by following the rationale of the Commission or even going in the direction of the Council.

The "idealistic" MEPs, guided by Mr. de Jong, felt that the Commission proposal lacked ambition. They particularly felt that the scope of the proposed Directive on legal aid should be extended and aligned "one-on-one" with the scope of Directive 2013/48/EU on access to a lawyer. After intense discussions that lasted several months, Mr. de Jong was able to secure a large majority of MEPs behind his position.[28] As a consequence, the European Parliament, represented by Mr. de Jong, entered into negotiations with the Council with a strong and ambitious mandate.

Whereas the Council in its general approach had reduced the scope of the Commission proposal, the LIBE Committee had substantially enlarged this scope in its orientation vote. It therefore did not seem easy to reach a compromise between the co-legislators during the trilogue negotiations.

6. Trilogue negotiations under Luxembourg Presidency

The negotiations between the Council and the European Parliament, assisted by the Commission as "honest broker", started under the Luxembourg Presidency (second semester of 2015). Contrary to the work in other files, no technical meetings involving civil servants of the three institutions were held in respect of the proposed Directive. The rapporteur of the European Parliament was namely of the opinion that during negotiations between the institutions, all work should be carried out in trilogues (i.e., in the presence of the rapporteur and often also of one or more shadow rapporteurs). This position did not pose any problem as regards the draft Directive on legal aid, which was a small instrument of a rather political nature.

At the beginning of the negotiations, not much progress was made. The rapporteur defended the Parliaments position, stating that the scope of the Directive on legal aid should be aligned with the scope of the Directive on access to a lawyer, since access to justice should be equally available to all, whether rich or poor. He underlined that access to justice would also be in the interest of the Member States, as it could avoid miscarriages of justice.

On behalf of the Council, the Luxembourg Presidency objected that, in times of financial constraint, the Member States could not permit themselves to have legal aid systems in place that are too expensive. The Presidency observed that, according to the Member States, accepting the wishes of the European Parliament to broaden the scope of the Directive would result in unacceptable additional financial burdens for them.

The rapporteur asked the Presidency to provide data, including an estimation of the financial implications of the wishes of the European Parliament, so that he could verify whether putting these wishes in place would indeed lead to such unacceptable additional financial burdens. The Presidency forwarded this question to the Member States.[29] While some answers were given,[30] it appeared impossible to elicit a complete answer from the Member States to the said question.

On suggestion of the rapporteur, the European Parliament then decided to ask its competent services[31] to make an impact assessment in order to evaluate, i.a., what the financial implications would be if Parliament's wishes for enlargement of the scope of the Directive were to be put in place. The Council and the Commission were a bit surprised by this move, since it meant that work on the Directive could be delayed for several months (until April 2016, when it was expected that the impact assessment would be available). This was one of the reasons why it was not possible to reach an agreement on the Directive under the Luxembourg Presidency.

7. Trilogue negotiations under the Netherlands Presidency

As from January 2016, the Netherlands held the Presidency of the Council for the first semester of 2016. The Netherlands, which was perfectly aware of the complexities of the draft Directive, took a mixed approach. On the one hand, as the Presidency, it was eager to reach an agreement with the European Parliament on this file during its term in office. On the other hand, it was a member of the group of northern States and as such was anxious about ending up with a text that would have too broad a scope.

It was therefore understandable that, during bilateral meetings with the Member States, the Netherlands Presidency not only sounded Member States out about their concerns and possible red-lines on this file, [32] but also informally explored the possibility of generating a "light version" of the Directive. Such a version would consist in maintaining the provisions on legal aid in EAW proceedings, but postpone to the future the discussions concerning the provisions on legal aid in criminal proceedings (and possibly deal with them in the context of another legal instrument). This idea, however, was not received with much enthusiasm by the other Member States, which feared that their negotiation leverage would then be reduced, while the hot potato remained on the table.

While waiting for the outcome of the impact assessment of the European Parliament, rapporteur MEP Dennis de Jong and Jan Janus (Chair of the Council working party) decided to start their talks on the issue of legal aid in EAW proceedings. It immediately appeared that the chemistry between both players – two Dutchmen of roughly the same age – was excellent. Therefore, once they had swiftly made substantial progress on the issue of legal aid in EAW proceedings, they successfully went on to tackle other issues, such as training and quality of legal aid services. However, the issue of legal aid in criminal proceedings still remained pending, since the negotiators had agreed that they would only try to crack this nut after the impact assessment by the European Parliament services became available.

This was the case by the end of April 2016. Subsequently, the European Parliament held a "strategic meeting" to examine the impact assessment. The European Parliament distilled two conclusions from this document: a) the amendments proposed by the LIBE Committee in its orientation vote would enhance the protection of suspects and accused persons from a fundamental rights point of view; and b) the costs for Member States as a result of these amendments would increase but they would still be reasonable. [33] In the light of these conclusions, the Parliament discussed four options on the way forward.[34] It decided to choose the second option, which meant that the Parliament accepted that the scope of the Directive on legal aid would not be aligned one-on-one with the scope of the Directive on access to a lawyer, while striving to improve the Commission proposal where possible. Hence, one could say that the Parliament went from an "idealistic" to a "realistic-plus" approach.

On this basis, the parties resumed negotiations at the beginning of May 2016. In view of the little time remaining before the end of the Netherlands Presidency, the negotiating parties had a busy schedule in order to reach full agreement on the text of the Directive. During this process, they received considerable support from Ard van der Steur, who was the Dutch Minister of Justice.[35]

8. Agreement

On 23 June 2016, at the ninth trilogue, the negotiating parties reached a provisional agreement on the text of the Directive. After having received the assurance that this text was agreeable to a (large) majority of political groups in the European Parliament, the Presidency submitted it to the Council's Permanent Representatives Committee (Coreper).[36] On the last day of the Netherlands Presidency, 30 June 2016, Coreper almost unanimously[37] confirmed that the text was acceptable to the Council.

After legal-linguist revision, the text of the Directive was formally adopted on 26 October 2016, and it was published as Directive (EU) 2016/1919 in the Official Journal of 4 November 2016. According to its Art. 12, the Member States are obliged to implement the Directive into their national legal orders by 25 May 2019.

III. Description of the Main Elements of the Directive

Directive (EU) 2016/1919 on legal aid is rather small. It contains two main articles: Art. 4 on legal aid in criminal proceedings and Art. 5 on legal aid in EAW proceedings, which have to be read together with Art. 2 on the Directive's scope. Moreover it contains two accessory provisions, which may however prove to be of considerable value: Art. 6 on decisions regarding the granting of legal aid, and Art. 7 on the quality of legal aid services and training. These provisions will be described below, after brief consideration of Art. 1 concerning the subject matter.

1. Subject matter

The purpose of the Directive is to ensure the effectiveness of the right of access to a lawyer provided for under Directive 2013/48/EU, by making available the assistance of a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings.[38]

According to its Art. 1(2), nothing in the Directive should be interpreted as limiting the rights provided for in Directive 2013/48/EU on access to a lawyer and in Directive (EU) 2016/800 on procedural safeguards for children. In relation to the Directive on access to a lawyer, the aim of this provision is notably to underline that the smaller scope of the legal aid Directive, compared to the Directive on access to a lawyer, does not in any way affect the rights provided for under the latter Directive.

As regards the Directive on safeguards for children, the provision is of even more relevance, since that Directive provides a self-standing right for children to be granted legal aid in certain circumstances.[39]

2. Legal aid in criminal proceedings

a) Searching for added value: provisional legal aid

In its proposal for a Directive, the Commission had suggested setting rules for provisional legal aid in criminal proceedings (and in EAW proceedings). Provisional legal aid would be a

kind of emergency legal aid of a temporary nature that Member States should grant when suspects or accused persons are deprived of liberty. According to the Commission, the right to provisional legal aid should last until the competent authority has taken the final decision on the eligibility of the suspect or accused person for (ordinary, regular) legal aid. The Member States could recover provisional legal aid granted to suspects or accused persons if, following the final decision on the application for legal aid, the person concerned would not, or would only partially, be eligible for legal aid under the Member State's legal aid regime.

In order to explain the choice for setting rules on provisional legal aid (instead of ordinary or regular legal aid), the Commission observed that other instruments of European and international law already provide rules on the right to legal aid in criminal proceedings, such as the Charter (Art. 47(3)), the European Convention on Human Rights (ECHR, Art. 6(3)(c)), and the International Covenant on Civil and Political Rights (ICCPR, Art. 14(3)(d)). The Commission had therefore carefully assessed where the Directive could contribute "added value" to those existing rules and improve mutual trust between criminal justice systems, while taking into account the need for caution in times of fiscal consolidation. According to the Commision, it is in the early phase of criminal proceedings, especially when deprived of liberty, that suspects or accused persons are most vulnerable and are most in need of assistance by a lawyer and, hence, of financial assistance. It is for this reason that the Commission proposed setting up rules on provisional legal aid, thus ensuring that suspects and accused persons who are deprived of liberty receive assistance by a lawyer at least until the decision on (ordinary, regular) legal aid is taken. [40]

The reasoning of the Commission, according to which the Directive should not copy existing rules but provide added value, is understandable. At the same time, it raises questions, since the application of this reasoning could put the existence of various Roadmap measures in doubt. It is true that procedural rights are also set forth in the instruments referred to by the Commission, notably the ECHR, as interpreted in the case law of the European Court of Human Rights (ECtHR). The Roadmap Directives, however, provide detailed rules on procedural safeguards in binding legislative instruments (not, as is often the case in the ECHR context, in casuistic case law), the Member States are obliged to bring their national legislation in line with the Directives, and the TFEU provides powerful enforcement mechanisms in order to make sure that Member States will comply with the Directives. Therefore, the mere fact that rules on procedural rights − even if comparable to the ECHR and the case law of the ECtHR − are put in EU Directives, is added value in itself.

b) From provisional legal aid to legal aid

Many Member States expressed misgivings regarding the concept of "provisional legal aid," because they feared that it would heavily complicate their procedures and because they felt it to be redundant. They observed in this regard that they were used to taking decisions on legal aid within a (very) short time. Therefore, rather soon in the discussions in the Council, it was agreed to put a recital into the text, stating that

> "if Member States have a comprehensive legal aid system ensuring that the persons concerned can receive assistance by a lawyer without undue delay after deprivation of liberty and at the latest before questioning, this should be considered as complying with the obligations imposed by the Directive with respect to provisional legal aid."[41]

During the negotiations for a Council general approach, the incoming Latvian Presidency suggested abandoning the concept of "provisional legal aid" and referring simply to "legal aid." Although this suggestion was very sensible, it received little support, probably because the Member States felt that it would be advisable to discuss such substantial modification during the trilogues between the institutions.

For this reason, it came as no surprise that, during the negotiations between the Council and the European Parliament, when the latter requested that the Directive should simply deal with legal aid, the Netherlands Presidency had no difficulties in convincing the Member States to agree with this request, as part of a compromise package. As a consequence, Art. 4 of the Directive no longer refers to "provisional legal aid" anymore, but to "legal aid."

c) Scope

The scope of the right to legal aid in criminal proceedings has been subject to considerable change. The Commission proposed that this right should apply in respect of all suspects and accused persons who are deprived of liberty and who have the right of access to a lawyer pursuant to Directive 2013/48/EU. As previously indicated, the European Parliament requested that the scope of the Directive on legal aid be aligned with the scope of the Directive on access to a lawyer, meaning that the Directive would apply to all suspects and accused persons, whether deprived of liberty or not (at large).

The Council, however, almost unanimously rejected this request. It observed in this context that the ECtHR in its case law attaches greater weight to deprivation of liberty[42] and that the Directive on access to a lawyer obliges Member States only in relation to situations of deprivation of liberty to make the necessary arrangements, including legal aid if applicable, in order to ensure that suspects or accused persons are in a position to effectively exercise their right of access to a lawyer.[43]

A compromise was reached on a scope that could be defined as "deprivation of liberty plus." Apart from the situation in which suspects or accused persons are deprived of liberty, two other situations were identified to which the provisions on the right to legal aid in criminal proceedings should apply (Art. 2(1)):

1) when suspects or accused persons are required by law to be assisted by a lawyer ("mandatory assistance"), and
2) when such persons are required or permitted to attend certain investigative or evidence-gathering acts, including (as a minimum) identity parades, confrontations, and reconstructions of the scene of a crime. These acts, inspired by the case law of the ECtHR, were already specifically identified in the Directive on access to a lawyer and are also described therein.[44]

The addition of the category "mandatory assistance" was logical: if Member States provide in their national law that suspects or accused persons are required to be assisted by a lawyer, then the consequence should be that the rules on legal aid also apply. The obligation for mandatory assistance can also derive from EU law, in particular from the Directive on safeguards for children (see point 1 above).

Although the text on the scope seems a fair compromise, one could raise the question of whether it would not have been possible for the Member States to agree on a wider scope of the right to legal aid in criminal proceedings, including the situation in which suspects and accused persons are *not* deprived of liberty, in view of the provisions on eligibility as finally agreed (see below under d). Indeed, these provisions contain considerable flexibility for Member States, and it can happen that persons who are not deprived of liberty (anymore) are suspected or accused of having committed an offence of such seriousness or complexity that providing legal aid is merited. To be noted, however, that the Directive sets *minimum* rules: Member States are perfectly free to set higher standards and provide in their national law that, in certain circumstances, legal aid should also be provided to suspects and accused persons who are not deprived of liberty.

d) Eligibility – Means and merits test

The above-mentioned *recommendation* of the Commission[45] contained extensive provisions on the issue of eligibility for legal aid in criminal proceedings. The European Parliament proposed transferring these provisions from the recommendation to the Directive. The Council could agree with that, since the suggestions were heavily inspired by the Charter and the ECHR, as interpreted in the case law of the ECtHR, which should be applied by the Member States anyway.

In the final text of the Directive, the basic rule on eligibility is almost a literal copy of Art. 47, third indent of the Charter, and of Art. 6(3)(c) ECHR:

> "Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require" (Art. 4(1)).

Hence, under the Directive, a suspect or accused person has the right to legal aid when two conditions are fulfilled:
a) lack of sufficient resources, and
b) the interests of justice must require legal aid to be provided.

In order to determine whether these conditions are fulfilled, the Member States may apply a means test, a merits test, or both (Art. 4(2)). In the context of a means test, when Member States determine whether a suspect or accused person lacks sufficient resources to pay for the assistance of a lawyer, they should take into account all relevant and objective factors, such as the income, capital, and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in the Member State concerned (Art. 4(3)).

It is obvious that such a means test leaves ample discretion to the Member States to determine whether a person lacks sufficient resources and hence is eligible for legal aid (subject, possibly, to a merits test). However, if a person offers to prove his lack of sufficient resources and there are no clear indications to the contrary, it seems that the condition relating to lack of sufficient resources is fulfilled.[46]

In the context of a merits test, when Member States determine whether the interests of justice require that legal aid be provided, they should take into account the seriousness of the criminal offence, the complexity of the case, and the severity of the sanction at stake (Art. 4(4)). These criteria come straight from the case law of the ECtHR.[47]

The European Parliament requested adding a criterion relating to the social and personal circumstances of the person concerned. This was left out, however, because it was felt that it should be possible to exclude eligibility for legal aid in respect of certain categories of offences. Reference to that possibility has been made in the recitals, where it is written that "the merits test may be deemed not to have been met in respect of certain minor offences."[48] In order to address the request of the European Parliament, a specific provision has nevertheless been inserted, obliging Member States to ensure that the particular needs of vulnerable persons be taken into account in the implementation of the Directive (see Art. 9). [49]

e) Eligibility – safety net

Since the merits test, like the means test, leaves a large margin of discretion to the Member States, a safety net has been installed. According to this safety net, the merits test is con-

sidered to have been met in any event in the following two situations (Art. 4(4), second sentence):

(a) when a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
(b) during detention.

Hence, as a result of this safety net, which is also laid down in the Directive on safeguards for children,[50] the suspect or accused person should be granted legal aid if detention is at stake[51] or if that person is in detention (subject, where applicable, to a means test).

"Detention" in this context has a restricted meaning: it refers to pre-trial (or provisional) detention, i.e., excluding post-trial detention, which refers to the period when a person serves a sentence. This is a result of the close link between the legal aid Directive and the Directive on access to a lawyer, which applies

> "until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence."[52]

Moreover, since the detention has to be ordered by a court or a judge, police custody and other similar forms of deprivation of liberty are excluded from this notion.

f) Legal aid to be granted in a timely manner

Legal aid has to be granted in a timely manner so that it produces the desired effects. In this context, the European Parliament insisted that legal aid be granted before suspects or accused persons are questioned by the police or by another competent authority, thus allowing such persons to be assisted by a lawyer prior to and during such questioning. It was agreed that the same holds true for certain investigative or evidence-gathering acts. For this reason, the Directive provides that Member States should grant legal aid without undue delay and, at the latest, before questioning or before an investigative or evidence-gathering act, as referred to in Art. 2(1) of the Directive, is carried out (Art. 4(5)).

This provision obviously should not be interpreted as a self-standing provision obliging Member States to grant legal aid. One is invited to read the provision as if it is introduced with wording along the following lines: "When legal aid is to be granted in accordance with this Article, Member States shall ensure that such aid …". In the recitals, it is provided that, if the Member States are not able to grant (ordinary, regular) legal aid in a timely manner, they should at least grant emergency or provisional legal aid before questioning or before investigative or evidence-gathering acts are carried out. This important clarification is a clear reference to the spirit of the original Commission proposal.[53]

2. Right to legal aid in EAW proceedings

a) Double right to legal aid in EAW proceedings

The Directive on access to a lawyer provides that a person who is subject to an EAW (requested person) has a double right of access to a lawyer once he has been arrested in the executing State. The requested person not only has the right of access to a lawyer in the *executing* State, but he also has the right to appoint a lawyer in the *issuing* State. The task of the latter lawyer is to assist the lawyer in the executing State by providing him with information and advice.[54]

In line with the Directive on access to a lawyer, the Commission proposed that requested persons should have the right to legal aid in both the executing State and the issuing State (if they appoint a lawyer in that State).

While the Member States could agree to the provisions on legal aid in the executing State, a majority of them was against the provisions on legal aid in the issuing State. According to these Member States, the strictly ancillary role of the lawyer in the issuing State would not justify such provisions. They also observed that introducing a right to legal aid in the issuing State could give rise to a number of practical issues, e.g., how the payment of the two lawyers would be claimed and organised, how the costs should be distributed, issues of communication, etc. For this reason, in its general approach, the Council deleted the provisions relating to legal aid for the lawyer in the issuing State.

During the trilogue negotiations, the European Parliament and the Commission put the issue back on the table. They put forth, i.a., that the budgetary implications of the provisions for the Member States would be somewhat reduced, in view of the small number of EAW cases. The Netherlands Presidency put considerable pressure on the Member States to show flexibility on this point, since it knew that some kind of concession would be a *conditio sine qua non* for the European Parliament (and the Commission) to reach a deal. In the end, the Member States reluctantly accepted inserting provisions on legal aid for the lawyer in the issuing State into the text, but subject to two conditions (Art. 5(2)):

a) the provisions on legal aid for the lawyer in the issuing State should only apply to EAWs issued for the purpose of conducting a criminal prosecution, and
b) legal aid should only be provided "in so far as such aid is necessary to ensure effective access to justice".

As a result of the condition under a), the provisions on legal aid for the lawyer in the issuing State do not apply to EAWs issued for the purpose of the execution of a sentence. The underlying idea is that requested persons have already had the benefit of access to a lawyer – and possibly legal aid – during

the trial that led to the sentence concerned. In respect of *in absentia* trials, however, this will not always be the case.

As regards the condition under b), the wording "in so far as such aid is necessary to ensure effective access to justice" was literally copied from Art. 47 of the Charter. The condition is fulfilled

> "where the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State."[55]

This underlines and defines the margin of discretion of the Member States. There is no merits test as regards legal aid in EAW proceedings (for both the lawyer in the executing and in the issuing State). Such merit is presumed to exist where an EAW has been issued. However, Member States may apply a means test (Art. 5(3)).

b) Costs relating to legal aid for the lawyer in the executing State

During the discussions in the Council, a curious question was raised: which State should bear the costs of legal aid for the lawyer in the executing State? It was always assumed that the executing State should bear these costs, since Art. 30 of Framework Decision 2002/584/JHA states that

> "[e]xpenses incurred in the territory of the executing Member State for the execution of a [EAW] shall be borne by that Member State. All other expenses shall be borne by the issuing Member State."

However, it was submitted that costs for legal aid should not be considered expenses for the execution of an EAW, as a result of which these costs should be borne by the issuing State. The question was discussed in the Coordinating committee in the area of police and judicial cooperation in criminal matters (CATS),[56] where it was confirmed that the executing State should bear the costs of legal aid for the lawyer in that State. Hence, the executing and issuing States have to bear the costs of legal aid for assistance by lawyers who have been appointed in their own States.

The fact that issuing States, as a result of the legal aid Directive, now "risk" possibly having to pay legal aid for a lawyer in the context of the execution of an EAW could incidentally be an incentive for them to abstain from using the EAW system for petty offences or trivial cases.

c) Summary of the eligibility provisions

The eligibility for legal aid, as regards both legal aid for suspects and accused persons in criminal proceedings as well as legal aid for requested persons in EAW proceedings, are summarized in figure 1.

3) Decisions on granting of legal aid

It is important to have good laws, but it is just as important that laws are applied properly. This holds even truer when a law, such as the Directive on legal aid, provides large margins of discretion.

For this reason, and inspired by the Commission recommendation, the European Parliament in its orientation vote proposed that decisions on whether or not to grant legal aid and decisions on the assignment of lawyers should be made promptly by an independent competent authority. Parliament also proposed providing that Member States should ensure that the responsible authorities make decisions diligently and that substantial guarantees against arbitrariness are in place.

Although the Member States could agree with the spirit of this proposal, they were reluctant to concede that decisions on legal aid should always be taken by an independent competent authority (such as an independent legal aid board), since decisions on legal aid are often taken by courts or judges, and sometimes also by the police or by prosecutors.

While the European Parliament could accept that decisions on legal aid are taken by courts or judges, which are also considered to be independent, it insisted that decisions on legal aid

Figure 1. In order to be eligible for legal aid under the legal aid Directive, suspects, accused, and requested persons must first of all have the right of access to a lawyer under Directive 2013/48/EU ("A2L," outer circle). Moreover, suspects and accused persons may need to pass the means and/or merits test, and requested persons may need to pass the means test (inner circle). These tests leave considerable margins of discretion to the Member States. However, when suspects or accused persons are detained and when detention is at stake, the merits test is deemed to have been met, which is also always the case in EAW proceedings (section in blue). In such situations, the persons concerned should be granted legal aid, unless it is determined through a means test that they have sufficient resources to pay for the assistance of a lawyer themselves.

or the assignment of lawyers should not be taken by the police or by prosecutors dealing with the case at hand, since they could have an interest in not granting legal aid or assigning a particular lawyer.

As a compromise, it was agreed to refer in the operative part of the text to a "competent authority." It is now provided that decisions on whether or not to grant legal aid and on the assignment of lawyers should be made by a competent authority without undue delay. Member States should take appropriate measures to ensure that the competent authority makes its decisions diligently, respecting the rights of the defence (Art. 6(1)).

In the recitals, it is clarified that the competent authority should be an independent authority that is competent to take decisions regarding the granting of legal aid, e.g., a legal aid board or a court, including a judge sitting alone. However, in urgent situations only, the temporary involvement of the police and the prosecution should also be possible in so far as this is necessary to be able to grant legal aid in a timely manner.[57]

The possible involvement of the police and the prosecution in urgent situations seems fair, since the necessity is partly due to modifications in other parts of the text (e.g., the modified subject matter of Art. 4, no longer provisional legal aid but legal aid) and since the Directive requires Member States to grant legal aid at the latest before questioning or before an investigative or evidence-gathering act is carried out (Art. 4(5), see above).

4. Quality of legal aid services

Art. 7 constitutes yet another example of where the text has been modified because of proposals by the European Parliament. This article contains requirements regarding the effectiveness and quality of the legal aid system as well as regarding the quality of legal aid services.

Again, the European Parliament was clearly inspired by the Commission recommendation. The text as agreed provides that Member States should take necessary measures, including those with regard to funding in order to ensure that: (a) there is an effective legal aid system of an adequate quality; and (b) legal aid services – namely services provided by a lawyer who is funded by legal aid – are of a quality adequate to safeguard the fairness of the proceedings (Art. 7(1)).

This is clear and rather strong language. While it could be argued that many other provisions of the Directive leave a lot of margin and/or merely copy provisions of the Charter and the ECHR, it seems that Art. 6 and, even more, Art. 7 at least provide rules that have substantial practical and added value.

5. Various practical arrangements and remedies

The rapporteur of the European Parliament requested to keep the Directive short and simple, without any unnecessary details. This request was followed, and the Directive is rather short, with relatively few recitals (33 – the other procedural rights Directives often have twice as many). As a result, the Directive provides the legislative framework for the granting of legal aid in the Member States, but all practical and detailed arrangements are to be filled in by the Member States, as is also specified in the recitals.[58] This concerns issues like claw-back, which had been discussed intensively during the negotiations, but in respect of which the final text of the Directive remains silent. Hence, under the control of the Court of Justice of the EU, the Member States are free to decide whether their authorities may request beneficiaries of legal aid to pay such aid back (e.g., when a court or a judge finds that they were guilty of having committed a criminal offence).

As regards remedies, the Commission did not provide any provision in this regard. The Council and the European Parliament agreed to insert a standard clause, according to which Member States should ensure that suspects, accused persons, and requested persons have an effective remedy under national law in the event of a breach of their rights under the Directive (Art. 8).

IV. Conclusion

Directive 2013/48/EU provides rules on the right of access to a lawyer. The Directive sets out when suspects, accused, and requested persons have the *opportunity* to be assisted by a lawyer. However, when persons who have the right of access to lawyer lack financial resources, they might not be effectively assisted by a lawyer. It was therefore very important to adopt the Directive on legal aid, which complements the Directive on access to a lawyer (and the Directive on safeguards for children). It was fortunate that the Directive on legal aid could be adopted before the deadline for transposition of the Directive on access to a lawyer expired.[59]

For a long time, uncertainty existed as to whether a Directive on legal aid would see the light of day, since the subject matter was complicated, and positions within the Member States and between the institutions lay far apart from each other. A further element of uncertainty was the impact assessment that had been ordered by the European Parliament in the middle of the negotiations.

The Commission proposal for a Directive was not very ambitious, but the accompanying recommendation contained a lot of material that could beef the text up. The European Parlia-

ment effectively made use of this possibility. The form and content of the Directive as finally agreed are to a large extent influenced by proposals of the European Parliament, on the basis of the recommendation of the Commission. That text, in turn, was largely inspired by the Charter, ICCPR and, notably, by the ECHR (including the ECtHR's case law). Therefore, various parts of the Directive resemble the latter. However, codification of these rules in a directive contributes added value in view of the binding nature of this legal instrument and the enforcements mechanisms under the TFEU. Staying close to the ECHR – to which all Member States are parties – was also key to ensuring that the text of the Directive could be accepted by a very large majority of Member States, from North to South and from East to West.

The text of Directive (EU) 2016/1919, which is rather lean, allows Member States sufficient flexibility to transpose the Directive into their national legal orders. Such transposition is to be carried out by Spring 2019. It is hoped that the Commission will actively follow the implementation process and that it will not refrain from starting infringement proceedings when Member States do not implement the Directive in a timely or correct manner.[60] This will contribute to ensuring that the Directive has added value.

The Directive will most likely give rise to interpretative case law by the CJEU. Perhaps the Directive will also inspire the case law of the ECtHR, as has been the case with other procedural rights Directives in the past.[61]

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* This article reflects solely the opinion of the author and not that of the institution for which he works.

1 Although it is provided that the catalogue of measures set forth in the Roadmap has a non-exhaustive nature, see recital 12 of the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *O.J.* C 295, 4.12.2009, p. 1.

2 See the reference in the previous footnote.

3 The step-by-step approach was adopted after it had initially appeared to be impossible, in 2007, to reach agreement on a comprehensive text encompassing several procedural rights – see the never adopted proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (COM 2004/0328).

4 *O.J.* L 190, 18.7.2002, p. 1.

5 *O.J.* L 130, 1.5.2014, p. 1.

6 *O.J.* L 280, 26.10.2010, p. 1. See, on this measure, S. Cras and L. De Matteis, "The Directive on the right to interpretation and translation in criminal proceedings", (2010) *eucrim*, 153.

7 *O.J.* L 142, 1.6.2012, p. 1. See, on this measure, S. Cras, and L. De Matteis, "The Directive on the right to information", (2013) *eucrim*, 22.

8 *O.J.* L 294, 6.11.2013, p. 1. See, on this measure, S. Cras, "The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings", (2014) *eucrim*, 32.

9 *O.J.* L 65, 11.3.2016, p. 1. See, on this measure, S. Cras and Anže Erbežnik, "The Directive on the presumption of innocence and the right to be present at trial", (2016) *eucrim*, 25.

10 *O.J.* L 132, 21.5.2016, p. 1. See, on this measure, S. Cras, "The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings", (2016) *eucrim*, 109.

11 In fact, in its proposal the Commission combined one aspect of measure C (legal advice, "C1") with measure D, concerning communication with relatives, employers, and consular authorities.

12 As has been observed in the past, the Commission was free to design its proposal in this manner, since the Roadmap itself states that the order of the rights indicated therein is "indicative". More importantly, the Roadmap does not affect the basic right of initiative of the Commission: this institution can decide not only whether or not to present a proposal but also on the contents of its proposals. See Cras, *op. cit.* (n. 8), 32.

13 Explanatory memorandum to COM(2011) 326/3, point 1.

14 Belgium, France, Ireland, the Netherlands, United Kingdom.

15 Council doc. ST 14495/11, point IV.

16 Art. 12(2) of the Commission proposal [COM(2011) 326/3], as clarified in point 29 of the accompanying explanatory memorandum.

17 See Art. 11 of Directive 2013/48/EU.

18 Council doc. ST 10908/12.

19 Of course, if the Commission would not have presented a proposal for a Directive on legal aid, a quarter of the Member States could have presented a Member States' initiative on this issue, in accordance with Art. 76 under b) TFEU. This was not a very attractive perspective, however, in view of the sensitive nature of the subject matter.

20 COM(2013) 824.

21 The two others proposals were COM(2013) 821 on the presumption of innocence (which later became Directive (EU) 2016/343) and COM(2013) 822/2 on procedural safeguards for suspected or accused children (which later became Directive (EU) 2016/800).

22 Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, *O.J.* C 378, 24.12.2013, p. 11.

23 The Council's general approach reflects its vision on the Commission proposal and is, in practice, the starting point for its negotiations with the European Parliament in the context of the ordinary legislative procedure of Art. 294 TFEU.

24 Council doc. ST 6603/15.

25 Belgium, Bulgaria, France, Italy, Portugal, Spain, and Lithuania.

26 Council doc. ST 7166/15 ADD 1.

27 The official term is "Legislative Resolution". Since the (old) term "orientation vote" was commonly used in the negotiations, it is also used in this text.

28 Orientation vote adopted on 6 May 2015, EP doc. A8-0165/2015.

29 Council doc. ST 12845/15.

30 Council doc. ST 13302/15.

31 The European Parliament's Directorate for Impact Assessment and European Added Value.

32 For the outcome of the bilateral meetings, see Council doc. ST 5556/16, point B.

33 Council doc. ST 8047/16, p. 4.

34 Council doc. ST 8047/16, p. 6.

35 In the Dutch political landscape, the ideas of the political party of Minister Van der Steur (VVD) have often been diametrically opposed to the ideas of the political party of rapporteur De Jong (SP). It was nice to see that in "Brussels" they helped each other to achieve their (common) goals.
36 Council doc. ST 10665/16.
37 In the end, all Member States except Poland supported the Directive. When the Council formally agreed to the Directive on 13 October 2016, Poland presented the following declaration: "Poland does not support the so-called 'compromise' presented for adoption at the Council meeting on 13 October 2016. We feel that an appropriate compromise taking due account of the interests of both Member States and suspected and accused persons was expressed in the general approach text adopted by the Council in February 2015. The present draft is in fact an unwarranted concession to the European Parliament and made by it without regard to the overall impact of this document and its internal consistency. Poland cannot in particular support the extension of the draft directive beyond its intended scope of temporary legal aid, the exclusion of specific provisions relating to less serious offences and the obligation to provide legal aid in the state issuing an EAW." (Council doc. ST 12835/16 ADD 1).
38 Recital 1.
39 See Arts. 6 and 18 of Directive (EU) 2016/800. On this issue, see Cras, *op. cit.* (n. 10), 114.
40 See the explanatory memorandum to the Commission proposal, in particular point 10.
41 See, e.g., the Council's general approach (Council doc. ST 6603/15), recital 12b.
42 See, e.g., ECtHR, 13 October 2009, *Dayanan v. Turkey*, Appl. 7377/03, para. 31.
43 See Art. 3(4), second indent, and recital 28 of Directive 2013/48/EU.
44 See Art. 3(3)(c) and recital 26 of Directive 2013/48/EU.
45 See above II.3 and note 22.
46 ECtHR, 25 April 1983, *Pakelli v. Germany*, Appl. no. 8398/78, para. 34.
47 ECtHR, 24 May 1991, *Quaranta v. Switzerland*, Appl. no. 12744/87, paras. 32–34.
48 Recital 13.
49 This provision is almost a literal duplicate of Art. 13 of Directive 2013/48/EU.
50 See Art. 6(6) of Directive (EU) 2016/800.
51 Compare ECtHR, 10 June 1996, *Benham v. UK*, Appl. no. 19380/92, para. 61: "The Court agrees with the Commission that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation (…). In this case, Mr Benham faced a maximum term of three months' imprisonment."
52 Art. 2(1) of Directive 2013/48/EU.
53 Recital 19.
54 Art. 10 of Directive 2013/48/EU.
55 Recital 21.
56 Council doc. ST 14302/14.
57 Recital 24.
58 Recital 18.
59 The deadline for transposition of Directive 2013/48/EU expired on 27 November 2016, one month after the Directive on legal aid had been adopted.
60 See, as regards infringement proceedings, the recent Communication from the Commission, "EU law: Better results through better application", *O.J.* C 18, 19.1.2017, p. 10.
61 See, in relation to Directive 2013/48/EU: ECtHR, 9 April 2015, *A.T. v. Luxembourg*, Appl. no. 30460/13, paras. 38 and 87.

The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations

Prof. Dr. Regina Garcimartín Montero*

I. Introduction

Directive 2014/41/EU regarding the European Investigation Order in criminal matters[1] was approved in April 2014 and regulates a new instrument for the obtaining of evidence. The main features of the European Investigation Order (hereinafter EIO) are:

- It covers all types of evidence;
- It contains time limits for the enforcement of mutual legal assistance requests;
- It limits the grounds for refusal;
- It can be used either to carry out investigatory measures in the executing state or to obtain evidence that is already in the state's possession.[2]

The obtaining of evidence in criminal proceedings is a highly sensitive matter from the point of view of fundamental rights, since the courts, prosecution services, and other law enforcement authorities must often limit the suspect's rights in order to get information in the criminal investigation.

The conflict between the necessary respect for fundamental rights and the importance of achieving swiftness and effectiveness in criminal investigations is readily apparent in Directive 2014/41/EU. Striking the right balance between both interests is, however, not an easy task: the different standards in the protection of fundamental rights among the Member States are the major obstacle when dealing with judicial cooperation in the framework of international relations.[3] In the EU context,

this opposition is even more apparent: on the one hand, the European Council of 1999 in Tampere claims the fundamental importance of the principle of mutual recognition not only for final judgements but also for every decision of judicial authorities.[4] On the other hand, EU law imposes the duty of due respect for fundamental rights in the Member States. Paradoxically and despite this rule, one of the main fears of Member States in the application of the Directive is to achieve this due respect for fundamental rights.[5]

The aim of this article is to analyse the position of Directive 2014/41/EU in relation to fundamental rights protection in criminal investigations: first, it gives an overview of the references in the Directive regarding the necessary respect for fundamental rights in the obtaining of transnational evidence. It then further analyses which possibilities the executing state has to intervene in case of fundamental rights violations and which legal remedies the Directive provides for reaction against an investigation that is not in line with fundamental rights.

II. The Respect for Fundamental Rights in the Directive

The duty to respect fundamental rights in the application of Directive 2014/41/EU is explicitly recognized in its Art. 1 para. 4.[6] Art. 11 para. 1 lit. f) of Directive 2014/41/EU refers to the Charter of Fundamental Rights of the European Union (hereinafter CFR) as a possible ground for refusing the execution of an investigative measure indicated in the EIO.[7] Apart from these references to fundamental rights, recital 15 provides that Member States should take into account the Directives that were adopted in conjunction with the 2009 Roadmap on strengthening procedural safeguards in criminal proceedings when implementing Directive 2014/41/EU.[8] Even though Directive 2014/41/EU does not allude to all the instruments that were going to be approved after 2014, national legislation should take them into account.[9]

Apart from these references in recital 15 of Directive 2014/41/EU – a non-binding part of the legal instrument – no further allusions to defence rights and other procedural guarantees can be found. In the preparatory phase of the EIO, authors already criticised that the European legislator showed a "chronic indifference of the Union for defence rights and procedural rights,"[10] which seems to be continued in the Directive to some extent.

What can be observed is that Directive 2014/41/EU features a special sensitivity vis-à-vis violation of the right to private life; there are actually some special provisions in Directive 2014/41/EU that explicitly regulate the obtaining of information by means that may threaten the right to private life – also referred to in the Spanish legal order as the "right to intimacy" *(derecho a la intimidad)* – such as the interception of telecommunications (Arts. 30 and 31) or information on bank and financial accounts or financial operations (Arts. 26 and 27). Undoubtedly, the right to privacy/intimacy is particularly vulnerable in a case of criminal investigation, because the suspect is usually reluctant to cooperate with the investigatory bodies, and this attitude may require decisions that restrict his/her right to private life in order to get information. Nonetheless, the attention paid to this fundamental right in Directive 2014/41/EU is disproportionate.[11] The EU legislator seems to be less concerned about other fundamental rights such as the rights to liberty, security, or defence, since there is no reference in the Directive, for example, to the importance of avoiding overly long interrogations that may exhaust the suspected person or to the right of access to a lawyer when necessary.

The respect for fundamental rights affects all judicial authorities intervening in the criminal proceedings either in the executing state or in the issuing state. However, Directive 2014/41/EU puts special emphasis on the control of any violation of fundamental rights by the executing state: procedures and safeguards for the executing state have a broader and more detailed regulation. This peculiarity can be easily understood given that the control in the issuing state should already have been exercised in accordance with the Directive: if the issuing authority assumes any infringement of fundamental rights, the consequence should be that the EIO is not issued in the first place.[12]

In the context of control of fundamental rights infringements in the issuing state, another feature of the EIO is worth mentioning: In some Member States, policemen, custom agents, or officers of administrative bodies are allowed to order investigative measures in criminal proceedings. In these cases, however, Directive 2014/41/EU requires that a judge, court, investigative judge, or public prosecutor validate the EIO (Art. 2 lit. c) ii)). Art. 2 lit. c) ii) explicitly refers to an examination of conformity with the conditions set out in Art. 6 para. 1 of the Directive. This means that the judicial authority must examine, in particular, whether the issuing of the EIO is necessary and proportionate for the purpose of the criminal proceedings, "taking into account the rights of the suspected or accused person." This intervention by the judicial authority enables the safeguarding of fundamental rights in the issuing state. Such validation can also solve in advance possible reservations on the part of the executing state. However, there is, as *Armada* cautions, the danger that the validation exercise may revert to a mere "rubber stamping."[13] It must therefore strongly be advocated that the analysis of the EIO as requested by the non-judicial authorities be thoroughly carried out by the judicial bodies of the issuing state.[14]

1. The executing state's intervention in case of a violation of fundamental rights

a) Lack of respect for fundamental rights as a ground for refusal

The executing state is the main actor in the EIO regime because it has to accomplish the task of obtaining the evidence required by the issuing state. One of the main differences between the EIO and the European Evidence Warrant (hereinafter EEW) is that the latter excludes the executing state's possibility to perform any activity in order to obtain evidence.[15] In comparison, the EIO allows investigative measures to be carried out in the executing state. This feature of the EIO is considered an important step forward compared to the EEW in legal literature.[16] Certainly, the potential effectiveness of the EIO in comparison with the EEW is without question and opens up wider possibilities in the criminal investigation.

The executing state may, however, show a certain reluctance to carry out the requested investigative measure. The most severe reaction from the executing state is non-execution of the requested measure because certain fundamental rights standards are not upheld in the issuing state. This possibility is recognized in Art. 11 para. 1 lit. f) Directive 2014/41/EU, which states that execution of an EIO can be refused if "there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligations in accordance with Article 6 TEU and the Charter."

The CFR is the point of reference for the refusal ground: according to *Armada* this refusal reflects the aim of the legislator to prevent Member States from adopting standards of protection of fundamental rights according to domestic law,[17] as the European Court of Justice expressly bans in the *Melloni* judgement.[18] Even though the executing state may have a legitimate interest in guaranteeing that the gathering of evidence was respectful of fundamental rights, it is not allowed to adjust the EIO to domestic fundamental rights standards.

Another point of discussion in this context is whether the system of mutual recognition as a maxim of Directive 2014/41/EU is convenient and suitable. *Zimmermann, Glaser and Motz* expressed that "the principle of mutual recognition works as follows: if the judicial authorities of one Member State (issuing State) issue a particular decision with regard to a criminal proceeding, the authorities of the Member State to which this decision is directed (executing State) are obliged to execute it without further examination. Thus the admissibility of the respective measure can only be established by the issuing authority on the basis of its domestic law, whereas the implementation of the decision is governed by the executing State's Law. As a consequence, the executing authority must comply with the issuing authority's decision, no matter if a comparable measure would be admissible under its own law."[19] Mutual recognition thus implies that control of the legality and proportionality of the investigative measure has to be performed by the issuing state, and the executing state must trust this decision.[20] Directive 2014/41/EU aims to foster effectiveness and expedience in the gathering of evidence in criminal proceedings.

The main fear as regards the prospect of a mutual recognition system for the Member States is to "lower down European and national standards of procedural safeguards and thus to reduce the protection of human rights."[21] According to *Jimeno Bulnes*, the option for mutual recognition in the regulation of the EIO implies a choice in favour of security and at the expense of justice, even though both objectives are part of the "Area of Freedom, Security and Justice" as stipulated in the Lisbon Treaty.[22] And although the new system should not be detrimental to fundamental rights, a right outweighed by the interests of effectiveness is difficult to achieve in practice.[23]

The reluctance towards the mutual recognition principle, in conjunction with the vagueness of the text of Directive 2014/41/EU in its description of the refusal ground of Art. 11 para. 1 lit. f), may lead to different approaches in the Member States when transposing the Directive. Therefore, both the effectiveness in the obtaining of evidence and the protection of fundamental rights risk being compromised.[24] In my view, there is a high probability that whenever the executing state has to choose between mutual recognition and respect for fundamental rights, the dilemma will probably be solved with that option which guarantees a more extensive protection of fundamental rights. Member States might have no difficulty in accepting an EIO coming from a country with a similar or higher level of protection of fundamental rights; a good bilateral judicial cooperation relationship will probably be favourable for the success of the EIO as well. However the judicial authorities might not be as willing to execute the EIO when it comes from a Member State in which the guarantees of fundamental rights are not as clearly protected.

To avoid misinterpretation, the text of Directive 2014/41/EU should have been more explicit about the grounds that would allow a refusal decision by the executing state.[25] *Jiménez* argues in a similar way that Directive 2014/41/EU should have included a more detailed regulation of the grounds of Art. 11 para 1 lit. f), and he suggests including different categories of investigative measures according to their potential interference with fundamental rights, such that Member States could get a clearer idea of which kind of measure might be intrusive enough to justify a non-execution decision.[26]

b) Recourse to an alternative investigative measure

Another important provision that ensures the respect for fundamental rights is Art. 10 of Directive 2014/41/EU, which enables the executing state – under certain circumstances – to resort to a different measure than the one requested. Two parts of this provision have a close link with the protection of fundamental rights: Art. 10 para. 2 allows the executing state to turn to a different investigative measure defined as non-coercive in the executing state, and Art. 10 para. 3 allows the executing state to resort to an investigative measure other than that requested "where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO."

Indeed, the recourse to a different measure as provided for in Art. 10 para. 3 is optional for the executing state. The application of this rule could, however, be highly advisable from the point of view of the protection of fundamental rights. If there is a less intrusive measure in the executing state that is as effective as the measure requested, the choice of the less intrusive measure should be mandatory for the executing state. *Aguilera* stands for this interpretation in relation with the EEW; she remarks that the Framework Decision on the EEW included a similar rule in Art. 10 para.3 and, even if the optional character of this norm has been seen critically, Directive 2014/41/EU preferred to retain this recourse rule.[27]

2. Remedies

In order to ensure the fulfilment of fundamental rights in the execution of the EIO, Directive 2014/41/EU provided means not only to the judicial authorities of the Member States but also to the parties who are involved in the criminal proceeding: the suspected person and the victim. Thus, an important issue when addressing the protection of fundamental rights within the framework of the EIO is that of legal remedies. Directive 2014/41/EU ensures that the use of legal remedies should be guaranteed in the transposition of the Directive both at the issuing and executing states.

There are two significant issues concerning the regulation of remedies in Directive 2014/41/UE. The first of them is the importance of balancing the right of the parties to use the legal remedies and, at the same time, the commitment of the Directive to achieve efficiency in the execution of the EIO; the second one is the necessity to guarantee the rights of the suspected person, the victim, and even third parties in the criminal proceedings and to determine whether the Directive achieves this purpose. Directive 2014/41/EU maintains the procedural guarantees of the parties as to legal remedies ensuring their availability but, at the same time, establishes some limits in order to prevent the parties from slowing down the execution of the EIO by means of a wrongful use of these remedies.

One of the means by which to achieve this purpose is to limit the subject matter of the remedies. The wording of Art. 14 para. 2 Directive 2014/41/EU suggests a difference between the available remedies in the issuing and in the executing states. Accordingly, the "substantive reasons" for issuing the EIO may be challenged only by an action brought by the issuing state, but Art. 14 para. 2 continues that this is "without prejudice to the guarantees of fundamental rights in the executing State." This means, in my view, that any action is possible in the proceedings in the issuing state, whereas remedies in the executing state are confined to only guaranteeing fundamental rights.[28]

Another means of preventing the parties from using remedies such as delaying strategy is also regulated in Art. 14 para. 6 Directive 2014/14/UE, which establishes, as a general rule, that the legal remedy will not suspend the execution of the EIO.

Of course, remedies are available not only to the suspected person, whose fundamental rights can be easily jeopardized in a criminal proceeding, but also to the victim of the criminal offence. In this sense, the framework of the Charter of Fundamental Rights (CFR) cannot be ignored as regards the available remedies in the executing state. Although Directive 2014/41/EU stresses, in general terms, the importance of due respect for the suspect's fundamental rights, the victims' rights have to be respected as well;[29] in particular, the "right to an effective remedy before a tribunal" recognised in Art. 47 CFR must be considered, according to which the remedy shall be provided "within a reasonable time." This requirement applies to both parties in the proceedings. For the Member States, the requirement of this right implies that any undue delay in the execution of an EIO could be an infringement of the rights of both defendants and victims.

Directive 2014/41/EU lacks a reference to the advisability of setting up means of providing security to third parties involved in investigative measures if requested by the EIO in domestic legislation, such as witnesses, experts, etc. In spite of the silence of the Directive on this point, the means for witness protection should be provided by the executing state according to the same terms as those in domestic law. The fundamental rights of third parties may be at risk due to their cooperation with judicial authorities in the criminal proceedings; even though Directive 2014/41/EU refers mainly to the rights of the suspected or accused, the Directive should have provided obligations for the protection of the fundamental rights of witnesses and experts.

III. Concluding Remarks

On the one hand, the commitment of Directive 2014/41/UE to the protection of fundamental rights in criminal investigations is expressly recognised. On the other, the purpose of achieving the effectiveness of the EIO is also recognised. This paradox between the protection of individual rights and the effectiveness of investigations becomes readily apparent in the EIO Directive. The Directive acknowledges the duty to respect fundamental rights in the obtaining of evidence in criminal proceedings. This duty affects all the authorities intervening in the proceedings, either in the issuing or in the executing state. The necessary validation of the EIO by a judge, a court, or a public prosecutor in the issuing state must be regarded as an important safeguard. The infringement of fundamental rights as a refusal ground according to the CFR, as provided in the Directive, is a sharp sword for the protection of fundamental rights. However, it is argued here that the lack of clarity in the definition of this refusal ground for non-execution as well as the optional nature of the provision that allows the recourse to a different type of measure, may turn out to be an obstacle to effective fundamental rights protection. The control of compliance with fundamental rights by the executing state is likely to be one of the most serious difficulties in the application of the EIO. This difficulty is aggravated by the fact that the EIO is based on the principle of mutual recognition, which is supposed to imply an effective and swift system for the obtaining of evidence abroad. It has been argued here that the orientation of this system towards effectiveness and swiftness may certainly challenge the appropriate protection of fundamental rights, but the Directive leaves enough options for the executing state to solve a conflict of interest in favour of fundamental rights protection.

Regarding the rights of the suspected person and the victim, they are ensured by access to the legal remedies recognised in Directive 2014/41/EU. The Directive, however, has not properly safeguarded procedural guarantees for third parties, such as the protection of witnesses or experts; their safety must be guaranteed by the domestic law of the executing Member State. A more homogenous approach could have been achieved by inserting respective duties for the protection of third parties and would have been a further asset of the Directive on the European Investigation Order.

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1 *O.J.* L 130, 1.5.2014, 1.

2 See also recitals 6 and 7 Directive 2014/41/EU, which emphasise that the EIO has established a comprehensive system of evidence gathering in a single instrument. It repeals Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant (*O.J.* L 350, 30.12.2008, 72), which focused on obtaining evidence in the possession of the executing authorities.

3 G. Illuminati, "Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees", in: S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2013, 15, 24.

4 Tampere European Council, Presidency conclusions, VI.33.

5 S. Allegreza, "Critical remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility", (2010) 5 *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 569, 575.

6 Art. 1. para. 4: "This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings and any obligations incumbent on judicial authorities in this respect shall remain unaffected."

7 Art. 11 para. 1: "Without prejudice to Article 1 (4) recognition or execution of an EIO may be refused in the executing State where: (…) (f) there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter."

8 The Directives mentioned in recital 15 are: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (*O.J.* L 280, 26.10.2010, 1), Directive 2012/13/EU on the right to information in criminal proceedings (*O.J.* L 142, 1.6.2012, 1) and Directive 2013/48/EU on the right of access to a lawyer (*O.J.* L 294, 6.11.2013, 1).

9 Directive 2016/343/EU on presumption of innocence, Directive 2016/800/EU on children rights and Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings.

10 See S. Allegrezza (2010) 5 ZIS, *op. cit.* (n. 5), 569, 576

11 I. Armada, "The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a Fundamental Rights Based Refusal the Solution?", (2015) 6 *New Journal of European Criminal Law (NJECL)*, 8, 29.

12 L. Bachmaier, "The role of the proportionality principle in the cross-border investigations involving fundamental rights", in: S. Ruggeri (ed.), *op. cit.* (n. 3), 86, 99 remarks that Art. 6 "reminds that every EIO should only be issued once the issuing authority has checked that such measure is necessary and proportionate (…). In order to avoid excessive or unnecessary evidence requests the issuing State shall limit the EIO only to those measures that are strictly needed and proportionate".

13 I. Armada (2016) 6 NJECL, *op. cit.* (n. 11), 8, 12.

14 However, Directive 2014/41/UE does not solve a problem that may arise in those countries (such as England, Italy or Spain) in which there is a distinction between two phases in the criminal proceedings: investigation and trial; in these countries, the information obtained during the investigation cannot, as a general rule, be used as evidence in the trial. See S. Allegrezza (2010) 5 ZIS, *op. cit.* (n. 5), 569, 579.

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15 Art. 4 Framework Decision 2008/978/JHA (*op. cit.* n. 2).
16 S. Allegreza, (2010) 5 *ZIS*, *op. cit.* (n. 5), 569, 571; M. Jimeno Bulnes, "Orden europea de investigación en material penal", in: M. Jimeno Bulnes (dir.) *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, 2016, p. 191; E. Martínez García, *La orden europea de investigación*, 2016, p. 52.
17 See I. Armada (2016) 6 *NJECL*, *op. cit.* (n. 11), 8, 15, Directive 2014/41/EU is "codifying the controversial Melloni judgement".
18 ECJ, 26 February 2013, case C-399/11, *Stefano Melloni*, in particular para. 63.
19 F. Zimmermann and S. Glaser and A. Motz, "Mutual recognition and its Implications for the Gathering of Evidence in Criminal proceedings: a Critical Analysis of the Initiative for a European Investigation Order", (2011) 1 *European Criminal Law Review (EuCLR)*, 56, 60. Regarding the underlying principle of mutual trust in the EIO, see also L. Bachmaier, "Towards the Transposition of Directive 2014/41 regarding the European Investigation Order in Criminal Matters", (2015) *eucrim*, 47.
20 L. Bachmaier, "European investigation order for obtaining evidence in criminal proceedings" (2010) 5 *Zeitschrift für Interntionale Strafrechtsdogmatik (ZIS),* 580, 581.
21 S. Allegrezza, (2010) 5 *ZIS*, *op. cit.* (n. 5), 569, 575.
22 M. Jimeno Bulnes, *Un proceso europeo para el siglo XXI*, 2011, pp. 130–131.
23 I. Armada (2016) 6 *NJECL*, *op. cit.* (n. 11), 8. The opinion of Advocate General Bot in *Melloni* purports that both interests are somehow incompatible when he states "even though the objective is to trend towards a high level of protection for fundamental rights, the specific nature of European Union law means that the level of protection deriving from the interpretation of a national constitution cannot be automatically transposed to the European Union level nor can it be relied upon as an argument in the context of the application of European Union law." (AG Bot, 2 October 2012,case C-399/11, *Stefano Melloni*, para. 111).
24 Opinion of the European Union Agency of Fundamental Rights on the draft Directive regarding the European Investigation Order, 2011, p. 11.
25 The European Union Agency of Fundamental Rights also considers that "any establishment of the fundamental rights-based refusal ground in the Directive should ideally be complemented by explicit parameters"; see Opinion, ibid.
26 F. Jiménez-Villarejo Fernández, "Orden europea de investigación ¿adiós a las comisiones rogatorias?", in C. Arangüena Fanego (Coord), *Cooperación judicial civil y penal en el nuevo escenario de Lisboa*, 2011, pp. 201–202.
27 M. Aguilera Morales, "El exhorto europeo de investigación: a la búsqueda de la eficacia y la protección de los derechos fundamentales en las relaciones humanas transfronterizas", (2012) 2145 *Boletín de Información del Ministerio de Justicia*, 17. See also in this context I. Armada (2016) 6 *NJECL*, *op. cit.* (n. 11), 8, 16–17.
28 See also L. Bachmaier, (2015) eucrim, *op. cit.* (n. 20), 47, 55.
29 Opinion of the European Union Agency of Fundamental Rights on the draft Directive regarding the European Investigation Order, 2011, p. 3 and 6.

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