



### **Focus: New Challenges for Judicial Cooperation in Spain**

**Dossier particulier: De nouveaux défis pour la coopération judiciaire en Espagne**

**Schwerpunktthema: Neue Herausforderungen für die justizielle Zusammenarbeit in Spanien**

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

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\* The news contain Internet links referring to more detailed information. These links are being embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If an external website features multiple languages, the Internet links generally refer to the English version. For other language versions, please navigate using the external website.

# Guest Editorial

Dear Readers,

Several anniversaries were recently celebrated in relation to the EU, in general, and to the Area of Freedom, Security and Justice (ASFJ), in particular: 60 years since the signature of the Treaty of Rome, 20 years since the enactment of the principle of mutual recognition, 10 years since the entry into force of the Treaty of Lisbon. The dynamic European landscape is giving rise to an increasing number of actors and instruments in judicial cooperation in criminal matters, with undeniable repercussions for the Member States.

This can be seen not only from a legal/judicial perspective but also from a social one, since the repercussions basically have an impact on the daily life of citizens. Call to mind the issuance/execution of a European Arrest Warrant (EAW) or, even more recently, a European Investigation Order (EIO). Other areas where we can observe repercussions are procedural rights in criminal proceedings, e.g., access to a lawyer, and protection of victims of crime.

There are currently two principles that convey the legal basis for the construction of the European judicial area: the principles of “mutual recognition of judgments and judicial decisions” and “the approximation of the laws and regulations of the Member States.” Presented as an alternative to the prevailing proposal of European harmonisation at the Tampere Council (1999), the principle of mutual recognition on its own was soon found to be insufficient to sustain judicial cooperation, especially in the criminal law field.

Almost a decade after enactment of the first mutual recognition instrument, i.e., the EAW in 2002, the first directive aimed at strengthening the procedural rights of suspects/accused persons in criminal proceedings under the formula of legislative approximation came to light, i.e., Directive 2010/64 on the right to interpretation and translation. Further procedural instruments on judicial cooperation in criminal matters following both principles were later enacted.

Alongside this specific procedural regulation employing the principles of mutual recognition and approximation, other legislation of a dual nature was enacted: Firstly, a kind of organic legislation aimed at creating European institutions/

bodies, with the objective of promoting European judicial cooperation within the Member States, e.g., the European Public Prosecutor’s Office (EPPO) in 2017 as the most recent. Secondly, substantive European criminal legislation, also articulated on the basis of the principles of mutual recognition and approximation. Both perspectives are addressed in this issue, in order to provide a general view of European judicial cooperation in criminal matters.

But the European judicial area does not end here. Instead, it continues to evolve unstoppably. This is why new proposals and challenges must be included in the analyses. The framework of e-evidence is undoubtedly the star in the field of criminal procedure, with instruments that will again use the two principles of mutual recognition and approximation of legislations as shown in the 2018 Commission legislative proposals on European Production and Preservation Orders.

The analyses presented here do not tackle the aforementioned matters only from a European perspective but also include the national one. In this issue, Spain serves as an example of the integration of such European instruments into the country’s legal system. Spain has greatly contributed to the development of the European judicial area, particularly in the criminal law field, due to its own vested interest in the fight against terrorism and organised crime. The nation maintains an intense level of activity in applying mutual recognition instruments, as evidenced by the annual statistics provided for the EU, and it is a “key player” in judicial cooperation in criminal matters within the Union.

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## European Union

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

### Foundations

#### Fundamental Rights

##### Threat of Rule of Law in Poland – Recent Developments

**spot light** New actions and regulations initiated by the Polish ruling party to push through reforms in the justice system triggered further controversies between the country and European institutions/civil society organisations. An overview of the main recent events:

- 19 November 2019: The CJEU rules on the independence and impartiality of the new Disciplinary Chamber at the Polish Supreme Court, considering that the referring court may disapply national legislation if the body to which jurisdiction was conferred to hear a case where the EU law may be applied, does not meet the requirements of independence and impartiality (see details in [eucrim 3/2019, pp. 155–156.](#))
- 5 December 2019: The Labour Chamber of the Supreme Court concludes that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial tribunal. Despite this judg-

ment, the Disciplinary Chamber continued its activities.

- 11 January 2020: Thousands of people, including judges and lawyers from many EU Member States, [assemble for a march through Warsaw](#), in order to protest plans by the Polish government and ruling majority in parliament to discipline the judiciary in Poland. The event was tagged as “1,000 Robes March.”
- 16 January 2020: The European Parliament [adopts a resolution on the Art. 7 procedures against Poland and Hungary](#). It, inter alia, “notes with concern that the reports and statements by the Commission and international bodies, such as the UN, OSCE and the Council of Europe, indicate that the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1) of the TEU.” The resolution also criticizes the fact that the current Art. 7 procedure and the hearing conducted have not resulted in any significant progress by the two states. MEPs reiterate the need for a new EU mechanism on democracy, the rule of law and fundamental rights (see [eucrim 1/2019, p. 3](#)). Support is again given to the [proposed regulation](#) on the protection of the Union’s financial inter-

ests in case generalized deficiencies as regards the rule of law in Member States occur.

- 21 January 2020: The deputy discipline officer [initiates first disciplinary proceedings](#) against Polish judges having participated in the 1,000 Robes March.
- 23 January 2020: [Poland’s Supreme Court said rulings](#) made by judges appointed under new government rules (affecting several hundred judges) could be challenged, resulting in a number of cases being postponed. The Supreme Court followed the lines of argument given by the CJEU.
- 23 January 2020: The Polish justice ministry – controlled by the ruling PIS party – reacts and declares that the Supreme Court’s judgment has no legal effects.
- 23 January 2020: The lower house of the Polish parliament (the Sejm) [passes a bill introducing further amendments into the Polish judiciary system](#), despite rejection by the opposition-controlled Senate and [criticism by the CoE Venice Commission](#) (opinion of 16 January 2020). The amendments (already initiated in December 2019) included, inter alia, the prohibition of political activities for judges in addition to new disciplinary offences and sanctions for judges and court presidents. Furthermore, the bill declared that any person appointed by the President of the Republic is a lawful judge, and it is prohibited to question his/her legitimacy. Doing so is a disci-

\* If not stated otherwise, the news in the following sections cover the period 1 January – 31 March 2020. Have also a look at the [eucrim homepage \(https://eucrim.eu\)](#) where all news have been published beforehand.

plinary offence, potentially punishable with dismissal. Only the Extraordinary Chamber can decide whether a judge is independent and impartial. The Venice Commission stated in this context: “The [amendment bill] seems to be to make it impossible for any court (...) to question the legitimacy of any court established in accordance with the current legislation.” In the press, the law has been labelled “gagging bill” and “muzzle law.”

■ 28 January 2020: [The Constitutional Tribunal suspends the Supreme Court’s resolution](#) of 23 January 2020. The Constitutional Tribunal declared, inter alia, that the Supreme Court could not limit the adjudication of judges appointed to office by the President of the Polish Republic. Judgments issued by benches which included said judges are binding.

■ 28 January 2020: The Parliamentary Assembly of the Council of Europe ([PACE](#)) [votes to open a monitoring procedure for Poland](#) over the functioning of its democratic institutions and the rule of law. [The resolution](#) declares that recent reforms “severely damage the independence of the judiciary and the rule of law.” PACE called on the Polish authorities to “revisit the total reform package for the judiciary and amend the relevant legislation and practice in line with Council of Europe recommendations.” The Assembly also called on all CoE Member States to ensure that the courts under their jurisdiction ascertain in all relevant criminal and civil cases – including with regard to European Arrest Warrants – whether fair legal proceedings in Poland, as defined under Art. 6 ECHR, can be guaranteed for the defendants. Poland is the first EU Member State to which the CoE monitoring procedure is being applied. The country shares this position with eight other CoE (but non-EU-) Member States, among them Russia, Turkey, and Ukraine.

■ 30 January 2020: The [CCBE publishes a statement on Poland](#) in which the lawyers’ organisation shares the criticism voiced by independent international bodies and organisations in reaction

to the muzzle law. The statement calls on the Polish authorities not to proceed with the law.

■ 10 February 2020: 22 retired judges of the Constitutional Tribunal (including eight former presidents and vice-presidents) [issue an open letter](#) in which they note that the Constitutional Tribunal “has virtually been abolished.” They regret that the actions of the legislature and the executive since 2015 and the Constitutional Tribunal leadership since 2017, “have led to a dramatic decline in the significance and the prestige of this constitutional body, as well as to the inability to perform its constitutional tasks and duties.” The open letter also deals with the pending dispute on the Supreme Court resolution of 23 January 2020, particularly the participation of two former MPs in the bench, that compromise the Constitutional Tribunal’s independence.

■ 11 February 2020: Following the EP resolution of 16 January 2020, [the plenary of the EP again discusses](#) the situation on the rule-of-law threat in Poland. At the beginning, Commission Vice-President [Věra Jourová](#) informed MEPs on the current developments, and Justice Commissioner [Didier Reynders](#) stressed that the Commission will apply all tools at its disposal to maintain the rule-of-law values in Poland. MEPs called on the Commission to take strong action against Poland. German MEP Katarina Barley (S&D) pointed out that Polish judges are in the unbearable situation of facing disciplinary sanctions if they apply EU law. She referred to concrete cases of recent repressions against judges.

■ 14 February 2020: [The “Muzzle Act” \(see above\) enters into force](#). Polish President [Andrzej Duda](#) signed the Act on 4 February 2020 despite continuing [protests](#) voiced by the European Commission, the Council of Europe, and civil society organisations.

■ 17 February 2020: In an unprecedented decision, the [Higher Regional Court of Karlsruhe suspends the execution of a European Arrest Warrant](#) issued

by Poland, because the enacted muzzle law does not guarantee the defendant a fair trial. Although the German court sent a catalogue of questions on the independence of the judiciary in Poland, it released the requested person based on the “high probability” that extradition would be unlawful at the moment (for more details on the decision, see the news in the category “European Arrest Warrant”).

■ 24 February 2020: The President of GRECO, [Marin Mrčela](#), [addresses a letter to the Polish Minister of Justice](#) in which he calls on the Polish government to revise the muzzle law. [Mrčela](#) points out that the diminishing independence of justice may facilitate corruption. He also fully shares the critical opinion of the Venice Commission of 16 January 2020 on the draft bill of the muzzle law.

■ 29 February 2020: The Association of Polish Judges “Iustitia” and association of prosecutors “Lex Super Omnia” publish an extensive [report detailing repressions](#) against Polish judges and prosecutors between 2015 and 2019. The report not only presents information on the investigations and disciplinary proceedings. It also refers to “soft repressions,” consisting, among other things, in the exercise of powers vested in court presidents, which bear features of harassment or mobbing. The report is to be completed with further cases in the future.

■ 9 March 2020: Several experts specialised in the rule of law address an [open letter to Commission President Ursula von der Leyen](#). They criticized the European Commission for being too inactive and lenient towards Poland. Regarding the recent changes implemented by the muzzle law, the experts urge the Commission to take immediate action. This must include expedited infringement action against the muzzle law, and requests for additional interim measures to prevent the muzzle law from being enforced by connecting these measures to the already pending infringement action with respect to Poland’s new disciplinary regime for judges. The Com-

mission should also tackle the rigging of rules as regards the selection of the next president of the Supreme Court, the changes at the Constitutional Tribunal, and the establishment of the National Council of the Judiciary.

■ 26 March 2020: The Grand Chamber of the CJEU declares references for a preliminary ruling of two Polish district courts inadmissible, expressing doubt as to the compatibility of the new disciplinary regime introduced in Poland via judicial reforms in 2017 with Art. 19(1) subpara. 2 TEU ([Joined Cases C-558/18 and C-563/18](#) – *Miasto Łowicz and Prokurator Generalny*). The CJEU follows the opinion of AG *Tanchev* of 24 September 2019 (see [eucrim 3/2019, p. 157](#)). The questions referred are general in nature, because they did not show a connecting factor between the dispute in the main proceedings and a provision of EU law for which interpretation is sought. In essence, the referring Polish judges sought a statement from the CJEU that the disciplinary procedures are a means of ousting judges if they take decisions that do not suit the legislative and executive branches. The CJEU clarified that the concept of preliminary rulings in Art. 267 TEU does not follow this purpose. The Grand Chamber clearly stated, however, that provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot be permitted. It is a key element of judicial independence that judges not be subjected to disciplinary proceedings/measures for having exercised their discretion to bring a matter before the CJEU.

■ 8 April 2020: The CJEU [grants the Commission's application for interim measures](#) against the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges. The powers are based on a 2017 judicial reform. The CJEU requests that Poland suspend the application of the relevant national

provisions before its final judgment on the substance of the case ([C-791/19](#)). The final judgment will be delivered at a later date. The judges in Luxembourg point out that, although the organisation of justice falls within the competence of the Member States, disciplinary regimes applicable to national courts are part of the system of the legal remedies in the fields covered by EU law. Therefore, they must comply with the Union's requirements on the independence of the judiciary. The mere prospect of Supreme Court judges or judges of the ordinary courts being the subject of disciplinary proceedings that may be referred to a body whose independence is not guaranteed is likely to affect judicial independence. By means of this line of argument, the CJEU confirms the condition of urgency, which is required for granting interim relief. The lack of independence of the disciplinary chamber may cause serious and irreparable harm to the EU legal order.

■ 29 April 2020: The European Commission [launches a new infringement procedure against Poland](#) regarding the muzzle law that entered into force on 14 February 2020 (see above). The Commission concludes in its letter of formal notice that several elements of the new law infringe Union law. This includes the established disciplinary regime that could be used as political control of the content of judicial decisions, thus violating Arts. 19, 47 CFR, which establish the right to an effective remedy before an independent and impartial court. In addition, several elements of the new law do not comply with the principle of the primacy of EU law. In this context, the Commission points out that the law prevents Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings from the CJEU and from assessing the power to adjudicate cases by other judges. Ultimately, the new law is incompatible with the right to respect for private life and the right to the protection of personal data as guaranteed by the CFR and the GDPR, since

it requires judges to disclose specific information about their non-professional activities. The Polish government now has two months to reply to the letter of formal notice.

■ 25 May 2020: At a [meeting of the LIBE Committee](#), MEP *Juan Fernando López Aguilar* (S&D, ES) presents a [draft interim report](#) that serves as a basis for an EP resolution on the way forward as regards the Article 7 procedure against Poland that was triggered by the European Commission in December 2017. The report (1) takes stock of the developments as regards the rule of law, democracy, and fundamental rights in Poland since 2015; and (2) urges the Commission and the Council to widen the scope of the Article 7(1) TEU procedure to include an assessment of clear risks of serious breaches of democracy and fundamental rights. During the discussions, most MEPs shared concerns over the systematic and continuing attacks against judicial independence and democratic institutions in Poland. They called on the Council and Commission to take decisive actions against Poland, including budgetary measures. The President of the European Association of Judges and a representative of the Polish judges association *Iustitia* reported on concrete examples of violations of judicial independence and disciplinary proceedings against Polish judges. They called for a “European Marshall Plan” to uphold the EU's core values in Poland. The plenary of the EP is to vote on the proposed resolution in September 2020. (TW)

#### Rule-of-Law Developments in Hungary

spot  
light

Although the executive attacks on the independence of the judiciary in Poland dominate headlines in the media, European institutions also have rule-of-law concerns with regard to Hungary. Next to Poland, Hungary is subject to an Article 7 TEU procedure, which may eventually lead to sanctions against an EU Member State if the Council states a clear risk of a seri-

ous breach of EU values. The procedure against Hungary was triggered by the European Parliament in September 2018. Concerns mainly address judicial independence, freedom of expression, corruption, rights of minorities, and the situation of migrants and refugees. As in the case of Poland, Hungary faces several infringement actions before the CJEU. The recent developments in brief:

- 14 January 2020: [Advocate General Campos Sánchez-Bordona proposes](#) that the CJEU declares Hungarian legislation imposing restrictions on the financing of civil organisations from abroad to be incompatible with EU law. The Hungarian legislation imposes several obligations of registering, providing certain pieces of information and publication on civil organisations if they receive donations above a certain threshold from abroad. The case was brought to the CJEU in an infringement action by the Commission ([Case C-78/18](#)). The AG argues that the legislation is contrary to the principle of free movement of capital in that it includes provisions amounting to unjustified interference with the fundamental rights of respect for private life, protection of personal data, and freedom of association as protected by the Charter. Objectives, such as the protection of public policy and the fight against money laundering and terrorist financing, cannot justify the Hungarian legislation.
- 16 January 2020: The European Parliament notes in a [resolution on the ongoing Article 7 procedures](#) against Poland and Hungary that reports and statements by the Commission, the UN, OSCE, and the Council of Europe indicate that “the situation in both Poland and Hungary has deteriorated since the triggering of Article 7(1).” MEPs expressed their dissatisfaction on the hearings within the Council; they have not yet resulted in any significant progress. The resolution states that “the failure by the Council to make effective use of Article 7 of the TEU continues to undermine the integrity of common European values, mutual trust, and the credibility of the Union as

a whole.” The Council is called on to determine the existence of a clear risk of Hungary’s serious breach of the values on which the Union is founded. The EP also criticizes the modalities of the procedure and shortcomings in the proper involvement of the EP in the Article 7 procedure.

- 5 March 2020: In other infringement proceedings ([Case C-66/18](#)), Advocate General [Juliane Kokott voices her belief](#) that the 2017 amendments of the Hungarian law on Higher Education do not comply with EU and WTO law. The amendment stipulates that higher education institutions from countries outside the European Economic Area would only be allowed to continue their activities in Hungary if an international treaty existed between Hungary and their home country. In addition, the new rules require foreign universities to operate in their country of origin if they want to offer higher education in Hungary. The law was seen as a move against Hungarian-born US businessman *George Soros* – an opponent of Hungarian Prime Minister *Viktor Orbán* – because his funded Budapest-based Central European University was the only active foreign higher education institution in Hungary that did not meet the new requirements. According to AG *Kokott*, the new rules are discriminatory and disproportionate; they infringe the freedom of establishment, the Services Directive, the Charter of Fundamental Rights, and the national treatment rule of the General Agreement on Trade in Services (GATS).

- 24 March 2020: Given the plans of the Hungarian government to expand “state of danger” measures due to the COVID-19 pandemic and to rule with executive decrees, the [EP’s Civil Liberties Committee \(LIBE\) issues a reminder](#) that all Member States have a responsibility to respect and protect fundamental rights, the rule of law, and democratic principles, even in difficult times. The chair of the committee, [Juan Fernando López Aguilar \(S&D, ES\)](#), called on the Commission to assess whether the

proposed bill complies with the values enshrined in [Article 2 of the Treaty on European Union](#).

- 30 March 2020: The Hungarian Parliament passes the contentious “state of emergency extension” [bill](#). [The new law](#) (dubbed the “Enabling Act”) gives the national conservative Hungarian government headed by *Viktor Orbán* the right to pass special executive decrees in response to the coronavirus outbreak. It also changes the Hungarian criminal code by introducing jail terms of up to five years for people who spread “fake news” about the virus or measures against it. Severe penalties were also introduced if people breach the quarantine ordered by authorities. For details, see also the [analysis by Renáta Uitz on Verfassungsblog](#). The law was heavily criticized by the opposition, the Council of Europe, and human rights organisations. They mainly disagree with the indefinite term of the expanded state of emergency and fear inappropriate restrictions on the freedom of press and freedom of expression. Another fear is that the “Enabling Act” cements the erosion of the rule of law in Hungary. In a [letter of 24 March 2020](#) to *Viktor Orbán*, CoE Secretary General *Marija Pejčinović Burić* stated, inter alia: “An indefinite and uncontrolled state of emergency cannot guarantee that the basic principles of democracy will be observed and that the emergency measures restricting fundamental human rights are strictly proportionate to the threat which they are supposed to counter.” CoE Human Rights Commissioner *Dunja Mijatović* commented the following on Twitter: “[#COVID19](#) bill T/9790 in [#Hungary’s](#) Parliament would grant sweeping powers to the gov to rule by decree w/o a clear cut-off date & safeguards. Even in an emergency, it is necessary to observe the Constitution, ensure parliamentary & judicial scrutiny & right to information.”

- 15 April 2020: Upon the initiative of Transparency International EU, 30 MEPs and 50 civil society organisations

send an [open letter](#) to the presidents of the European Commission and the Council calling on “swift and decisive actions” against Hungary. The letter eyes the new Hungarian emergency law of 30 March 2020. Although exceptional times during the COVID-19 pandemic “demand exceptional measures and it may be legitimate for governments to temporarily use extraordinary powers to manage the situation,” the latest actions by the Hungarian government are a “flagrant attack on the cornerstones of the rule of law and the values of the Union,” the signatories emphasise. The law of 30 March 2020 has a “chilling effect on free speech and anticipate the potential to suffocate those remaining elements of the checks and balances system in Hungary.”

■ 17 April 2020: In a [resolution on EU coordinated action to combat the COVID-19 pandemic](#) and its consequences, the EP voices deep concern over the steps taken by Hungary to prolong the state of emergency indefinitely, to authorise the government to rule by decree without a time limit, and to weaken the emergency oversight of the parliament. These measures are deemed “totally incompatible with European values.” The Commission is called on to make use of all available EU tools and sanctions to address this serious and persistent breach; the sanctions could include budgetary cuts. The Council is called on to resume the ongoing Article 7 procedures against Hungary.

■ 20 April 2020: 75 European personalities, including former European Commission president *Jean-Claude Juncker*, former heads of state and government, and major figures from European civil society [publish an open letter](#) calling on the EU to swiftly propose and adopt sanctions against the latest “democratic backsliding” by the Hungarian government. The signatories voice concern over the recent drift of *Victor Orban’s* government towards autocracy in Hungary. The emergency law of 30 March 2020 is criticized as an unprecedented concen-

tration of power: “It does not serve the fight against COVID-19 or its economic consequences; instead, it opens the door to all types of abuses, with both public and private assets now at the mercy of an executive that is largely unaccountable,” the letter says. The letter calls on all European stakeholders to get aware of the situation in Hungary and to take collective action. As guardian of the EU Treaties, the Commission is called on to urgently propose sanctions taking into account the seriousness of violation of European rules and values. The EP and Council should adopt these sanctions without delay. National media are advised to dedicate news segments to the Hungarian situation (daily, if necessary) and to grant Hungarian citizens free access to their content as a source of pluralistic and independent information.

■ 7 May 2020: In a [hearing before the Committee on Legal Affairs \(JURI\)](#), Commissioner for Justice and Consumer Affairs, *Didier Reynders*, reiterates that the Commission closely monitors the proportionality of emergency measures taken by the EU Member States during the coronavirus crisis. This includes the Enabling Act in Hungary with its indefinite term of application and its restrictions to the freedom of expression/freedom of press. MEPs are concerned over the situation in countries like Poland and Hungary, which they fear used the crisis to put in place measures that weaken democracy.

■ 14 May 2020: In a plenary debate with European Commission Vice-President *Věra Jourová* and the Croatian Presidency of the EU, [several MEPs reiterate their criticism of the emergency measures](#) taken by the Hungarian government to fight the COVID-19 pandemic. Next to the indefinite state of emergency, MEPs particularly criticise the criminalization of ostensible “fake news,” as it is a measure directed against government-critical statements. MEPs urge the Commission to promptly open infringement procedures against the Hungarian emergency law. Further-

more, EU funding to Hungary should be stopped, unless rule of law is respected. The Council is called on to move forward with the Article 7 procedure initiated by the EP in 2018. (TW) ■

### Bar Associations’ Resolution on Rule of Law

On the occasion of the 48th European Presidents’ Conference on 21 February 2020 in Vienna, representatives from over 50 bar associations adopted [a resolution on the rule of law and the independence of justice](#). European Institutions and national authorities are urged to do the following:

- Make full use of the tools available in order to safeguard and restore the independence of the judiciary and the administration of justice in Europe;
- Maintain the strict autonomy and independence of bar associations and the legal professions, including the judiciary, especially as regards disciplinary proceedings.

In particular, the resolution recommends using expedited infringement procedures and filing applications for interim measures before the CJEU.

The resolution also includes a call to a “March of European Robes” between 24 and 26 June 2020 in Brussels in order to voice, in the heart of Europe, the lawyers’ commitment to the rule of law, the separation of powers, an independent judiciary, and fundamental rights. (TW)

### EU Action Plan on Promotion of Human Rights and Democracy in the World

On 25 March 2020, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) presented their plans for the future EU policy on strengthening human rights and democracy in the EU’s external actions. The package presented to the public consists of the following:

- [Joint Communication EU Action Plan on Human Rights and Democracy 2020–2024](#);
- [EU Action Plan on Human Rights and Democracy 2020–2024](#);



- [Joint Proposal for a recommendation of the Council to the European Council](#) on the adoption of a decision identifying the strategic objectives of the Union to be pursued through the EU Action Plan on Human Rights and Democracy 2020–2024;
- [Annex to the Joint Proposal for a recommendation of the Council to the European Council](#).

The Joint Communication notes that past EU policy achieved significant progress in countries and regions where human rights were under strain; however challenges persist. Among the critical trends listed by the Communication:

- Weakening of the rule of law;
- Increased violence and intimidation of human rights defenders (over 2600 reported attacks over the past three years);
- Widespread impunity for human rights violations and attacks on the role of the International Criminal Court.

In addition, new technologies and global environmental problems, e.g., climate change, pose additional threats to human rights. Against this background, a renewed focus on human rights and democracy is necessary to strengthen state and societal resilience. The Joint Communication proposes the following:

- Enhancing EU leadership in promoting and protecting human rights and democracy worldwide;
- Setting out EU ambitions, identifying priorities, and focusing on implementation in view of changing geopolitics, digital transition, environmental challenges, and climate change;
- Maximising the EU's role on the global stage by expanding the human rights toolbox, its key instruments, and its policies;
- Fostering a united and joined-up EU by promoting more efficient and coherent action.

The EU Action Plan 2020–2024 defines the priorities of the EU and the Member States in their relationship with third countries more concretely. It aims at promoting human rights and democracy consistently and coherently in all

areas of EU external action (e.g., trade, environment, development). In operational terms, the Action Plan has five lines of action that will be implemented on the ground in partner countries:

- Protecting and empowering individuals;
- Building resilient, inclusive, and democratic societies;
- Promoting a global system for human rights and democracy;
- New technologies: harnessing opportunities and addressing challenges;
- Delivering results by working together.

The Action Plan 2020–2024 builds on two previous action plans that were adopted in 2012 and 2015 for a four-year period each. It also takes into account the 2012 [EU strategic framework on human rights and democracy](#).

The accompanying Joint Proposal refers to Art. 22 TEU and invites the European Council to adopt the Action Plan – by unanimity – as a strategic interest of the EU. In the affirmative, decisions on actions implementing the Action Plan could then be taken by qualified majority voting in the Council. This procedure would make the EU more assertive.

The documents are now being transmitted to the Council and the European Parliament. The Council is now called on to adopt the Action Plan and to decide on faster and more efficient decision-making in the area of human rights and democracy. (TW)

## **Area of Freedom, Security and Justice**

### **Brexit – The Way Forward**

At the end of 31 January 2020, the United Kingdom left the European Union. The [“Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community”](#) of October 2019 was endorsed by the Council and the European Parliament. The Withdrawal Agreement

entered into force and started a transition period that will end on 31 December 2020. In essence, the United Kingdom will continue to apply Union law during the transition period but will no longer be represented in the European institutions. The special position of the United Kingdom in respect of measures in the area of freedom, security and justice will also continue. The Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to one or two years.

Ongoing police and judicial cooperation in criminal matters is regulated in Part III, Title V of the Withdrawal Agreement (Art. 62 et seq.). The framework of the future relationship between the European Union and the United Kingdom is set out in the [Political Declaration of 17 October 2019](#). From the outset, the Political Declaration emphasises the importance of data protection. The EU and the UK are committed to ensuring a high level of personal data protection to facilitate data flows and exchanges, which are seen as key to the future relationship. Part 3 of the Political Declaration outlines the policy objectives of the future security partnership. The partnership will comprise law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence, and thematic cooperation in areas of common interest.

On 25 February 2020, the General Affairs Council [formally authorised](#) the Commission to negotiate a new partnership agreement with the United Kingdom. The Council also adopted [negotiating directives](#) that specify the Commission's mandate for the negotiations. The directives largely follow the recommendation presented by the Commission on 3 February 2020 ([COM\(2020\) 35 final](#)). They mainly build on the aforementioned political declaration of October 2019. The EP already endorsed the draft directives in a [resolution of 12 February 2020](#).

The negotiating directives reiterate the EU's wish to set up an ambitious,

wide-ranging, and balanced economic partnership with the UK. The EU intends to establish a free trade agreement with the UK to ensure that zero tariffs and quotas apply to trade in goods. This agreement regulates customs cooperation and regulatory aspects. The mandate also contains provisions for future cooperation in areas such as digital trade, intellectual property, public procurement, mobility, transport, and energy.

- As regards the envisaged security partnership, the EU reiterates its aim to establish a broad, comprehensive, and balanced security partnership with the UK. As regards future law enforcement and judicial cooperation, in particular, the mandate outlines the following aspects:

- Although the security partnership should provide for close law enforcement and judicial cooperation in relation to the prevention, investigation, detection, and prosecution of criminal offences, account must be taken of the UK's future status as a non-Schengen third country, meaning that the UK cannot enjoy the same rights and benefits as a Member State;

- Respect for fundamental rights, including adequate protection of personal data, is a necessary condition for the envisaged cooperation. The EU will automatically terminate cooperation if the UK no longer gives effect to the ECHR;

- The security partnership must also provide judicial guarantees for a fair trial, including procedural rights, e.g., effective access to a lawyer. Cooperation instruments must lay down appropriate grounds for refusal, including a transnational *ne bis in idem*;

- In the area of data exchange, the security partnership should include PNR arrangements, an information exchange (currently foreseen within the Prüm framework), and the effective/efficient exchange of existing information and intelligence, e.g., on wanted and missing persons/objects;

- Within the framework of operational cooperation, the partnership should provide for cooperation between the UK

and Europol/Eurojust in accordance with Union standards on third country cooperation;

- A streamlined extradition scheme should be built up, which includes the possibility to waive the double criminality check for certain offences, to make arrangements regarding political offences, to give EU Member States the right to not extradite own nationals, and to allow additional guarantees in particular cases;

- In other areas of cooperation in criminal matters, a future agreement should facilitate and supplement the application of relevant CoE conventions; arrangements may impose time limits, foresee standard forms, and must take into account the latest technological advancements;

- The envisaged partnership should include commitments to support international efforts to prevent and fight against money laundering and terrorist financing, which comply with the FATF standards or even go beyond these standards as far as certain aspects are concerned (e.g., beneficial ownership).

Ultimately, the mandate foresees that the future partnership should be embedded in an overall governance framework covering all areas of cooperation. The Commission has a [special website](#) that provides regular updates on the Brexit negotiations. Negotiations on an agreement for the post-transition phase started in early March 2020. The Commission published a [draft text on the new partnership agreement](#) with the UK on 18 March 2020. (TW)

### Commission: White Paper on AI

**spot light** On 19 February 2020, the Commission presented a “[White Paper on Artificial Intelligence: a European approach to excellence and trust.](#)” The White Paper outlines policy options on how to achieve the dual objectives of promoting the uptake of artificial intelligence (AI) and addressing the risks associated with certain uses of this new technology.

The Commission sets out that AI will bring a number of benefits to all of European society and economy. Hence, the EU is set to become a global leader in innovation in the data economy and its applications. The Commission, however, also points out that the new technology entails a lot of potential risks in relation to fundamental rights and EU fundamental values, such as non-discrimination. Therefore, any trustworthy and secure development of AI solutions in the future must respect the values and rights of EU citizens, e.g., the rights to privacy and data protection. Against this background, the White Paper identifies two main building blocks:

- “An ecosystem of excellence” that sets out the policy frameworks needed to mobilise the necessary economic resources, including research and innovation and providing the right incentives for small and medium-sized enterprises, in particular;

- “An ecosystem of trust” that sets out the key elements of a future regulatory framework for AI in Europe ensuring compliance with EU rules.

For high-risk cases, e.g., health, policing, justice, and transport, the White Paper suggests that AI systems should be transparent, traceable, and guarantee human oversight. Authorities should be able to test and certify the data involving algorithms used to check cosmetics, cars, or toys.

The Commission wishes to launch a broad public debate in Europe specifically on the gathering and use of biometric data for remote identification purposes, for instance through facial recognition in public places. The debate should focus on how their use can be justified as an exception to the general prohibition of remote biometric identification. It should also focus on which common safeguards need to be established in accordance with EU data protection rules and the Charter of Fundamental Rights. For lower-risk AI applications, the Commission envisages a voluntary labelling scheme if certain defined standards are respected.

Another challenge is whether current EU and national legislation on liability is sufficient to compensate persons who suffered harm from the application of AI technology. According to the Commission, there is currently no need to completely rewrite liability rules. It would like to garner opinions on how best to ensure that safety continues to meet a high standard and that potential victims do not face more difficulties in getting compensation compared to victims of traditional products and services. The liability challenges are identified in more detail in a [“report on the safety and liability implications of Artificial Intelligence, the Internet of Things and Robotics.”](#) The report accompanies the White Paper.

Together with the launch of the White Paper, the Commission opened a [public consultation](#). All European citizens, Member States, and relevant stakeholders (including civil society, industry, and academia) are invited to provide their feedback on the White Paper and on the EU approach to AI by 31 May 2020.

It should also be noted that the White Paper is accompanied by the [European data strategy](#) that was presented on the same day. Both documents are the first pillars of the new [digital strategy](#). The new strategy comes in response to the digital transformation that affects all European citizens and businesses. Under the heading “putting people first and opening new opportunities for business,” the EU has the following digital strategy aims:

- Developing technology that works for the people;
- Ensuring a fair and competitive digital economy;
- Establishing an open, democratic, and sustainable society.

These three pillars were further outlined in the [political guidelines of Commission President Ursula von der Leyen](#), who emphasises that digital transformation must go hand-in-hand with the second main future challenge: the European Green Deal. In this context, during her

first 100 days in office, she kick-started the debate on human and ethical Artificial Intelligence and the use of big data to create wealth for societies and businesses. The Commission [plans further actions](#) as regards the implementation of ideas on the digital world. (TW) ■

### EP LIBE: AI in Criminal Law

On 20 February 2020, MEPs in the LIBE Committee heard experts on the benefits and risks of artificial intelligence in the criminal law framework. In the hearing [“Artificial Intelligence in Criminal Law and Its Use by the Police and Judicial Authorities in Criminal Matters,”](#) discussion focused on facial recognition, risk assessment, and predictive policing (see also the [hearing agenda](#)). Panelists observed that the use of AI for voice processing is already commonplace. In the future, AI should be increasingly applied in the field of terrorist financing.

As regards the use of AI for biometric facial identification, participants voiced concerns over the risks to fundamental rights. Data quality poses one of the major challenges in this area. Another problem related to the use of AI for facial identification is the so-called algorithmic bias, which may lead to discrimination of ethnic groups. Against this background, participants discussed how the EU can ensure transparency, explainability, and accountability. The existing regulatory framework therefore needs to be adjusted, as proposed by the European Commission in its [White Paper on Artificial Intelligence](#), which was made public on 19 February 2020 (see also separate news item). (TW)

### EP: Resolution on Artificial Intelligence and Automated Decision Making

EU institutions are dealing with the question of how the EU should react to the rapid development of artificial intelligence (AI). Alongside the Commission White Paper on AI of 19 February 2020, which was followed by the LIBE committee hearing on the use of AI in the criminal law field (see separate news

items), the European Parliament adopted a [resolution on 12 February 2020](#): the resolution focuses on consumer protection as regards AI technology and automated decision making (ADM). It sets out that an examination of the current EU legal framework, including the consumer law acquis, product safety, and market surveillance legislation, is needed to check whether it is able to properly respond to AI and ADM and provide a high level of consumer protection. MEPs mainly state the following:

- ADM has huge potential to deliver innovative and improved services, but consumers should “be properly informed about how the system functions, about how to reach a human with decision-making powers, and about how the system’s decisions can be checked and corrected”;
- ADM systems should use “explainable and unbiased algorithms”;
- Review structures must be set up to remedy possible mistakes;
- While automated decision-making processes can improve the efficiency and accuracy of services, “humans must always be ultimately responsible for, and able to overrule, decisions that are taken in the context of professional services,” e.g., legal professions;
- Supervision or independent oversight by qualified professionals is important where legitimate public interests are at stake;
- Legislation must follow a risk-based approach.

MEPs favour adjusting the EU’s safety and liability rules to the new technology. The Commission is called on to take respective legislative action.

The resolution will be transmitted to the Council and the Commission, so that they can take the EP’s views on AI into account. Digital transformation is one of the priorities of the Commission under President *Ursula von der Leyen*. (TW)

### CCBE Position Paper on AI

In March 2020, the Council of Bars & Law Societies in Europe (CCBE) pub-

lished a [position paper](#) in which it sets out its considerations on the legal aspects of artificial intelligence (AI). The CCBE voices several concerns over the use of AI in the following areas that directly concern the legal profession:

- AI and human rights;
- The use of AI by courts;
- The use of AI in criminal justice systems;
- Liability issues;
- The impact of AI on legal practice.

The CCBE notes that lawyers should be further involved in future developments of AI, e.g., further studies and reflections at the EU and Council of Europe level, because both access to justice and due process are at stake.

Regarding human rights concerns, the CCBE paper calls on AI developers to act responsibly. This could be framed by ethics codes or new codifications setting out the principles and requirements for the use of AI. In addition, the following is recommended:

- Putting AI systems under independent and expert scrutiny;
- Duly informing persons impacted by the use of an AI system;
- Ensuring the availability of remedies for these persons.

Regarding the use of AI by courts, the CCBE underlines that AI tools must be properly adapted to the justice environment given the risk that access to justice may be undermined by AI tools. Therefore, the following parameters should be taken into account:

- Possibility for all parties involved to identify the use of AI in a case;
- Non-delegation of the judge's decision-making power;
- Possibility to verify the data input and reasoning of the AI tool;
- Possibility to discuss and contest AI outcomes;
- Compliance with GDPR principles;
- The neutrality and objectivity of AI tools used by the judicial system should be guaranteed and verifiable.

The CCBE highlights the sensitivity of the use of AI in the area of criminal

justice. Here, several challenges come to light. Therefore, AI systems should be introduced only when there are sufficient safeguards against any form of bias or discrimination. All measures of increased surveillance should be carefully balanced against the impact they may have on an open and pluralistic society.

AI, however, can also support lawyers and law firms in coping with the increasing amount of data generated. The use of AI by lawyers is more or less limited to research tools, simplification of data analytics and, in some jurisdictions, predicting possible court decisions. Nonetheless, AI will change the work of legal professionals and the way how legal advice is provided. In this context, challenges arise as to the competence of lawyers; they must, for instance, be able to ask meaningful questions about the decisions made by AI, and to point out the limits of applicability and utility of AI systems, which cannot remain in a purely technical domain. This necessitates appropriate training of lawyers.

In the overall conclusions, the CCBE emphasises that with the great opportunities and benefits offered by AI also comes a great responsibility to ensure that AI remains ethical and respects human rights. The use of AI does, in certain aspects, pose significant threats to the quality of our justice systems, the protection of fundamental rights and the rule of law. The development of AI tools must take into account the role and interests of all actors in the justice system. Against this background, one of the main messages of the position paper is that there is a clear need for the CCBE and its membership to continue monitoring the impact of the use of AI in the legal and justice area. (TW)

## Schengen

### COVID-19 Travel Restrictions – Guidance by Commission

On 30 March 2020, the European Commission issued [practical guidance](#) on

implementation of the [temporary restriction on non-essential travel](#) to the EU. The ban pursuant to the Schengen Borders Code was outlined in a Commission Communication of 16 March 2020. The guidance paper issued now aims to assist border guards and visa authorities. It gives advice on implementation of the temporary restriction at the border, on facilitating transit arrangements for the repatriation of EU citizens, and on visa issues. It addresses issues that Member States raised in the bi-weekly videoconferences of Home Affairs Ministers and in technical meetings with Member States.

Frontex, Europol, and the European Centre for Disease Prevention and Control (ECDC) assisted in the preparation of the guidance. It also follows up on the [joint statement](#) of the Members of the European Council of 26 March 2020, which emphasised the need to step up efforts to ensure that EU citizens stranded in third countries who wish to go home can do so. (TW)

## Institutions

### Council

#### Coronavirus Dominates JHA Council Meeting of March 2020

The [first formal JHA Council meeting](#) under the Croatian Presidency on 13 March 2020 was dominated by the coronavirus crisis. Ministers discussed civil protection items, in particular:

- Lessons learnt so far in the tackling of the COVID-19 outbreak;
- Possible additional preparedness and response measures for the EU Civil Protection Mechanism;
- Ways to step up information-sharing, making full use of the integrated political crisis response (IPCR) toolbox;
- Additional support from Member States.

Other topics in relation to the coronavirus included the EU guidelines

for health screening at borders and the working methods of the Council during the crisis.

Ministers also dealt with the strategic guidelines for justice and home affairs, which will further implement the common EU objectives set out in the strategic agenda 2019–2024, as adopted by the EU leaders in June 2019. The Council Presidency observed that despite broad support for the strategic JHA guidelines, agreement could not be reached since two Member States are still opposing. Further consultations will have to take place. (TW)

## European Commission

### Commission Work Programme Published

On 20 January 2020, the Commission published its [Work Programme for the year 2020](#). The first annual Work Programme is entitled “A Union that strives for more” and sets out the most important Commission initiatives in the programme’s first year, including commitments for the first 100 days. The Work Programme is based on [the headline ambitions presented in the Political Guidelines issued by Commission President von der Leyen](#). It reflects the main priorities for the European Parliament and those in the European Council’s Strategic Agenda for 2019–2024.

In the security context, the Work Programme outlines the Commission’s intention to put forward a new Security Union Strategy. This strategy shall define the areas in which the EU can offer added value to support Member States in their efforts to ensure security. Security areas include:

- Combatting terrorism and organised crime;
- Preventing and detecting hybrid threats;
- Cybersecurity;
- Increasing the resilience of critical infrastructure;
- Strengthening Europol’s mandate in

order to reinforce operational police cooperation.

Further priorities in the field of criminal law under the Work Programme include plans for an EU Strategy enabling a more effective fight against child sexual abuse and a new Action Plan on anti-money laundering. (CR)

## European Court of Justice (ECJ)

### Information on Working Arrangements during the COVID-19 Pandemic

On 30 March 2020, the Court of Justice published an [important message for parties](#) to the proceedings with regard to its judicial activities during the coronavirus COVID-19 pandemic. According to the information, judicial activity at the Court of Justice continues, with priority being given to urgent cases. While procedural time limits for instituting proceedings and for lodging appeals continue to run, time limits in ongoing non-urgent proceedings have been extended by one month. Time limits that are to be fixed by the registry shall also be extended by one month. Hearings that were scheduled up until 30 April 2020 have been adjourned until a later date can be arranged.

The General Court of the EU has adjourned all hearings until 3 April 2020, dealing only with particularly urgent cases. When possible, however, it is also endeavouring to continue dealing with other cases. The Courts recommend consulting the website of the [Court of Justice of the EU](#) for regular updates. (CR)

### New Version of Practice Directions Adopted

In February 2020, the Court of Justice adopted a [new version of its Practice Directions](#), containing information on developments regarding the protection of personal data and the handling of appeals.

Data protection rules, for instance, require party representatives to give full

effect in their pleas or written observations to an order – made by the referring court or by the Court of Justice – that data must be anonymous in preliminary ruling proceedings. The same goes for orders made by the General Court in cases of appeals. With regard to appeals at the General Court, the Practice Directions recall that such appeals are limited to questions of law and should not, in principle, reveal secret or confidential information. Another reminder addresses the need to lodge a special request along with the appeal to allow it to proceed in cases of Article 58a of the Protocol on the Statute of the Court of Justice of the EU. Lastly, the Practice Directions draw attention to the importance of complying with formal requirements relating to procedural acts.

As regards the oral stage of procedure, the Directions reiterate the criteria governing the organisation of an oral hearing. Specific guidance is given on arrangements to be made before the hearing, e.g., regarding language requirements, disability, or reduced mobility. (CR)

### New Advocate General Appointed

*Jean Richard de la Tour* has been appointed [Advocate General](#) at the Court of Justice for the period from 23 March 2020 to 6 October 2024. Before joining the Court, Mr *de la Tour* served as First Advocate General of the Commercial, Financial and Economic Chamber of the French Court of Cassation. He replaces former Advocate General *Yves Bot*, who passed away on 9 June 2019. (CR)

## OLAF

### OLAF’s Work in Times of Crisis

On 7 April 2020, OLAF informed the public that it is still fully operational and committed to fighting fraud despite the restrictions set up by the Belgian authorities during the coronavirus crisis. The [press release](#) provides some statistical data on OLAF’s case work

since 16 March 2020. OLAF has also developed specific rules on conducting interviews in times when travelling is not recommended. It points out that the COVID-19 pandemic offers new opportunities for fraudsters to take advantage of the increased demand for medical supplies, personal protection, and hygiene products. In this context, OLAF refers to its successful investigation against fake COVID-19 related products (see separate news item). OLAF investigators and analysts have quickly adapted to the extraordinary situation thanks to secure remote access to OLAF's IT systems and other working tools. (TW)

### OLAF Investigation into Fake COVID-19 Related Products

After the outbreak of the coronavirus in Europe, fraudsters started to benefit from the distress and needs of the population. In March 2019, [OLAF opened an investigation](#) into the import of fake products to be used against the COVID-19 infection: masks, medical devices, disinfectants, sanitisers, and test kits. These products proved to be ineffective, non-compliant with EU standards, and even detrimental to health.

OLAF has been collecting intelligence and information on this type of illicit trafficking since the beginning of the pandemic. It provides customs authorities in the EU Member States and third countries with relevant information in real time. The products entered the EU by means of misdeclarations or fake certificates, black market sales, and smuggling.

On 13 May 2020, OLAF informed of the [progress made as regards its inquiry into the fake COVID-19 products](#). The interim results include:

- Identification of over 340 companies acting as intermediaries or traders of counterfeit or substandard products;
- Seizure of millions of substandard medical products with fake EU conformity certificates in several Member States;
- Establishment of an OLAF Cyber

Task Force comprised of experts specialised in cyber criminality that trawl the internet with the objective of identifying and taking down illicit websites offering fake products;

- Increased identification of ineffective medicine products (e.g., pills);
- Collection of intelligence in order to determine the true origin of face masks, medical devices, disinfectants, sanitisers, medicines, and test kits, which is currently the most pressing challenge in dealing effectively with the fraudulent schemes.

OLAF stressed that close cooperation with all customs and enforcement authorities in the EU and many other countries as well as with international organisations, e.g., Europol, Interpol, the WCO, and EUIPO, has been established. This proved essential to target shipments and identify the fraudulent companies. OLAF also warned that small shipments with fake or substandard products due to direct sales online to European customers by companies based in non-EU countries are posing a major challenge. (TW)

### Successful OLAF Operations Against Smuggling

In February 2020, OLAF informed the public about several successful actions against illicit trade and trafficking:

- With the support of OLAF, Belgian and Malaysian customs authorities were able to [seize a record sum of nearly 200 million smuggled cigarettes](#). After the Belgian authorities successfully seized around 135 million cigarettes in Antwerp, OLAF launched an investigation against the smugglers and the routing. Over 62,6 million cigarettes had been falsely declared and were waiting for export from a free trade zone in Malaysia. After having been alerted by OLAF, the Malaysian authorities seized the containers on 3 February 2020, preventing the cigarettes from being shipped to the EU. If the cigarettes had been successfully brought to the markets in the EU, OLAF estimates that financial loss to the

EU/Member State budgets would have been €50 million.

- In close cooperation with OLAF, the Italian Customs Agency [seized 12.5 tonnes of fluorinated greenhouse gases](#), so-called hydrofluorocarbons (HFCs), on 5–6 February 2020. HFCs replace ozone-depleting substances and are often used in refrigerated units. Although they do not deplete the ozone layer, they have a high global warming potential. The illicit import of such gases became one of OLAF's operational priorities, in line with the top priority on the agenda of the new Commission under *Ursula von der Leyen*, who announced plans to make Europe the first climate neutral continent by 2050: “The European Green Deal.”

- On 12 February 2020, OLAF reported a [successful strike against the smuggling of fake spirits](#). Shortly before Christmas 2019, Dutch customs authorities seized 47,000 bottles of counterfeit rum, an equivalent of 10 containers. The final destination of the seized bottles was Spain. OLAF investigators uncovered the modus operandi of the rum smugglers and located a suspicious warehouse in the Netherlands. OLAF also coordinated the action between the Dutch and Spanish customs authorities. The value of the counterfeit rum is estimated to be €2 million. (TW)

### Humanitarian Crisis in Syria: OLAF Detects Fraud and Misuse of EU Funds

On 24 March 2020, OLAF reported that it closed investigations in January 2020 that revealed [fraud by beneficiaries of a rule-of-law project in Syria](#). The EU had funded a UK-based company and its partner in the Netherlands and the United Arab Emirates with a total of nearly €2 million, in support of a project to deal with possible prosecutions for violations of international criminal and humanitarian law in Syria. OLAF investigators discovered that the claim to support the rule of law in Syria was false; in fact, the partners were committing widespread violations themselves, including

submission of false documents, irregular invoicing, and profiteering. OLAF recommended that the competent national authorities in the UK, the Netherlands, and Belgium recover almost the entire contractual sum and consider flagging the partners in the Commission's Early Detection and Exclusion System database.

On 7 February 2020, OLAF informed the public that it had closed an [investigation into the misuse of EU funds](#) provided to a well-known NGO for emergency assistance in Syria. The OLAF investigation detected a fraud and corruption scheme being carried out by two staff members of the NGO who siphoned taxpayers' money away from the humanitarian crisis in Syria and into their own pockets and those of their collaborators. OLAF also revealed significant shortcomings in the way in which the NGO had administered EU money. OLAF recommended the recovery of nearly €1.5 million from the NGO. (TW)

### OLAF Unveils Humanitarian Aid Fraud in Mauretania

In January 2020, OLAF [concluded investigations](#) against a Dutch company which revealed a fraud scheme against EU money for development and humanitarian aid as well as corruption. A Dutch company had won a large EU-funded contract managed by the Mauritanian authorities for the removal of 57 shipwrecks from a bay in Mauritania. OLAF and the Dutch authorities found that public procurement procedures had been breached, subcontract rules violated, and two Mauritanian officials bribed.

According to OLAF Director-General *Ville Itälä*, the case showed that OLAF also ensures the protection of EU money in non-EU countries, that OLAF fights for EU assistance to be received by those who need it, and that OLAF investigations know no borders. Detection of the fraud scheme was possible through on-the-spot checks, witness interviews, and analyses of large amounts of technical data. As a result of

the investigations, OLAF recommended the recovery of over €3 million and the prosecution of the fraudsters. In addition, OLAF recommended flagging the Dutch company in the Commission's Early Detection and Exclusion System (EDES), which would exclude the company from possible access to European taxpayers' money. (TW)

### European Public Prosecutor's Office

#### EPPO: Nomination of College Delayed, Budget Increase

The compilation of the College of the European Public Prosecutor's Office has been delayed. Due to the COVID-19 pandemic, the selection panel could not meet in March 2020; therefore, the appointment of recently nominated European Prosecutors had to be postponed. Initially, it was envisaged that the EPPO start its operational work in November 2020.

On 27 March 2020, the [European Commission proposed €3.3 million in additional funding](#) for the EPPO. The money is to be used for staff employment and IT equipment. In total, funding for the EPPO in 2020 has almost doubled (48%). By means of this increase in funding, the Commission has met the demands made by the European Chief Prosecutor, *Laura Kövesi*. The budget amendments have yet to be approved by the European Parliament and the Council. (TW)

### Europol

#### Stronger Collaboration with Mexico

In February 2020, Europol started negotiations for a collaboration with the Mexican Ministry of Security and Citizen Protection (SSPC) and the Mexican Ministry of Foreign Affairs. The aim is to sign a Working Agreement [to expand and intensify their collaboration](#) in preventing and combating serious crime such as the illicit flow of arms, arms

components, ammunition, and explosives.

To better support the EU Member States in preventing and combatting transnational organised crime, Europol's Management Board had recently included Mexico to the [list of priority partners](#) to conclude cooperation agreements with. (CR)

### EDPS Opinion on Europol Agreement with New Zealand Published

On 31 January 2020, the European Data Protection Supervisor (EDPS) published its [Opinion on the negotiating mandate to conclude an international agreement on the exchange of personal data between Europol and New Zealand](#). The Agreement shall provide the legal basis for the transfer of personal data between Europol and the New Zealand authorities that are responsible for fighting serious crime and terrorism. Their actions and mutual cooperation in preventing these crimes will be supported and strengthened.

In its opinion, the EDPS recommends, for instance, that the Agreement should explicitly lay down a list of criminal offences regulating which personal data can and cannot be exchanged. It should also include clear and detailed rules regarding the information that should be provided to the data subjects. Furthermore, it should specifically provide for periodic review of the need for storage of transferred personal data. The European Commission adopted a Recommendation for a Council Decision authorising the opening of negotiations for this agreement on 30 October 2019 (see also [eucrim 3/2019, p. 165](#)). (CR)

### Operation Against Counterfeit Medicine

At the beginning of March, [Operation 'Pangea'](#), a global operation targeted against trafficking in counterfeit medicines, resulted in the arrest of 121 persons and the dismantling of 31 organised criminal groups. The operation also indicated a significant increase in

the production of illicit pharmaceuticals and other medical products driven by the COVID-19 outbreak. As an example nearly 34,000 counterfeit surgical masks were seized and more than 2000 links related to bogus COVID-19 products were taken down. Operation ‘Pangea’ involved 90 countries worldwide, was coordinated by Interpol, and supported by Europol (CR)

### Hit Against Fuel Fraud

At the beginning of February 2020, law enforcement authorities from 23 EU Member States conducted a [major operation against Organised Crime Groups \(OCGs\) involved in fuel fraud](#). The operation led to 59 arrests, the seizure of 5.2 million litres of designer fuel worth approximately €6.8 million, and the seizure of €331,000 and other assets. It was led by the Hungarian National Tax and Customs Administration and the Slovak Financial Administration. Fuel fraud is a growing phenomenon used by OCGs to avoid excise duties. It typically involves base-oil fraud, also called designer fuel fraud, and fuel laundering. (CR)

### Staff Exchange

The second [staff exchange initiative](#) took place between the European Defence Agency (EDA), the permanent Computer Emergency Response Team (CERT-EU), the EU Cybersecurity Agency (ENISA), and Europol’s European Cybercrime Centre (EC3).

From 17 to 20 February 2020, experts from the different agencies met in Brussels to learn about each other’s priorities and practices, focusing on strategic developments in cyber defence. In addition, they met with industry representatives and were trained in threat hunting. (CR)

### Eurojust

#### Second Report on Encryption Published

In February 2020, Eurojust and Europol published their [second joint report on](#)

#### [the observatory function of encryption](#).

The report analyses the following:

- The progress of the encryption debate;
- The current legal landscape in which to address encryption in criminal investigations;
- Existing challenges.

The challenges include the following issues:

- Increasing use of encrypted communication devices by Organised Crime Groups (OCG);
- Policies and decisions by technology companies that influence the ability to access user data for the purpose of criminal investigations;
- The industry’s shift towards developments using End-to-End-Encryption (E2EE);
- The introduction of user-controlled encryption allowing users to have ultimate control over the encryption and decryption of their data;
- Homomorphic encryption allowing for data to be computed without compromising the privacy of that data;
- Information-hiding technologies, e.g., steganography;
- Quantum computing and 5G.

In its conclusions, the report pin-points the overarching problem of conducting criminal investigations in contemporary society when sources of data by which to gather evidence are cut off. For the first joint report on encryption, see [eucrim 1/2019, p. 12](#). (CR)

#### Anti-Drug Trafficking Results 2019

In 2019, Eurojust and the EU Member States [tackled illicit drug trafficking worth over € 2.8 billion](#). Through action days, coordination meetings, and other judicial support, a total of 2686 suspects were able to be arrested or surrendered to other Member States. Approximately €2 billion in criminal assets were frozen and over a thousand weapons, mobile phones, laptops, and cars seized.

In numbers: Eurojust organised 27 coordination centres, 430 coordination meetings were held, and 800 agreements

made on the most effective strategies to prosecute suspects. The total number of cases increased from 3401 cases in 2014 to 7804 cases in 2019. 21,323 victims of crime were affected. (CR)

#### Action Against Large-Scale Bitcoin and Crypto-Currency Fraud

In January 2020, a Joint Investigation Team set up between authorities in Belgium and France and supported by Eurojust and Europol led to the arrest of ten suspects allegedly involved in an Organised Crime Group (OCG). The group had been [committing international fraud with the sale of bitcoins and other crypto-currencies](#).

Victims were contacted by phone and offered large profits on investments in bitcoins. Having made some initial gains, victims felt encouraged to make further investments, which the OCG then transferred to fake companies. The OCG later transferred the profits to bank accounts in various Asian countries and Turkey. The investigations unveiled further plans to commit fraud, which were not able to be realised. (CR)

#### European Judicial Network (EJN)

##### Compilation on Judicial Cooperation under COVID-19 Available

The EJN is currently collecting and [compiling information](#) on the measures taken by the EU Member States in the area of international cooperation in criminal matters under the COVID-19 restrictions. The information is accessible for the EJN Contact Points under the [Restricted Area for Contact Points](#). (CR)

##### Updated Publication of European Criminal Law Texts Available

The compendium [“European Union instruments in the field of criminal law and related texts”](#) (see [eucrim 4/2019, p. 227](#)) is now available for download from the [EJN website](#). The publication contains a selection of 106 texts that are relevant in the field of European criminal



nal law. Hard copies can be ordered from the Documentation Centre of the Council of the European Union. (CR)

## Frontex

### Cooperation with DG Migration and Home Affairs

On 5 February 2020, Frontex and the European Commission's Directorate-General for Migration and Home Affairs signed [Terms of Reference \(ToR\) to enhance their collaboration in the development of state-of-the-art technology for the border and coast guard community](#). Under the ToR, Frontex has been asked to identify research activities addressing capability gaps in the following areas: surveillance, situational awareness, biometrics, cybersecurity, and information availability and exchange. These gaps are to be translated into requirements for research solutions.

Furthermore, Frontex shall contribute to the development of solutions by facilitating their operational testing and validation within the framework of Frontex Joint Operations and in cooperation with national authorities. In order to better address national as well as its own operational needs, the Agency shall also monitor the outcomes of research and assess their operational relevance. Successful results shall be disseminated and exploited in order to facilitate their market uptake and use. Lastly, with the results and knowledge obtained from the Border Security research and innovation projects, Frontex will contribute to national capability development planning and the generation of the European Border and Coast Guard capability roadmaps. (CR)

### Rapid Border Intervention and the Greek-Turkish Border

On 2 March 2020, Frontex launched a [rapid border intervention](#) to assist Greece in dealing with the large numbers of migrants at its external borders to Turkey. Border guards and other relevant staff

as well as technical equipment will be deployed and provided by the Rapid Reaction and Rapid Reaction Equipment Pools. Consequently, [on 12 March 2020](#), 100 additional border guards from 22 EU Member States were deployed at the Greek land borders. Furthermore, Member States are providing technical equipment, including vessels, maritime surveillance aircraft, and Thermal-Vision Vehicles. Two additional Frontex border surveillance planes are in action. Prior to this rapid border intervention, Frontex already had more than 500 officers deployed in Greece, along with 11 vessels and various other equipment. (CR)

## Agency for Fundamental Rights (FRA)

### New FRA Website

Since February 2020, FRA has a [re-designed website](#) based on an enhanced, theme-based structure. Main themes include hate crime, asylum, and data protection. The new website highlights useful tools such as FRA's EU Fundamental Rights Information System (EFRIS) and provides country-specific information. It is also fully responsive across all mobile devices. (CR)

### Volume on FRA Published

A new book written by 24 human rights experts and published at the end of January 2020 looks at [FRA's impact during its 13-year existence](#). The book, entitled "Human Rights Law and Evidence-Based Policy – The impact of the EU Fundamental Rights Agency," reflects on FRA's experience throughout its first decade. It also examines the Agency's position in the policy environment, its role in researching applied rights, and its response to challenges and constraints. The book is available from [Routledge](#). (CR)

### FRA's Workplan in 2020

At the beginning of 2020, FRA published a [calendar with scheduled products for 2020](#). The calendar covers issues such as:

- Migration;
- Child rights;
- Disability;
- Roma;
- Ageing;
- Integration;
- Artificial intelligence, etc.

One of FRA's priorities for the year 2020 will be the national application of the EU's Fundamental Rights Charter.

Furthermore, the situation of Roma in different EU Member States will form a prominent part of FRA's work.

To complete its 2020 survey of lesbian, gay, trans, bisexual, and intersex people, FRA will take a closer look at the experiences of intersex people with the aim to further contribute to the European Commission's list of actions to advance the rights of LGBTI people across the EU. (CR)

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Budgetary Control Committee: EU Must Strengthen Fight Against Fraud

On 19 February 2020, the EP's Budgetary Control Committee (CONT) voted on the [discharge report](#) prepared by MEP [Monika Hohlmeier](#) (EPP, DE). By a 20 to 4 vote, the committee members [voted in favour of granting discharge](#) of the Commission's accounts for 2018 (corresponding to 97% of the entire EU budget). However, MEPs recommend a number of measures to fight fraud and avoid conflicts of interest:

- The Commission should introduce subsidy ceilings, so that EU financial support is distributed more fairly; it should be made impossible to receive subsidies amounting to hundreds of millions of Euros in one MFF-period;
- The Commission should create rules that allow disclosure of the end beneficiaries of agricultural funds;
- The EU must establish a complaint

mechanism enabling farmers to inform the Commission of organised crime or other malpractices (e.g., land-grabbing, forced labour, etc.);

- Future guidelines must tackle conflicts of interest with regard to high-profile politicians;

- The newly created European Public Prosecutor's Office is underfinanced and not fully operational in conjunction with current budget planning; based on an estimated caseload of 3000 cases per year, the EPPO needs at least 76 additional posts and €8 million in funding;

- MEPs insist on the adoption of the regulation enabling the EU to restrict EU money for rule-of-law violations in a Member State (this regulation is [currently blocked in the Council](#)).

The CONT report comes in preparation for the [EP's discharge decision](#). The discharge is one of the most important rights of the EP. (TW)

## Money Laundering

### EBA Report on Performance of AML/CFT Banking Supervision

**spot light** Authorities still face challenges in the AML/CFT supervision of banks. Measures to correct deficiencies in banks' anti-money laundering and countering the financing of terrorism (AML/CFT) systems and controls should be more dissuasive. These are one of the main conclusions of the European Banking Authority's (EBA) [first report on competent authorities' approaches to the AML/CFT supervision of banks](#). It is part of the EBA's new duties to ensure consistent and effective application of the EU's AML/CFT law.

The report is based on a peer review of seven supervisory authorities in five EU Member States that was carried out in 2019. It describes how these competent authorities apply the risk-based approach according to international standards, Directive (EU) 2015/849 (the 4th AMLD), and the European Supervisory Authorities' joint AML/CFT guidelines.

The EBA report acknowledges that all authorities in the sample have taken significant steps to strengthen their approach to AML/CFT supervision. Supervisory staff is well-trained and committed to fighting financial crime. Several authorities have also made the fight against ML/TF one of their key priorities and significantly expanded their AML/CFT supervisory teams in a number of cases. The report also observes, however, that most authorities faced challenges in operationalising the risk-based approach to AML/CFT. A number of challenges are common to all peer-reviewed authorities and may therefore hold true for other supervisory authorities in all EU Member States. The major challenges are as follows:

- Translating theoretical knowledge of ML/TF risks into supervisory practice and risk-based supervisory strategies;

- Moving away from a focus on tick box compliance towards assessing the effectiveness of banks' AML/CFT systems and controls;

- Taking sufficiently dissuasive corrective measures if banks' AML/CFT control systems are not effective;

- Cooperating effectively with domestic and international stakeholders to draw on synergies

- Positioning AML/CFT in the wider national and international supervisory frameworks.

These challenges can result in ineffective banking supervision. The EBA's peer review will be continued in 2020. The EBA will also continue to provide support and training to all competent EU AML/CFT authorities in order to help them tackle the key challenges identified in the present report. The EBA is also working on a review of its AML/CFT guidelines in order to provide further guidance in areas where weaknesses persist. It has launched a [public consultation](#) on the revised draft guidelines. Stakeholders are invited to comment by 6 July 2020.

The EBA has also published a [factsheet](#) explaining its new functions

in coordinating, leading, and monitoring the fight against money laundering and terrorist financing in more detail. (TW)

### Commission Roadmap on Future AML/CFT Actions

On 12 February 2020, the Commission published the [roadmap "towards a new comprehensive approach to preventing and combating money laundering and terrorism financing."](#) The roadmap launched a public consultation on possible ways to overhaul current EU AML/CFT legislation. It follows the AML package presented by the Commission in July 2019 (see [eucrim 2/2018, pp. 94–97](#)). In this package, the Commission highlighted a number of deficiencies in implementation of the EU anti-money laundering framework and the need to develop a new comprehensive approach at the EU level. The debate is fuelled by recent money laundering scandals, which, according to the Commission, show the full implementation of the most recent provisions introduced by the 5th AML Directive. The 2018 Council AML/CFT action plan cannot remedy the current weaknesses.

The Commission's initiative now aims at sounding out the areas in which further action is needed at the EU level in order to achieve a comprehensive and effective framework to prevent criminals from laundering the proceeds of their illicit activities and to prevent the financing of terrorism. It prepares further work which might result in concrete legislative proposals.

The Commission will also respond to demands from the EP to carry out a more fundamental reform of the current EU AML/CFT legal framework, in particular replacing the current AML directives with a directly applicable EU regulation. In light of the recent Luanda Leaks, MEPs reiterated their position when they discussed the [state of play of the EU fight against money laundering in the plenary session](#) on 12 February 2020. (TW)

### Infringement Procedures for Non-Transposition of 5th AML Directive

On 12 February 2020, the Commission [started infringement proceedings against eight Member States](#) for not having transposed the 5th Anti-Money Laundering Directive ([Directive \(EU\) 2018/843](#); see also [eucrim 2/2018, pp. 93–94](#)). The Commission sent [letters of formal notice](#) to Cyprus, Hungary, the Netherlands, Portugal, Romania, Slovakia, Slovenia, and Spain, because the countries have not notified any implementation measure for the 5th AML Directive. The Commission stressed the importance of the Directive's rules for the EU's collective interest. EU Member States were to have transposed the Directive by 10 January 2020. The Member States concerned now have two months to deliver a satisfying response; otherwise, the Commission will send them reasoned opinions. (TW)

### Tax Evasion

#### New Legislation to Fight VAT Fraud in Cross-Border E-Commerce

In February 2020, the Council [adopted new legislative measures to combat cross-border VAT fraud](#) caused by the fraudulent behaviour of some businesses in the area of cross-border e-commerce. The reform will introduce obligations for payment service providers, e.g., banks, to keep sufficiently detailed records and to report certain cross-border payments, thus enabling the location of the payer and the payee to be more easily identified. It will help facilitate controls of the supplies of goods and services by the competent Member State authorities.

In addition, a new central electronic system of payment information ("CESOP") will be set up for storage of the payment information and for further processing of this information by national anti-fraud officials. CESOP will store, aggregate, and analyse all VAT-relevant information regarding payments trans-

mitted by Member States in relation to individual payees. CESOP will enable a full overview of payments received by payees from payers located in the Member States and make the results of specific analyses of information available to Eurofisc liaison officials. The data in CESOP can also be cross-checked with other European databases.

The new rules shall apply from 1 January 2024. They consist of two legal acts amending existing EU legislation in the field of VAT:

- Council [Regulation \(EU\) 2020/283](#) of 18 February 2020 amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud (*O.J. L 62, 2.3.2020, 1*);
- Council [Directive \(EU\) 2020/284](#) of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers (*O.J. L 62, 2.3.2020, 7*).

Against the background of this new legislation, on 18 March 2020, the European Commission published a [survey for actors in the payment industry](#). The survey aims to gather input from the different actors in the payment industry regarding the new reporting obligations introduced by Directive (EU) 2020/284. It gathers their views on implementation of the legislative package on the transmission and exchange of payment data in order to fight VAT fraud. The results will feed the work of the expert group established to implement the new VAT regulations. (TW)

#### Kiel Study: EU's Trade Self-Surplus Goes Back to VAT Fraud

In a [working paper](#) published in January 2020, the Kiel Institute for the World Economy (IfW) and the ifo Institute in Munich, Germany elucidate that the main reason for the EU's large trade surplus with itself is apparently large-scale VAT fraud. By applying forensic accounting methods, the researchers observed that the EU runs a trade surplus with itself of €307 billion or 1.9 percent

of the Union's GDP in 2018. The working paper analysed data over a large period of time. Apparently, the EU's trade self-surplus has become persistent over time: the EU has had a self-surplus since 1993, when the single market was established. This surplus has increased considerably with the 2004 enlargement of the EU and grown to a total of €2.9 trillion over the past twelve years.

The researchers argue that the figure should be zero if all transactions were properly reported and recorded. The phenomenon cannot be explained by measurement errors or incidental inaccuracies only, but rather the large fraction of the EU's self-surplus seems to be related to fraud in value added tax. It is estimated that EU-wide VAT revenue shortfalls could range from €27 to 35 billion per year in a realistic scenario. At worst, revenue shortfalls would even amount to €64 billion.

The researchers also point out that data quality varies among the Member States. The differences were most pronounced between EU neighbouring countries and also between Member States with the more divergent VAT rates. As a result of the study, the following recommendations were made:

- Institutions in charge should substantially improve the quality and reliability of intra-EU data on the balance of payment;
- An electronic clearing procedure should be established to make tax fraud and data misreporting very difficult;
- The non-disclosure or non-collection of certain balance-of-payment items (e.g., primary income) should be dealt with urgently.

The study shows that tackling VAT fraud in the EU should be a top priority, because the large trade self-surplus is fuelling international disputes. (TW)

#### Commission Announces New Initiatives to Tackle Tax Evasion

The European Commission announced that it will adopt a [new action plan to fight tax evasion](#) in the second quarter of

2020. The Commission opened a public consultation for this purpose. The Action Plan will not only include key initiatives to tackle tax evasion and tax fraud but also to simplify the tax system in order to make compliance easier. It will also launch the External Strategy on tax good governance 2020.

The Commission points out that billions of euros are lost due to tax evasion every year in the EU (see also the news item on the recent Kiel study on VAT fraud). On the one hand, efforts by national tax authorities to tackle tax evasion are increasingly being hampered by new business models, especially those based on digital technology. On the other hand, companies that do business in the single market need a simpler and more up-to-date tax system.

Against this background, the new Action Plan is to implement *Ursula von der Leyen's* vision that Europe will be “an economy that works for people.” This includes fair taxation, so that everybody pays their fair share, and the creation of a tax environment in which the economy can grow. The Action Plan is also to take advantage of the latest developments in technology and digitalisation. (TW)

### Council Revises List of Non-Cooperative Tax Jurisdictions

On 18 February 2020, the Economic and Financial Affairs Council revised the [EU list of non-cooperative jurisdictions for tax](#) purposes. By blacklisting certain countries, the EU aims to promote good tax governance at the global level. The list includes jurisdictions that either have not engaged in a constructive dialogue with the EU on tax governance or failed to deliver on their commitments to implement reforms complying with the EU's criteria on time.

Next to the eight countries already on the [blacklist](#) (American Samoa, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, US Virgin Islands, Vanuatu), the Council added Palau, Panama, Seychelles, and – as the first British Overseas Territory – Cayman Islands. Other

British Overseas Territories (Bahamas, Bermudas, and British Virgin Islands) were removed from the list, as the Council considered these jurisdictions to be in line with the international tax standards in the meantime. This move was criticised by tax transparency organisations. The Council also removed 13 additional jurisdictions from the “black list.”

Thirteen countries remain on a “grey list” (including, e.g., Turkey, Bosnia-Herzegovina, Morocco, and Australia). This list (Annex II of the Council conclusions) covers jurisdictions that showed cooperation and are set to deliver on their reform commitment, although they have not yet met the international tax standards. The Council partly granted deadline extensions to these countries.

The Council will continue to regularly review and update the list in the coming years, taking into consideration the evolving deadlines for jurisdictions to deliver on their commitments and the development of the listing criteria that the EU uses to establish the list. (TW)

### Tax Policies in the European Union – 2020 Survey

On 31 January 2020, the European Commission (DG TAXUD) published the fourth edition of its [survey on “tax policies in the EU.”](#) The survey examines how Member States' tax systems perform in respect of the following benchmarks:

- Stimulating investment and addressing positive and negative externalities;
- Improving tax administration and tax certainty;
- Developing a more employment-friendly environment;
- Correcting inequalities and promoting social mobility;
- Fighting tax fraud, evasion, and avoidance.

These benchmarks in mind, the report identifies possible improvements to tax systems in terms of tax design, implementation, and compliance.

After defining what makes a fair and efficient tax system and providing an

overview of recent taxation trends, the survey outlines how national taxation systems perform against the five benchmarks. The aim is to help Member States find the best way to address their own specific tax challenges. The survey then reviews Member States' most recent tax reforms and describes some general reform options. Lastly, it presents the major recent actions on tax matters at EU level (2014–2020). New elements of the present edition of the survey include, inter alia, discussions on:

- Tax competition;
- Design and distribution of the overall tax mix;
- Sustainability of tax systems in a changing world;
- Measurement of effective tax rates on corporate income.

The survey provides evidence that multinational enterprises continue to engage in aggressive tax planning in order to decrease their tax burden. In addition, billions of euros in tax revenue are lost in the EU each year, because individuals evade taxes. According to the survey, taxation is more than just about raising revenue but also plays a central role in shaping a fairer society. Right and fair tax policies can eventually contribute to achieving the goals of the European Green Deal.

One of the main conclusions is that there is scope for Member States' tax systems to be fairer and more efficient. This can be accomplished by various means, including tax incentives, reduced tax burdens on low-income earners, tax policies to foster social mobility, and the creation of effective tools to fight tax avoidance. The Commission admits, however, that there is no “one size does fit all” rule, but instead tax policies must take account of the national specificities and circumstances.

The survey on tax policies in the EU is an important tool in the context of the [European Semester](#) and substantiates the tax policy priorities of the Commission's [Annual Sustainable Growth Strategy](#). (TW)

## Evaluation of the Tobacco Taxation Directive

On 10 February 2020, the European Commission published the results of its evaluation of [Directive 2011/64/EU](#), which provides for the structure and rates of excise duties on manufactured tobacco (i.e., cigarettes, cigars and cigarillos, fine-cut tobacco for rolling cigarettes, and other smoking tobacco). The Directive identifies which tobacco products are subject to the harmonised rules for excise duties and sets minimum levels of taxation. It aims at ensuring the proper functioning of the internal market, at a high level of health protection, and at bolstering the fight against tax fraud, tax evasion, and illegal cross-border shopping.

The [evaluation assesses](#) to which extent implementation of the Directive's provisions has contributed to achieving the objectives. In line with the EU's [Better Regulation Guidelines](#), it was carried out according to the basic evaluation criteria of effectiveness, efficiency, relevance, coherence, and EU added value. The main findings are as follows:

- The current legislation has been working well in terms of the predictability and stability of fiscal revenues for Member States;
- The Directive allows Member States enough flexibility to implement their national fiscal policies for traditional tobacco products (with €82.3 billion excise tax revenue in the EU in 2017);
- New products, such as e-cigarettes or heated tobacco products, illustrate the limits of the current legal framework, which is unable to cope with these increasingly developing markets;
- The impact of the tobacco taxation Directive on public health has been moderate;
- Significant differences in taxes (hence prices) between Member States also limit the objective of achieving public health, particularly where there is a high level of cross-border shopping;
- Although illicit trade in cigarettes and fine-cut tobacco have decreased

slightly over the years, this area remains a substantial challenge. It is estimated that the EU potentially loses €7.5 billion in excise revenues, which calls for strengthening enforcement policies and designing tax regimes with enforcement safeguard measures;

- There has been an increase in the illicit manufacturing of cigarettes within the EU, requiring a harmonised approach to monitoring the flow of raw tobacco within and into the EU.

Ultimately, the evaluation report calls for a more comprehensive and holistic approach, because Directive 2011/64 is not much coherent with other EU policies. This approach should take into account all aspects of tobacco control, including public health, taxation, the fight against illicit trade, and environmental concerns. (TW)

## Organised Crime

### Impact of COVID-19 on Serious and Organised Crime

**spot light** On 27 March 2020, Europol published [a report on exploitation of the COVID-19 pandemic by criminals](#). The report, which aims to support EU Member States' law enforcement, looks at the impact of measures taken by governments against the COVID-19 crisis on serious and organised crime. The report analyses the impact of the crisis in four key areas: cybercrime, fraud, trafficking in counterfeit and substandard goods, and organised property crime. Furthermore, it takes a brief look at other criminal activities.

In the area of cybercrime, the report sees a further increase in the number of cyberattacks involving various malware and ransomware packages themed around the COVID-19 pandemic. The threat of cyberattacks against critical health infrastructure is seen as a major risk.

According to the report, a large number of new or adapted fraud and scam schemes is expected to emerge. It seems

that investment scams are being adapted to elicit speculative investments in stocks related to COVID-19. One special form involves supply scams attacking businesses providing supplies to prevent COVID-19, e.g., protective masks. With regard to counterfeit and substandard goods, the report notes a booming market in the pandemic economy, especially with regard to medical products.

As far as organised property crime is concerned, the report finds criminals' *modi operandi* being adapted to already existing schemes involving theft, e.g., the impersonation of relatives or authorities (faking and entering) in 'Corona' situations.

Lastly, looking at other criminal activities, the report finds it difficult to assess the short-term impact of the COVID-19 crisis on the drug trafficking market, but anticipates that supply shortages will translate into increased drug-related violence between rival suppliers and distributors.

The demand for migrant smuggling services may increase, with new movements being undertaken to circumvent the enhanced border control measures. Sexual exploitation may increase due to the closure of establishments offering legal sex work.

The report is based on information received by the EU Member States on a 24/7 basis. (CR)

## Cybercrime

### EU's 5G Cybersecurity Toolbox

On 29 January 2020, the Commission tabled an [EU toolbox of mitigating measures](#) with the consensus of EU Member States in order to address security risks related to the rollout of 5G, the fifth generation of mobile networks. Ensuring protection of 5G from cybersecurity threats is one of the EU's top strategic priorities. The concrete proposals in the toolbox follow the [European Council conclusions](#), which called for a concerted approach to the 5G security,

as well as the ensuing [Commission Recommendation](#) for Member States to take concrete actions to assess cybersecurity risks of 5G networks and to strengthen risk mitigation measures (both adopted/issued in March 2019).

The toolbox lays out a range of security measures, allowing the effective mitigation of risks and ensuring that secure 5G networks are deployed across Europe. It sets out detailed mitigation plans for each of the identified risks and recommends a set of key strategic and technical measures to be taken by all Member States and/or by the Commission. Member States should take first concrete, measurable steps to implement the key measures by 30 April 2020 (see also the Commission Communication “Secure 5G deployment in the EU – Implementing the EU toolbox,” [COM\(2020\) 50 final](#)). They are also invited to prepare a joint report on implementation in each Member State by 30 June 2020. By October 2020, the Commission plans a review of its March 2019 Recommendation. (TW)

### **Eurobarometer: Europeans Attitudes Towards Cyber Security**

Alongside the presentation of the EU toolbox on joint security measures for 5G networks in January 2020, a [special Eurobarometer survey](#) was published that aimed at identifying EU citizens’ awareness, experience, and perception of cyber security. The fieldwork was carried out in October 2019. The main findings of the survey are as follows:

- The majority of respondents (52%) feel that they are not able to protect themselves sufficiently against cybercrime (while the figure was much higher (71%) in 2017);
- Awareness of cybercrime is rising, with 52% of respondents stating that they are fairly well or very well informed about cybercrime (up from 46% in 2017);
- Bank card or online banking fraud, infection of devices with malicious software, and identity theft were reported

as the most frequent concerns about becoming a victim of cybercrime;

- A large majority (77%) are unaware of the means to report a crime;
- A large majority (70%) did not report a cybercrime.

The survey also informs on the percentage which measures are taken by the internet users in reaction of cybercrime threats. (TW)

### **Cyber Information and Intelligence Sharing Initiative Launched**

Europol launched the “Cyber Information and Intelligence Sharing Initiative (CIISI-EU)” together with the European Central Bank and a group of Europe’s largest and most important financial infrastructures. The aim is to protect the European financial system from cyber-attacks.

The initiative of 27 February 2020 brings together central banks, clearing houses, stock exchanges, and payment system providers as well as Europol and the European Union Agency for Cybersecurity (ENISA) in order to share vital cybersecurity threat information. Key issues concern:

- The ability to understand the threat;
- The ability to provide for a collective response;
- Awareness raising concerning protective measures needed to achieve a change in behaviour amongst financial institutions. (CR)

### **Racism and Xenophobia**

#### **Terrorist Content Online Regulation – Controversies in Trilogue**

On 21 January 2020, the LIBE Committee discussed the Commission proposal for a regulation on preventing the dissemination of terrorist content online (for the proposal, see [eucrim 2/2018, 97–98](#) and the article by *G. Robinson*, [eucrim 4/2018, p. 234](#)). Rapporteur *Patryk Jaki* (ECR, PL) outlined that agreements with the trilogue partners were reached on broad parts of the proposal.

The Commission still has reservations, however, insisting that cross-border removal orders be directly enforced by hosting service providers and voicing concern over the deployment of automated detection tools. By contrast, MEPs stressed that the freedom of expression must also be safeguarded in the Internet; they are against the obligation to use ex-ante control measures or “upload filters” (see also the [report on the proposal](#) by LIBE member *Daniel Dalton* of 9 April 2019; see also in this context the EP resolution of 17 April 2019 and [eucrim 1/2019, p. 21](#)). Civil stakeholders identified additional critical issues and oppose the EU’s approach (see [eucrim 1/2019, p. 22](#)). In his [formal comments](#) of February 2019, the European Data Protection Supervisor encouraged the EU legislator to respect fundamental rights, in particular data protection, and to take into account the principles of quality of law and economic certainty (see details at [eucrim 1/2019, p. 21](#)). (TW)

## **Procedural Criminal Law**

### **Procedural Safeguards**

#### **CJEU: Prosecutor Can Balance Defence Rights Against Effective Fraud Prosecution (Kolev II)**

In [Case C-612/15](#) (criminal proceedings against *Nikoley Kolev, Stefan Kostadinov*, judgment of 5 June 2018, see [eucrim 2/2018, pp. 99/101](#)), the CJEU ruled that Union law, i.e., the obligation to protect the EU’s financial interests in accordance with Art. 325(1) TFEU, precludes national legislation that establishes a procedure for the termination of criminal proceedings, such as that provided for in Arts. 368 and 369 of the Bulgarian Code of Criminal Procedure, in so far as that legislation is applicable in proceedings initiated with respect to cases of serious fraud or other serious illegal activities affecting the financial interests of the European Union in cus-

toms matters. The CJEU added that it is up to the national court to give full effect to Art. 325(1) TFEU by disapplying that legislation, where necessary, while also ensuring respect for the fundamental rights of the persons accused.

Following this judgment, the referring court wished to remedy itself the procedural irregularities that had occurred during the pre-trial phase of the criminal proceedings against the defendants. The irregularities concerned their right to be informed about the charges and to access the case material, although the trial phase had already been terminated and the case referred back to the prosecutor. The appeal court criticised this action on the part of the referring court, because it was contradictory to national procedural law. The appeal court requested that the referring court refer the case back to the prosecutor.

The referring court again referred the case to the CJEU, seeking clarification on whether Union law precludes the interpretation made by the appeal court (*Case C-704/18, Kolev II*). The referring court argued that the injunction of the appeal court would make it impossible to comply with the operative part of the CJEU judgment according to which the defendants' rights in Arts. 6 and 7 of Directive 2012/13 must be implemented.

In its *judgment of 12 February 2020*, the CJEU clarified that the choice on how the defendants' rights are ensured falls within the procedural autonomy of the Member States. In applying the principles of equivalence and effectiveness, the CJEU concludes that, as it is with the criminal court, the prosecutor is also able to guarantee the rights of the defence in the pre-trial phase. Hence, there is nothing wrong with the injunction of the higher court (imposed on the referring court to refer the case back to the prosecutor), after termination of the trial phase of the criminal proceedings, for procedural irregularities committed during the pre-trial phase of those proceedings to be remedied. (TW)

### CJEU: Accused Person Can Waive Right to Be Present at Trial

The CJEU ruled on the conditions under which the non-appearance of accused persons at certain trial hearings for reasons either within or beyond their control is compatible with Union law. The concrete case deals with the provisions of the Bulgarian Criminal Code of Procedure on "trials in absentia" and which was brought to the CJEU by the Spetsializiran nakazatelen sad (Special Court for Criminal Cases, Bulgaria): the CJEU interpreted the right to be present at trial guaranteed by Art. 8 of Directive 2016/343 (for the Directive, see *eucri* 1/2016, p. 13 and the article by *S. Cras/A. Erbežnik, eucri* 1/2016, pp. 25–36). In its judgment of 13 February 2020 (*Case C-688/18, criminal proceedings against TX and UW*), the CJEU did not object to the Bulgarian rules.

The CJEU refers to recital 35 of Directive 2016/343, which states that the right of suspects and accused persons to be present at the trial is not absolute. In fact, under certain conditions, suspects and accused person should be able to, expressly or tacitly, but unequivocally, waive that right. The judges in Luxembourg took up the case law of the ECtHR, according to which such waiver of the right to take part in the hearing must be established unequivocally and be attended by minimum safeguards commensurate with its seriousness. Furthermore, it must not run counter to any important public interest.

In situations where the accused did not appear in hearings for reasons which are beyond his control, a waiver must be flanked with guarantees that procedural steps, which were taken during his non-appearance (e.g., questioning of a witness), can be repeated. This is the case under Bulgarian law.

The CJEU stressed, however, that Directive 2016/343 lays down only common minimum rules applicable to criminal proceedings concerning certain aspects of the presumption of innocence

and the right to be present at the trial. In light of the minimal degree of harmonisation, the Directive therefore cannot be understood as a complete and exhaustive instrument. (TW)

### German Bar Association Calls for Further Strengthening of Procedural Safeguards in EU

The German Bar Association (Deutscher Anwalt Verein – DAV) called on the establishment of additional minimum guarantees for procedural rights within the EU. In its *statement No 5/20 of January 2020*, the association assesses the state of play of procedural safeguards in the EU on the basis of the six Directives implemented since the 2009 Roadmap. According to the statement, without effective control mechanisms to implement these directives, the introduction of new instruments will only lead to limited improvement in procedural rights in the EU. The right to access case materials, enshrined in Art. 7 of Directive 2012/13, for instance, requires further concretisation. Given that the existing directives only cover part of the (minimum) harmonisation, the German Bar Association advocates new initiatives. In this context, the statement expressly welcomes the proposals for a new Roadmap 2020 by the ECBA (see *Matt*, guest editorial, *eucri* 1/2017, p. 1). Among the measures proposed, the German Bar Association considers the following three areas important for new EU initiatives:

- Minimum standards for pre-trial detention;
- Conflicts of jurisdiction and ne bis in idem;
- Admissibility and exclusion of evidence.

The German Bar Association also calls for revision of the Framework Decision on the European Arrest Warrant, ideally to take into account the CJEU's case law in this area, correct the existing deficits, and introduce effective remedies against the issuance of a EAW in the issuing State. (TW)

## Data Protection

### AG: Data Retention Should Be Strictly Limited

**spot light** Advocate General (AG) *Manuel Campos Sánchez-Bordona* advocates that the CJEU's rather restrictive case law on the retention of personal data and access to these data by law enforcement or intelligence authorities should be upheld. Following the judgment in the Joined Cases C-203/15, *Tele2 Sverige*, and C-698/15, *Tom Watson and Others* (see [eucrim 4/2016, p. 164](#)), the CJEU now has to deal with further references for preliminary rulings. The AG's opinion is linked to references initiated by national courts in France, Belgium, and the UK. All seek clarification as to whether their national legislation on data retention is in line with EU law. The courts criticised the CJEU for having established hurdles that are too high; the requirements set out in *Tele2 Sverige/Watson* deprive the EU Member States of an instrument that is absolutely necessary in order to combat terrorism and safeguard national security, thus putting corresponding national security measures at risk. The references are as follows:

- **Case C-623/17:** Request for a preliminary ruling from the Investigatory Powers Tribunal (UK) in the case *Privacy International v Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters, Security Service, Secret Intelligence Service*. The main proceedings at the referring court concern the acquisition and use of bulk communications data by the United Kingdom Security and Intelligence Agencies (SIAs) via the operators of public electronic communications networks for the purpose of protecting national security, e.g., in the fields of counter-terrorism, counter-espionage, and counter-nuclear proliferation.

- **Joined Cases C-511/18 and 512/18:** both requests for a preliminary ruling

came from the Conseil d'État (France) in the cases *La Quadrature du Net*, French Data Network, Fédération des fournisseurs d'accès à Internet associatifs, Igwan.net v Premier ministre, Garde des Sceaux, Ministre de la Justice, Ministre de l'Intérieur, Ministre des Armées. The Conseil d'État essentially seeks clarification as to whether two obligations imposed on telecommunication service providers under French legislation are compatible with EU law: i.e., a) the (real-time) collection of specific data; b) the retention of location and traffic data in order to facilitate identification of any person who is civilly and criminally liable.

- **Case C-520/18:** Request for a preliminary ruling from the Cour constitutionnelle (Belgium) in the case: *Ordre des barreaux francophones et germanophones, Académie Fiscale ASBL, UA, Liga voor Mensenrechten ASBL, Ligue des Droits de l'Homme ASBL, VZ, WY, XX v Conseil des ministres*. The Belgian court wonders whether the Belgian rules on the retention of data which follow multiple objectives (e.g., including the investigation, detection and prosecution of offences other than serious crime and the attainment of the defence of the territory and of public security) are compatible with EU law. In addition, the referring court asks whether it might maintain the effects of the national law on a temporary basis if a failure with EU law is concluded.

Although the AG issued three separate opinions, he clarifies that all cases before the CJEU [raise common problems](#). In essence, the yardstick for all cases is [Directive 2002/58/EC](#) concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and the fundamental rights enshrined in the CFR.

First, the AG examines the applicability of Directive 2002/58/EC. Although Art. 1 para. 3 of the Directive excludes from its scope “activities concerning public security, defence,

State security (...) and the activities of the State in areas of criminal law,” the AG concludes that this exemption only refers to specific activities by the State authorities on their own account. In data retention situations, however, obligations are imposed on private parties, whose cooperation is required. Even if this cooperation is required for national security interests, these activities are governed by the Directive, i.e., the protection of privacy, which is enforceable against private actors. Accordingly, Directive 2002/58 is applicable in the data retention scenarios.

Second, the AG deals with the possibility under Art. 15 para. 1 of Directive 2002/58. Under certain conditions, it allows Member States to adopt legislative measures providing for the retention of data if these measures follow objectives of safeguarding national security, defence, public security, and the prevention, investigation, detection, and prosecution of criminal offences or of unauthorised use of the electronic communication system. Limitations to the privacy rights enshrined in the Directive (in particular, the guarantee of confidentiality of communications and related traffic data) must be interpreted strictly and with regard to the fundamental rights enshrined in the CFR. The AG proposes upholding the case law of the judgment *Tele2 Sverige /Watson*. From the Union law perspective, it is disproportionate and unlawful if national laws establish a general and indiscriminate retention of all traffic and location data of all subscribers and registered users. By contrast, a Member State can follow the approach of limited and discriminate retention flanked with limited access to said data. This would entail the following aspects:

- Retention of specific categories of data that are absolutely essential for the effective prevention and control of crime and the safeguarding of national security;

- Retention for a determinate period adapted to each particular category;



- Data access subject to a prior review carried out either by a court or by an independent administrative authority;
- Notification of data subjects (provided that ongoing investigations are not jeopardised);
- Adoption of rules to avoid misuse of, and unlawful access to, retained data.

The AG stressed, however, that it is not the task of the CJEU to develop a lawful data retention model. This must be done by the legislator.

Further developing the previous case law, the AG suggests that imposing a more extensive and general data retention regime is possible for “exceptional situations characterised by an imminent threat or an extraordinary risk warranting the official declaration of a state of emergency.” However, such a regime can also only be lawful for a limited period and it must be proportionate.

As regards the concrete cases at issue, the AG concludes that Union law precludes the established national data retention legislations in France, Belgium, and the UK, because they are general and indiscriminate. There is, however, no preclusion for the specific part of French law that permits the real-time collection of traffic and location data of individuals, “provided that those activities are carried out in accordance with established procedures for accessing legitimately retained personal data and are subject to the same safeguards.”

As regards the specific question posed by the Belgian court, the AG proposes that “a national court may, if its domestic law so permits, maintain the effects of legislation such as the Belgian legislation, on an exceptional and temporary basis, even where that legislation is incompatible with EU law, if maintaining those effects is justified by overriding considerations relating to threats to public security or national security that cannot be addressed by other means or other alternatives, but only for as long as is strictly necessary to correct the incompatibility with EU law.”

If the CJEU follows the opinion of

AG *Campos Sánchez-Bordona*, the cases at issue may have an impact on other jurisdictions. This includes the request for a preliminary ruling by the Federal Administrative Court of Germany asking for verification of the lawfulness of the 2015 German law on data retention (see [eucrim 3/2019, p. 176](#)). On 21 January 2020, AG *Pitruzzella* also published his opinion on interpretation of the Estonian data retention legislation (see separate news item). (TW)

### AG: Conditions of Access to Retained Telecommunications Data for Law Enforcement

Advocate General *Giovanni Pitruzzella* presented his opinion on the Estonian data retention law, advising on how Member States may arrange the contentious retention of personal data for law enforcement purposes while keeping in line with Union law ([opinion of 21 January 2020, Case C-746/18, H.K. v Prokuratuur](#)).

The case is related to criminal proceedings against H.K. for several robberies, fraud, and violence against parties to court proceedings. The criminal court of first instance based H.K.’s conviction on, *inter alia*, reports drawn up using data relating to electronic communications in accordance with the established Estonian data retention law. The investigating authority had obtained the data from a telecommunications service provider in the pre-trial procedure, after having been granted authorisation from an assistant public prosecutor. The data provided insight into the location, length, partners, etc. of the accused’s communication within a given period of time. H.K. argued that the reports are inadmissible evidence and his conviction therefore unfounded.

The Estonian Supreme Court, indeed, had doubts on the compatibility with EU law of the circumstances in which investigating authorities had access to that information. The Estonian Supreme Court raised the question of whether Art. 15(1) of [Directive 2002/58/EC](#) on privacy and

electronic communications, read in the light of Arts. 7, 8, 11, and 52(1) CFR, must be interpreted as meaning that the categories of data concerned and the duration of the period for which access is sought are among the criteria for assessing the seriousness of the interference with fundamental rights that is associated with the access by competent national authorities to the personal data that providers of electronic communications services are obliged to retain under national legislation.

AG *Pitruzzella* confirmed this view. Examining the lessons learned from the judgments in *Tele2 Sverige/Watson* (Joined Cases C-203/15 and C-698/15, see [eucrim 4/2016, p. 164](#)) and *Ministerio Fiscal* (Case C-207/16, see [eucrim 3/2018, pp. 155–157](#)), the AG concludes that both the categories of data concerned and the duration of the period for which access to these data is sought are relevant. He further states that, depending on the seriousness of the interference, it was up to the referring court to assess whether this access was strictly necessary to achieve the objective of preventing, investigating, detecting, and prosecuting criminal offences.

In addition, the Estonian Supreme Court posed the question of whether the public prosecutor who granted access – also in view of the various duties assigned to it under Estonian law – can be considered an “independent” administrative authority. This question refers to the CJEU requirement set out in its *Tele2 Sverige/Watson* judgment in that access to retained data “should, as a general rule, ... be subject to a prior review carried out *either by a court or by an independent administrative body*, and that the decision of that court or body should be made following a reasoned request by those authorities submitted, *inter alia*, within the framework of procedures for the prevention, detection or prosecution of crime.” The AG maintains that this requirement is not met by the public prosecutor’s office, because it is responsible for directing the pre-trial procedure, on

the one hand, while also being likely to represent the public prosecution in judicial proceedings, on the other.

The AG's opinion on the Estonian data retention law comes shortly after the opinion of his colleague *Manuel Campos Sánchez-Bordona*, who examined the general lawfulness of data retention regimes in France, Belgium, and the UK. The topic of data retention will continue to keep the CJEU busy. (TW)

### Council Endorses Start of Negotiations on EU-Japan PNR Deal

On 18 February 2020, the [Council gave green light to the Commission](#) to start negotiations with Japan on an agreement on the transfer and use of passenger name record (PNR) data. The Council endorsed the respective negotiating directives recommended by the Commission in September 2019 (see [eucrim 3/2019, p. 175](#)). The Agreement will set out the framework and conditions for the exchange of PNR data, so that they can be used to prevent and fight terrorism and serious crime. PNR data is personal information provided by passengers, which is collected and held by air carriers (e.g., name of passenger, travel dates, itineraries, seats, baggage, contact details, and means of payment).

The data transfer to Japan will be in line with the EU General Data Protection Regulation as the [Commission attested Japan](#) to guarantee an adequate level of protection of personal data in January 2019. (TW)

### Commission Presents European Data Strategy

On 19 February 2020, the Commission unveiled its plans and actions for a [European data strategy](#). The new Commission under President *Ursula von der Leyen* set the ambitious goal that the EU become the leading role model for a society empowered by data to make better decisions – in business and in the public sector. All European citizens and businesses should benefit from new technologies and the use of data. The

digital-agile economy must be boosted. The European Data Strategy aims at creating a single market for data with the following features:

- Data flow within the EU and across sectors, for the benefit of all;
- Full respect for European rules, in particular on privacy and data protection as well as on competition law;
- Fair, practical, and clear rules for access and use of data.

In its [Communication](#) on a European data strategy, the Commission first sets out what is at stake, what its vision is, and what the problems are. Future actions will be based on four pillars:

- A cross-sectoral governance framework for data access and use;
- Investments in data and strengthening of Europe's capabilities and infrastructures for hosting, processing, and using data, interoperability;
- Empowerment of individuals, investing in skills and in SMEs;
- Common European data spaces in strategic sectors and domains of public interest.

The strategy sets out key actions in each pillar. For this year, the Commission announced, inter alia, proposals on a Digital Services Act and a European Democracy Action Plan, a review of the eIDAS regulation, and measures to strengthen cybersecurity by developing a Joint Cyber Unit.

The Commission has invited the public to give feedback on its data strategy. The [public consultation](#) is open until 31 May 2020. (TW)

### EDPB: Data Protection Guidelines on Video Surveillance

At its 17th plenary meeting on 28/29 January 2020, the European Data Protection Board (EDPB) adopted [guidelines on the processing of personal data through video devices](#). The guidelines take into account a prior public consultation on the topic (see [eucrim 2/2019, p. 105](#)).

These guidelines examine how the GDPR applies in relation to the processing of personal data by video devices and

how consistent application of the GDPR can be ensured in this regard. The examples are not exhaustive, but the general reasoning can be applied to all potential areas of use. They cover both traditional video devices and smart video devices.

The EDPB highlights that the intensive use of video devices has massive implications for data protection. It also affects citizens' behaviour. In particular, the technologies can limit the possibilities of anonymous movement and anonymous use of services. While individuals might be comfortable with video surveillance set up for a certain security purpose, for example, guarantees must be taken to avoid misuse for totally different and – for the data subject – unexpected purposes (e.g., marketing purpose, employee performance monitoring, etc.). The huge amount of video data generated, combined with new technical tools to exploit images, increase the risk of secondary use. Furthermore, video surveillance systems in many ways change the way professionals from both the private and public sector interact. The growing implementation of intelligent video analysis has contributed to high-performance video surveillance. These analysis techniques can be either more intrusive (e.g., complex biometric technologies) or less intrusive (e.g., simple counting algorithms). The data protection issues raised in each situation may differ, as will the legal analysis when one or the other of these technologies has been used.

In addition to privacy issues, there are also risks related to the possible malfunctioning of these devices and the biases they may produce. According to the guidelines report, research studies found that software used for facial identification, recognition, and analysis performs differently based on the age, gender, and ethnicity of the person, and algorithms are based on different demographics. Thus, bias is one of the major problems of video surveillance; data controllers must regularly assess the relevance of such identification methods and su-

pervise the necessary guarantees. The EDPB ultimately stresses that “video surveillance is not by default a necessity when there are other means to achieve the underlying purpose.”

The guidelines address the lawfulness of processing, including the processing of special categories of data, the applicability of the household exemption, and the disclosure of footage to third parties. Other analysed items include:

- Processing of special categories of data;
- Rights of the data subject;
- Transparency and information obligations;
- Storage periods and erasure obligations;
- Technical and organisational measures;
- Data protection impact assessment.

[The EDPB](#) – an assembly of the EEA data protection authorities and the European Data Protection Supervisor – works on consistent application of data protection rules throughout the European Union and promotes cooperation between the EU’s data protection authorities. (TW)

### Corona Outbreak and Data Protection

The outbreak of COVID-19 and subsequent initiatives and policy measures have triggered many crucial privacy and data protection law issues. The VUB Law, Science and Technology Society Research Group has provided a [collection of statements and materials](#) on tracking initiatives and on European/international resources on the pandemic at its website.

In a [statement of 19 March 2020](#), the European Data Protection Board (EDPB) provides an answer to several questions on data protection in the context of the fight against the COVID-19 pandemic. The statement focuses on the processing of personal data by both public health authorities and employers. The EDPB refers to EU data protection rules and stresses that the GDPR does not, in general, hinder restrictions of freedom

in this emergency situation; however, these measures must be proportionate and limited to the emergency period. Under certain circumstances, the GDPR allows the processing of personal data in the interest of public health without the individual’s consent. The EDPS statement also serves as a reminder of the core principles relating to the processing of personal data.

For the processing of electronic communication data, such as mobile location data, the e-Privacy Directive additionally applies. In this context, public authorities should first aim to process location data in an anonymously (i.e., processing data should be aggregated in a way that individuals cannot be re-identified). This could enable the generation of reports on the concentration of mobile devices at a certain location (“cartography”). If it is not possible to only process anonymous data, Art. 15 of the ePrivacy Directive enables the Member States to introduce legislative measures pursuing national security and public security. Such emergency legislation is possible under the condition that it constitutes a necessary, appropriate, and proportionate measure within a democratic society. If these measures are introduced, a Member State is obliged to put in place adequate safeguards, such as granting individuals using electronic communication services the right to judicial remedy. The proportionality principle also applies. The least intrusive solutions should always be preferred, taking into account the specific purpose to be achieved. (TW)

### Victim Protection

#### Commission Announces New Victims’ Rights Strategy

On the occasion of the European Day for Victims of Crime on 22 February 2020 and following the xenophobic/racist attacks in Hanau/Germany on 19 February 2020, Commission Vice-President *Věra Jourová* and Commissioner for Justice *Didier Reynders* [announced a new](#)

[Commission strategy for victims’ rights \(2020–2024\)](#) by summer 2020. According to the Commissioners, 75 million people fall victim to crime every year across Europe. Although the EU has robust victims’ rights legislation in place, there are still too many victims whose rights are not equally guaranteed when a crime is committed in an EU country other than their own. The EU must therefore aim to guarantee equal rights, regardless of where in the EU a person falls victim to a crime.

The new victims’ rights strategy will:

- Empower victims;
- Strengthen cooperation and coordination between national authorities;
- Improve protection and support to victims;
- Facilitate access to compensation.

Support and protection of victims is currently ensured by the EU through the Victims’ Rights Directive (2012/29/EU), sector-specific regulations (e.g., protection of victims of human trafficking, child sexual abuse/child pornography, and terrorism), and a legal scheme that facilitates access to compensation in situations where the crime was committed in an EU country other than the victim’s country of residence. (TW)

### Freezing of Assets

#### CJEU: Confiscation of Illegal Assets via Civil Proceedings Possible

EU law does not preclude national legislation, which provides that a court may order the confiscation of illegally obtained assets following proceedings that were not subject either to a finding of a criminal offence or, a fortiori, the conviction of the persons accused of committing such an offence. The CJEU drew this conclusion in [Case C-234/18 \(ARGO IN 2001\)](#), following a reference for preliminary ruling by the Sofia City Court, Bulgaria. The Bulgarian court is conducting civil proceedings against BP and others for the confiscation of illegally obtained assets. BP, the chair of the

supervisory board of a Bulgarian bank, allegedly incited others to misappropriate funds belonging to that bank in the sum of approximately €105 million. The criminal proceedings against him have not been finally concluded and are still pending. Independent of these criminal proceedings, the Bulgarian Commission responsible for combatting corruption and for confiscating assets brought civil proceedings before said civil court in Sofia. The Bulgarian Commission requested ordering the confiscation of assets from BP and members of his family, because it found that they had acquired assets of considerable value whose origin could not be established. The Bulgarian court asked the CJEU whether such legislation is in line with Council [Framework Decision 2005/212/JHA](#) of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, i.e., whether civil confiscation procedures can be concluded without first establishing the commission of a criminal offence.

In its [judgment of 19 March 2020](#), the CJEU confirmed the Bulgarian legislation. The CJEU pointed out the purpose of the Framework Decision. It aims at obliging Member States to establish common minimum rules for the confiscation of crime-related instrumentalities and proceeds in order to facilitate the mutual recognition of judicial confiscation decisions adopted in criminal proceedings. This does not preclude Member States from providing other means of confiscation, such as the ones in the case at issue, which are civil in nature. Coexistence with a confiscation regime under criminal law is possible.

The CJEU concludes that EU law does not preclude national legislation which provides that a court may order the confiscation of illegally obtained assets following proceedings which are not subject either to a finding of a criminal offence or, a fortiori, the conviction of the persons accused of committing such an offence. (TW)

## Cooperation

### European Arrest Warrant

#### CJEU Ruling in Spanish Rapper Case: Legislation at Time of Offence Is Decisive

On 3 March 2020, the Grand Chamber of the CJEU decided the legal question referred to by the Court of Appeal of Ghent, Belgium in the extradition case against rapper *Valtònyc* (Case C-717/18).

Spain had issued a European Arrest Warrant against *Josep Miquel Arenas* (who performs as rapper under the name *Valtònyc*) for the purpose of executing a 2017 sentence of imprisonment. He was, inter alia, sentenced to the maximum prison sentence of two years for “glorification of terrorism and the humiliation of the victims of terrorism.” The sentence followed the law in force at the time the offences were committed

(in 2012/2013); however, the maximum term of imprisonment was changed to three years in 2015. The question now was which point in time is decisive in order to determine the “minimum maximum threshold” in Art. 2(2) FD EAW. Art. 2(2) FD EAW does away with the verification of double criminality, inter alia for “terrorism,” under the condition that the offence is punishable in the issuing State for a maximum period of at least three years. For the background of the case and the opinion of the Advocate General, see [eucrim 4/2019, pp. 245–246](#).

Contrary to the opinions of the Belgian and Spanish governments and the Belgian Procureur-generaal, the CJEU ruled that the executing authority must take into account the law of the issuing State in the version applicable to the facts giving rise to the case in which the EAW was issued. The purpose of the FD EAW, which is to facilitate and ac-

### EPRS Study on European Arrest Warrant

In February 2020, the European Parliamentary Research Service (EPRS) published an [in-depth analysis on implementation of the European Arrest Warrant](#) (authors: *Wouter van Ballegoij and Ivana Kiendl Krišto*). The analysis is designed to support an [own-initiative implementation report](#) by the EP’s LIBE committee (rapporteur: *Javier Zarzalejos*, EPP, Spain) and to feed discussions on possible revision of the 2002 Framework Decision on the European Arrest Warrant that may be triggered in 2020. The February report will be followed by a study (planned for April 2020) that will present conclusions on implementation of the framework decision and tentative recommendations on how to address any shortcomings identified.

The analysis observes that the FD EAW is generally recognised as a successful instrument; however, its application has triggered a number of problems:

- Definition of “issuing judicial authorities” and their independence from government;
- The proportionality of EAWs issued for “minor offences” and before the case was “trial ready”;
- Verification of double criminality, its compatibility with the principle of mutual recognition, and the need for further approximation of laws;
- Interplay of the FD EAW with the FD on the transfer of prisoners in the cases of surrender of nationals/residents;
- Application of the “trials *in absentia*” exception;
- The role of the executing authority in safeguarding the fundamental rights of the requested person.

The analysis also deals with the difficulties experienced by requested persons in effectively exercising their procedural rights in accordance with the EU directives setting out the approximation of criminal procedure in EAW cases. (TW)

celerate judicial cooperation, as well as the context of the provision justify this interpretation. The CJEU further argues that making reference to the version of the law at the time of the issuance of the EAW means that the executing authority has to look into possible amendments of the laws in the issuing State, which would run counter to the principle of legal certainty.

Lastly, the CJEU clarifies the relationship between Art. 2(2) and Art. 2(4) FD EAW: the fact that the offence at issue cannot give rise to surrender without verification of the double criminality of the act, pursuant to Art. 2(2), does not necessarily mean that execution of the EAW has to be refused. The executing judicial authority is responsible for examining the double criminality criterion of the act set out in Art. 2(4) in the light of the offence at issue.

The judgment means that the Belgian extradition court must now verify whether the facts giving rise to the EAW against the rap artist would also be punishable under Belgian law. However, the first instance court already denied the double criminality of the act at issue, so it is likely that *Valtònyc* will not be surrendered to Spain. Another solution would be that Spain withdraws the EAW because it was apparently issued on false legal assumptions. (TW)

### MEPs: Revision of EAW Would Open Pandora's Box

On 20 February 2020, MEPs discussed policy options for the European Arrest Warrant in a meeting of the LIBE committee. Legal experts reported on implementation of the Framework Decision on the European Arrest Warrant (FD EAW). Politicians could also draw on a [study by the European Parliamentary Research Service](#) (EPRS) that provided a first in-depth analysis on implementation of the EU's surrender scheme (see separate news item). The EAW instrument was considered a generally successful tool; however, challenges remain. These involve the detention conditions in some

EU Member States, mutual trust among Member States, and interpretation of the 2002 Framework Decision as such. MEPs pointed out that, after 18 years of existence, the FD EAW still triggers a number of CJEU judgments interpreting its provisions in a more or less fundamental way. They are not eager to revise the FD, however, because this would open “Pandora's box” and the achievements would (again) be at stake.

Notwithstanding, the representative from the European Commission announced readiness to revise the FD EAW. Problems are mainly seen in the implementation of the FD and its incorrect application.

The FD EAW will be at the centre of further policy discussions in 2020. The EPRS will present another study on the EAW in April 2020. This will serve as the basis for drafting an own-initiative report by the EP on the EAW implementation. The Commission envisages presenting an in-depth assessment on the EAW by summer. And the upcoming German Council Presidency will put the issue of revision of the EAW on its JHA agenda. (TW)

### Fair Trial Concerns: German Court Suspends Execution of Polish EAW

With its [decision of 17 February 2020](#), the Higher Regional Court (HRC) of Karlsruhe, Germany set aside an extradition arrest warrant against a Polish national who was to be surrendered to Poland via an EAW issued for the purpose of criminal prosecution. The court argued that a fair trial for the requested person is not guaranteed in Poland following recent reforms that had an impact on the disciplinary regime of the judiciary in Poland.

#### ► Background

The court in Karlsruhe refers to the CJEU's judgment of 25 July 2018 in *Celmer* ([Case C-216/18 PPU](#) – also dubbed “LM”), in which the judges in Luxembourg concluded that the executing authority can refrain from giving effect to an EAW under certain circum-

stances on the grounds that the right to a fair trial will not be respected in the issuing EU Member State (see details in [eucrim 2/2018, pp. 104–105](#)).

#### ► *Decision of the HRC*

The court in Karlsruhe extensively dealt with the recent reforms in Poland, which further restrict the independence of judges by introducing, *inter alia*, new rules on the disciplinary regime to the Polish judiciary. This “muzzle law” came into force on 14 February 2020 (for details, consult the recent news on the rule-of-law situation in Poland in the category “Foundations > Fundamental Rights”). The court also took into account recent developments against the Polish reform at the EU level. It paid particular attention to the CJEU's judgment of 19 November 2019, in which doubts were raised as to the independence and impartiality of the new Disciplinary Chamber at the Polish Supreme Court (see details in [eucrim 3/2019, pp. 155–156](#)). It also took into consideration other (pending) infringement actions against the reform that had been referred to the CJEU by the European Commission.

Since the defendant put forward material supporting the assertion that there are systemic deficiencies in the rule of law in Poland, the HRC examined the real risk of breach of the fundamental right to a fair trial – the second step required by the CJEU in the *Celmer* judgment. As this real risk could not be excluded, the HRC sent a catalogue with comprehensive questions to the Polish Ministry of Justice asking for further clarifications on the new muzzle law and its impact on the concrete criminal proceedings, including possible disciplinary measures against the deciding judges. At the same time, the HRC set aside the extradition arrest warrant in Germany – following the current developments in Poland in respect of the judicial reform – because a “high probability” exists that extradition would be inadmissible (at least) at the moment.

### ► Put in Focus

The HRC of Karlsruhe rendered a landmark decision. It is the first time that a court in an EU Member State denied extradition because of possible fair trial infringements in another EU country. Until now, courts in Europe consistently refused to accept non-extradition, following the judicial reforms in Poland that started in 2015, because the hurdles set by the CJEU in *Celmer* could not be overcome. Nearly all cases failed because the courts were not convinced that the requested person would run a real risk of fair trial infringement in Poland. The HRC of Karlsruhe justifies its change in view because the recent muzzle law has shown that the person concerned could run this real risk. It is no longer an abstract danger, because the new disciplinary regime has repercussions on the entire judiciary, including on judges at the competent criminal courts of first instance. However, the HRC of Karlsruhe stresses that the extradition procedure in Germany is not yet finished; a final decision on the case rests on the reply to the catalogue of questions by the Polish authorities.

The decision of the HRC also demonstrates that the judiciary in other EU Member States cannot assess fair trial issues at the level of the European Arrest Warrant without looking at other developments in judicial reform, in particular concrete CJEU case law following infringement proceedings against the reform. The question is also whether the CJEU's case law on the EAW, on the one hand, and on the judicial reform in Poland, on the other, is consistent.

In the present context, the following statement of the Parliamentary Assembly of the Council of Europe is worth reading:

“The Assembly notes that the concerns about the independence of the Polish judiciary and justice system, as well as Poland's adherence to the rule of law, directly affect Europe as a whole. The questions about the independence of the justice system and the respect for

the rule of law are therefore not to be considered as internal issues for Poland. The Assembly calls upon all Council of Europe member states to ensure that the courts under their jurisdiction ascertain in all relevant criminal cases – including with regard to European Arrest Warrants – as well as in relevant civil cases, whether fair legal proceedings in Poland, as meant by Art. 6 of the European Convention for Human Rights, can be guaranteed for the defendants” (No. 11 of the adopted [resolution of 28 January 2020](#)).

The reference number of the HRC's decision (*Beschluss*) of 17 February 2020 is: Ausl 301 AR 156/19. See also [the press release](#) by the Oberlandesgericht Karlsruhe and the summary by [Anna Oehmichen in “beck-aktuell”](#) (both in German). A first analysis in English has been provided by [Maximilian Steinbeis on Verfassungsblog.de](#). (TW)

### Updated Overview on Position of Public Prosecutors in Relation to the EAW

On 30 March 2020, Eurojust published a new version of its [country-by-country overview](#) on the position of public prosecutors in relation to the European Arrest Warrant (EAW) (for the previous version, see [eucrim 2/2019, p. 110](#)). The overview was compiled following the CJEU's judgment of May 2019, in which it declared that the German public prosecutors' offices do not fall within the concept of “issuing judicial authority” in the sense of Art. 6(1) FD EAW due to lack of independence (cf. [eucrim 1/2019, pp. 31–33](#)). In another judgment of May 2019 as regards the Lithuanian Prosecutor General, the CJEU set out requirements of objectivity and independence and the need for effective judicial protection that must be afforded to the requested persons if an EAW is issued by a public prosecutor's office. The judgments raised uncertainties amongst practitioners regarding the legal position of public prosecutors in the Member States.

Alongside an updated summary of

the most recent CJEU judgments taken on this issue in 2019 (see also [eucrim 3/2019, p. 178](#), and [eucrim 4/2019, pp. 242, 244–245](#)), Eurojust's update now also offers information on the UK and Norway as well as information on judicial protection and the possibility to contest a prosecutor's decision to issue an EAW. (CR)

### Financial Penalties

#### CJEU Rules on Union-wide Enforcement of Fines against Legal Persons

**spot light** After its judgment on the interpretation of the Framework Decision on the application of the principle of mutual recognition to financial penalties ([FD 2005/214/JHA](#)) of 5 December 2019 (see [eucrim 4/2019, pp. 246–247](#)), the CJEU delivered another important judgment on the cross-border enforcement of fines on 4 March 2020 ([Case C-183/18, Bank BGŻ BNP Paribas](#)). The reference for preliminary ruling was brought up by a Polish court. In the case at issue, the District Court of Gdańsk, Poland, has to deal with a request from the central judicial recovery office of the Netherlands (CJIB) to recognise and enforce a fine of €36 imposed on the *Bank BGŻ BNP Paribas Gdańsk*, because the driver of a vehicle belonging to the bank had exceeded the authorised speed limit in Utrecht (Netherlands).

#### ► Legal Problems

The referring court first observed that the *Bank BGŻ BNP Paribas Gdańsk* has no legal personality under Polish law and does not have the capacity to act as a party in judicial proceedings. It is a separate entity of the parent company *Bank BGŻ BNP Paribas S.A.*, which has its seat in Warsaw. By contrast, Dutch law covers organisational units like the bank in Gdańsk under the concept of “legal persons” who can be liable for misdemeanours.

Second, the Polish court argues that

there is no legal basis for recognising and enforcing the imposed fine, because the provisions of the Polish Code of Criminal Procedure transposing FD 2005/214 do not include legal persons. Although Art. 9 para. 3 of the FD imposes the obligation to enforce financial penalties against legal persons, even if the executing State does not recognise the principle of criminal liability of legal persons, in the view of the court, an interpretation of the Polish law in conformity with the provision of Art. 9 para. 3 FD would be *contra legem*.

#### ► Questions Referred

As a consequence, the *District Court of Gdańsk* asked the CJEU the following questions:

■ Must the concept of “legal person” in the FD 2005/214 be interpreted in accordance with the law of the issuing State or the executing State or as an autonomous concept of EU law, and which consequences does this answer have for the concrete liability of the banking entity in Gdańsk?

■ Must the financial penalty imposed on a legal person in the Netherlands be enforced in a Member State that has no national provisions on the execution of financial penalties imposed on legal persons?

#### ► Decision as to the First Question

Drawing on the context and the purpose of FD 2005/214, the CJEU concluded that the concept of “legal person” cannot be interpreted as an autonomous concept but must be interpreted in light of the law of the issuing State. The CJEU does not consider the legislation itself problematic but rather the implementation of the FD in practice. It advises the Polish court to consider whether, under the given circumstances, the infringement committed by the bank in Gdańsk can be attributed to the parent company Paribas with its seat in Warsaw. The sanction can be regarded as having been imposed on the entity with a legal personality. As a result, the fine could be enforced against *Bank BGŻ BNP Paribas S.A.*

#### ► Decision as to the Second Question

As regards the conflict between the national law and the obligations under Art. 9 para. 3 FD 2005/214, the CJEU first reiterates its established case law on the effects of Union acts and the principle of uniform interpretation. Referring to the *Poplawski* judgment (see [eucrim 2/2019, pp. 110–111](#)), the CJEU recapitulates that, although the framework decisions cannot have direct effect, their binding character nevertheless places an obligation on national authorities to interpret national law in conformity with EU law as from the date of expiry of the period for the transposition of these framework decisions. While the premise has its limits, e.g., no interpretation *contra legem*, the referring court must exhaust all possibilities to consider an interpretation of the Polish law in conformity with Union law (here, the obligation under Art. 9 para. 3 FD 2005/214). Contrary to the opinion of the referring court, the CJEU believes that the concepts of the Polish Code of Criminal Procedure can be interpreted as referring to the entity on which a final financial penalty has been imposed, regardless of whether this entity is a legal or natural person.

#### ► Put in Focus

Although it is up to the national court alone to determine whether national law can be interpreted in conformity with EU law, the CJEU stressed that national courts are empowered to pull out all the stops in order to ensure compatibility with the wording and purpose of EU law (here the framework decision). The CJEU has thus applied the lessons learned in the context of the European Arrest Warrant (judgment in Case C-573/17, *Poplawski II*) to another instrument of mutual recognition in criminal matters, i.e., the mutual recognition of financial penalties. Against this background, the present judgment in *Bank BGŻ BNP Paribas* is of general significance, because the CJEU applies basic principles of its established case law on the primacy of Union law. (TW) ■

## Law Enforcement Cooperation

### EDPB: CoE E-Evidence Legislation Must Ensure Strong Data Protection Safeguards

In view of the negotiations on a Second Additional Protocol to the CoE Cybercrime Convention (Budapest Convention), which will include a framework for law enforcement authorities to directly receive data from service providers, the European Data Protection Board addressed a letter to the responsible CoE committee calling for the integration of strong data protection safeguards. The EDPB points out that the contents of the additional protocol deal with sensitive issues of data protection; it will involve the collection of personal data, including not only subscriber but also traffic data, on the basis of orders from another jurisdiction. The new legal framework must be consistent with the [CoE data protection convention](#) (CETS no. 108) and should also be compliant with the EU’s primary and secondary law. The EDPB also called on the CoE committee to ensure transparency of the ongoing discussions. The concerns of the data protection authorities must be taken seriously.

Alongside the CoE, the EU is also working on a new regime for simplified and expedited access to e-evidence following a Commission proposal of April 2018. For the discussion, see [eucrim 3/2019, p. 181](#) with further references. For the state of play of the proposal, see the [EP’s Legislative Observatory website](#). In parallel, the EU is also negotiating an e-evidence agreement with the USA (see [eucrim 4/2019, p. 248](#) with further references). The USA has already established an e-evidence legal framework via its CLOUD Act. *Andrea Jelinek*, the Chair of the EDPB, stressed that the establishment of a modernised instrument for the exchange of personal data with third countries for fighting cybercrime is not only consistent with the Council of Europe *acquis*, but also fully compatible with the EU Treaties and the Charter of Fundamental Rights. (TW)



## Council of Europe

Reported by Dr. András Csúri

### Foundations

#### European Court of Human Rights

##### ECtHR: Exceptional Measures due to the Global Health Crisis

On 27 March 2020, the ECtHR provided insight into its [activities during the unprecedented global health crisis](#). Since 16 March 2020, the Court has taken a number of exceptional measures announced in an earlier press release. Its essential activities, including the registering of incoming applications, their allocation to the relevant judicial formations, and especially the handling of priority cases have been principally maintained. As a general rule, teleworking and electronic communication was put in place and the premises of the Court are not accessible for the public.

Procedures were adopted for the examination of requests for interim measures under Rule 39 of the Rules of Court, when there is an imminent risk of irreversible harm. The hearings scheduled for March and April were cancelled. At the same time, making use of the written procedure, the Grand Chamber has been able to continue work on some pending cases. As an exception, the six-month time limit for the lodging of applications under Article 35 of the ECHR was suspended for a one-month period, while all time limits allotted in proceedings pending at the time were also suspended for one month. On

9 April 2020, the Court announced that these deadlines had again been extended by another two months to 15 June 2020. This does not apply to the three-month period under Article 43 of the Convention for parties to file a request for referral to the Grand Chamber.

The Court decided not to notify any further judgments and decisions from 26 March 2020 on until normal activity resumes. With the exception of the Grand Chamber and particularly urgent cases, the Court will continue to adopt judgments and decisions but will postpone their delivery until then.

##### ECtHR: Publication of Annual Report and Statistics for 2019

On 29 January 2020, the ECtHR published its [annual activity report](#) and [statistics](#) for 2019. At the close of 2019, the number of applications pending before the Court totalled 59,800. The majority of pending cases were against the Russian Federation (25.2%), followed by cases against Turkey (15.5%), Ukraine (14.8%), Romania (13.2%), and Italy (5.1%).

The number of new cases in 2019 rose on account of an increase in applications against Bosnia-Herzegovina, the Russian Federation, Turkey, and Ukraine. During the year, the Court delivered judgments in 2187 applications (a 20% decrease compared to 2018). A large proportion of these applications were joined, and the number of judgments actually delivered was 884 – a decrease of 13%.

The total number of decisions on interim measures (1570) is stable compared with 2018 (1540). The Court granted requests for interim measures in 145 cases (a 1% increase compared to 143 in 2018), with half of the requests granted in expulsion or immigration cases.

On 31 December 2019, there were 24,424 priority applications, the cases falling within the [top three categories](#). This is an increase of 18% compared to the beginning of the year and can be explained mainly by the higher number of applications concerning conditions of detention in Russia and the lawfulness of detentions in Turkey. The Court and its Registry have continued to implement new methods and procedures in order to speed up the processing of cases.

Among the major events in 2019, the Court delivered its first advisory opinion under Protocol No. 16 and the first infringement proceedings. The Superior Courts Network expanded considerably, now covering 86 superior courts from 39 countries, and dialogue has continued with the Court of Justice of the European Union. Lastly, a delegation from the Court attended the first Forum of Regional Courts, bringing together the three human rights courts: beside the ECtHR, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, which President *Sicilianos* considered to be the main achievement of the year 2019.

### Specific Areas of Crime

#### Corruption

##### GRECO: Fifth Round Evaluation Report on Croatia

On 24 March 2020 GRECO published its [fifth round evaluation report on Croatia](#). The focus of this evaluation round is on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies. The evaluation focuses



particularly on such issues as conflicts of interest, the declaration of assets, and accountability mechanisms (for other reports on this evaluation round, see, e.g., [eucrim 1/2018, pp. 38–39](#); [2/2018, pp. 109–110](#); [4/2018, p. 208](#); [1/2019, pp. 43–44](#) and [3/2019, pp. 182–184](#)). Regarding the report on Croatia, GRECO recognises the available anti-corruption tools but calls for improvements in legislation and practice. Among the key challenges, integrity standards should also apply to persons working for the government in an advisory capacity, in particular members of the government, state secretaries, and assistant ministers. A code of conduct for people in senior positions needs to be adopted. This should be complemented by practical guidance, briefings, and confidential advice on conflicts of interest and other integrity-related matters such as gifts, outside activities, and contacts with third parties.

When recruiting, people in top executive functions should disclose their contacts with lobbyists/third parties and later also disclose situations in which their private interests could conflict with their official functions. A financial statement should be submitted annually to the Commission for the Prevention of Conflicts. The Commission's ability to obtain information should be further enhanced by rules requiring officials to provide the necessary information. In addition, the available sanctions should be reviewed to ensure that all breaches of the relevant law have the appropriate consequences. The procedural immunity of members of the government should be limited by exempting offences related to corruption that are subject to public prosecution.

The public shows a low level of trust towards the police. GRECO therefore recommends preventing corruption risks within the police force by means of the following:

- Abolishing the practice of paying fines directly in cash to police officers;
- Carrying out a comprehensive risk assessment, thereby identifying problems

and emerging trends within the police;

- Conducting a comprehensive risk assessment, thereby identifying problems and emerging trends within the police in order to use this data for the proactive design of an integrity and anti-corruption strategy;
- Updating the code of ethics for police officers to include all relevant integrity issues, supplemented by a manual or handbook;
- Conducting a study on the activities of police officers after leaving the police and, if necessary, introducing rules to limit the risks of the emergence of any conflicts of interest;
- Introducing a requirement for police staff to report integrity-related misconduct encountered in the police service.

#### GRECO: Fifth Round Evaluation Report on Belgium

On 23 January 2020, GRECO published its [fifth round evaluation report on Belgium](#). The lack of an integrity policy or ethical framework for ministers and staff members of their private offices emerged as the most striking problem. There are few regulations on incompatibilities and on issues such as relations to third parties or the phenomenon of “revolving doors.” Therefore, with regard to members of private offices, GRECO recommends regulating their recruitment and employment and establishing an appropriate ethical code and implementation mechanisms. In general, documents produced by ministers and their strategic units should be preserved in a way that makes them available to their successors, and ad hoc reporting should be introduced for persons in top executive functions when conflicts arise between their private interests and their official duties.

With regard to the Federal Police, the report calls for an increase in staff, as the lack of resources has a particular impact on the services for preventing and fighting corruption. In addition, the code of conduct must be updated, and the integrity of candidates must be verified when they change posts, also at regular

intervals throughout their careers. As the most conspicuous gap, the report highlights that a recent change in the law on the right to pursue outside activities has resulted in an almost automatic authorisation. However, this right is to be regulated by objective and transparent criteria in conjunction with effective supervisory arrangements. The internal supervisory system as a whole needs to be more proactive.

#### GRECO: Fifth Round Evaluation Report on France

On 9 January 2020, GRECO published its [fifth round evaluation report on France](#). The report calls primarily for improvements in the effectiveness and practical application of the existing framework to prevent corruption within the executive branch (President of the Republic, ministers, members of private offices, and senior officials) and in the National Police and National Gendarmerie.

Among the positive legislative developments, GRECO commends the establishment of the High Authority for Transparency in Public Life, the French Anticorruption Agency, and the National Financial Prosecution Office. In addition, it welcomes the adoption of a multi-annual anti-corruption plan for the systematic identification of corruption risks and their prevention within ministries, as well as legislation on whistleblowers and the creation of a public register identifying areas where ministers will withdraw from the decision-making process.

The core problem can be summarised as the need to better coordinate certain measures and commitments between the various actors. Accordingly, the multi-annual anti-corruption plan should also involve the Private Office of the President of the Republic, while the codes of conduct to be adopted by the ministries and the Charter of Ethics of the President's private office should be aligned with each other in terms of integrity requirements and sanctions for violations. In order to facilitate transparency and

avoid conflicts of interest, GRECO also proposes the following:

- The public register, which lists the areas in which ministers withdraw from decision-making, should also apply to members of private offices, as they have an impact on the decision-making process;
- In order to specify the role of lobbyists on the executive and decision-making, members of the executive, including the President of the Republic, should publicly and regularly report on their meetings with lobbyists and on the issues discussed;
- The declaration of assets and interests submitted by the President of the Republic should be examined upon taking office in order to avoid any potential conflict of interest.

The report also recommends that corruption cases involving ministers be referred to another court. They currently fall within the jurisdiction of the Court of Justice of the Republic, half of which is made up of parliamentarians.

With regard to the National Police and the National Gendarmerie, the report calls for the development of a comprehensive strategy to prevent corruption. In this context, security vetting should be guaranteed throughout the entire police career and not only at the time of recruitment. This should make it possible to account for changes that might make police force members more vulnerable to corruption risks. In addition, staff rotation should be provided for in sectors that are more exposed to risks of corruption.

Lastly, the implementation of the whistleblower legislation proved to be complex and not entirely effective. The report therefore recommends that the legislation be revised and the staff of the law enforcement branch given more training in this area.

### GRECO: Ad hoc Report on Slovenia

On 18 February 2020 GRECO published an [ad hoc report under Rule 34 on Slovenia](#). During its 83rd General

Assembly (21 June 2019), GRECO was alerted to possible political interference by the legislative branch in relation to public officials, prosecutors, and judges in Slovenia – in a letter from the Head of the Criminal Law Department of the Slovenian State Prosecutor General’s Office. GRECO decided to apply Rule 34 of its Rules of Procedure, which may be triggered in exceptional cases when GRECO receives reliable information on institutional reforms, legislative initiatives, or procedural changes that may lead to serious violations of Council of Europe anti-corruption standards. In its decision, GRECO explicitly recalled that the prevention of corruption in relation to members of parliament, judges, and prosecutors had been the subject of its fourth evaluation round.

The case concerns the setting up of a parliamentary inquiry into the judicial proceedings against a politician who was investigated and prosecuted, together with others, in a number of corruption cases. The requested parliamentary inquiry was aimed at investigating possible politically motivated decisions by officials, prosecutors, and judges involved in the criminal proceedings (some of them still pending) and possible violations of fundamental rights under the ECHR. The establishment of the parliamentary inquiry was approved by the National Assembly and the Minister of Justice on the basis of the Constitution and the Rules of Procedure of the Assembly. Subsequently, the State Prosecutor General filed a request for a constitutional review and a constitutional complaint on the unlawfulness of such legislative intervention in the judiciary. In a preliminary decision, the Slovenian Constitutional Court suspended the implementation of the parliamentary inquiry and emphasised that the law ordering the parliamentary inquiry impeded the constitutional principle of the independence of the judiciary.

GRECO invited the Slovenian authorities to provide further information on this issue, which formed the basis

for the ad hoc report. The report was adopted during the 84th GRECO General Assembly (2–6 December 2019). GRECO reaffirmed that the independence of the judiciary is a cornerstone of the rule of law and that, in principle, appeals against court decisions should be dealt with within the judiciary itself. Given that the Constitutional Court has not yet taken final decisions and that some of the court cases are still pending, GRECO will closely follow the assessment of the situation in order to draw conclusions from the case as regards the adequacy of Slovenia’s anti-corruption and integrity framework.

## Money Laundering

### MONEYVAL: Fifth Round Evaluation Report on Cyprus

On 12 February 2020, MONEYVAL published its [fifth round evaluation report](#) on the effectiveness of the Cypriot anti-money laundering (AML) and countering the financing of terrorism (CFT) regime and its level of compliance with FATF Recommendations. MONEYVAL calls on the Cypriot authorities to take a more “aggressive” approach to combating ML of criminal proceeds obtained outside Cyprus and to adopt a more proactive stance on freezing and confiscating foreign proceeds. MONEYVAL states that Cyprus understands the ML and terrorist financing risks it faces to a large extent; however, the understanding of TF risk is less comprehensive.

As an international financial centre, Cyprus is primarily exposed to external ML threats, as non-residents may seek to transfer criminal proceeds to or through Cyprus, particularly through the Cypriot banking system. They may also seek to use trust and company service providers, known in Cyprus as administrative service providers (ASPs), to facilitate their aims. Although the terrorism threat is considered low in Cyprus, the authorities rate the terrorist financing (TF) risk as medium, due to the fact that the coun-

try is an international financial centre and due to its proximity to conflict areas.

The elements of the Cypriot ML and CFT regime that are functioning include an understanding of the risks involved, a good level of domestic cooperation and coordination, support from the FIU to competent authorities, and timely and constructive assistance to other countries. Among the areas that require major improvements, the report highlights that ML from criminal proceeds generated outside of Cyprus, which pose the highest threat to the Cypriot financial system, need to be sufficiently pursued. Moreover, the competent authorities have not been very proactive in freezing and confiscating foreign criminal proceeds at their own initiative, although they have been instrumental in assisting other countries in doing so.

The country has a developed company formation and administration sector. As regards legal persons, no formal risk assessment has yet taken place, which reduces the authorities' ability to implement better targeted mitigating measures to ensure their transparency.

Weaknesses also exist in the implementation of preventive measures by the trust and corporate services sector as a whole. This has major implications for the availability of beneficial ownership information on legal persons and arrangements registered in Cyprus as well as for the reporting of suspicious transactions.

While significant strides have been made by Cyprus to implement a comprehensive supervisory framework for trust and corporate services providers, MONEYVAL calls for further major improvements. In particular, trust and corporate service providers have no uniform level of understanding the risks involved in evading targeted financial sanctions for TF and the proliferation of weapons of mass destruction. Given their role as gatekeepers, some service providers may not always be in a position to identify individuals or entities seeking to conceal their identity behind complex

structures in order to evade sanctions, constituting a significant vulnerability.

The report states that the risk for the real estate sector has increased exponentially since it has become the preferred choice of investment by which to acquire citizenship under the Cyprus Investment Programme. Therefore, a comprehensive ML and TF risk assessment of the programme is necessary, together with significant enhancement of supervision of the real estate sector, in addition to the introduction of measures to increase the level of compliance of real estate agents with preventive measures.

On the positive side, several measures have been deployed to mitigate some of the main risks effectively. There is a good level of domestic cooperation and coordination between the competent authorities, both on policy issues and at the operational level. The banking sector has become more effective in mitigating risks, which is largely due to the increasingly sound supervisory practices of the Central Bank of Cyprus. The report also positively notes that, where there is terrorism investigation/prosecution, the authorities also investigate the financial aspects and that a number of TF investigations have been carried out and steps taken to increase awareness of terrorist financing risks.

The FIU is well able to support the operational needs of competent authorities through its analysis and dissemination functions. Cyprus has developed mechanisms that are capable of delivering constructive and timely assistance to other countries, both on a formal and an informal basis.

#### **MONEYVAL: Fifth Round Evaluation Report on Gibraltar**

On 12 February 2020, MONEYVAL published its [fifth round evaluation report](#) on the British Overseas Territory of Gibraltar. MONEYVAL calls on the authorities of Gibraltar to better use the tools and mechanisms they have in place to combat ML and FT.

The financial sector in Gibraltar ac-

counts for approximately 20% of Gibraltar's GDP and consists primarily of branches or subsidiaries of international firms. The sector provides services primarily to non-resident clients, including clients from high-risk jurisdictions. The national risk assessments (NRA) conducted by Gibraltar identify the geographic proximity to areas where organised crime is active as a threat. The main sources of criminal proceeds generated domestically are fraud, tobacco smuggling, tax crimes, drug trafficking, and robbery/theft. Electronic money, the trust and corporate service providers sector, and private banking (wealth management) were identified in the 2018 NRA as being among the most vulnerable areas. The FT risk is considered low to medium in Gibraltar. Although several FT investigations were commenced during the period under review (2014–2018), no cases have reached the prosecution phase yet. According to the 2018 NRA, there is no proof that the FT risk has materialized, and there was no evidence that such a risk arises from links to organised criminal groups operating in neighbouring countries.

The authorities have devoted significant effort to raising awareness of the 2018 NRA findings, although their understanding of the results and, in general, of the ML and FT risks varies. The key supervisors have a robust understanding of risks at the sectoral level, but the jurisdiction's overall understanding of ML/FT risks is limited by several shortcomings related to the NRA: in particular, by the limited analysis of quantitative and qualitative data and by underestimating the cross-border threat that Gibraltar faces as an international financial centre. The authorities demonstrated a good understanding of the risk of terrorism, but their understanding of FT risk is affected by insufficient consideration of available data on transactions to/from conflict zones and high-risk jurisdictions.

The FIU has increased its capacity in recent years and extended domestic co-

operation with law enforcement and supervisory authorities. This is one of the strengths of the overall regime.

However, law enforcement authorities have made only limited use of the FIU's analytical products, which therefore had only a marginal impact on the development of investigations into ML and predicate offences. Better results were achieved with regard to FT investigations.

The report recognises improvements in the legal framework, which provides the authorities with a solid basis by which to detect, investigate, and prosecute ML/FT. Still, the effective investigation and prosecution of ML offences remains poorly represented. There were several convictions for self-laundering involving domestic predicate offences, but no successful prosecutions or convictions in relation to third-party and stand-alone ML. This is not in line with the jurisdiction's risk profile.

The legislation provides all that is necessary for the detection, restraint, and confiscation of proceeds and forfeiture of the instrumentalities of crime. Nevertheless, this field needs fundamental improvements as well. In particular,

assets deriving from foreign predicates in complex and international cases remain largely undetected and therefore that crime is being neither restrained nor confiscated.

Law enforcement authorities demonstrated a good understanding of potential FT risks in an international financial centre such as Gibraltar. However, the relative lack of reports on suspicious transactions raises concern as to whether the lack of any prosecutions for TF is in line with the jurisdiction's risk profile.

Through legislation enacted prior to the MONEYVAL on-site visit, Gibraltar now ensures the implementation of the UN's targeted financial sanctions regimes on TF and the financing of proliferation of weapons of mass destruction without delay. The report also reflects that obligations are being implemented to some extent by reporting entities such as financial institutions and designated non-financial businesses and professions (DNFBPs). Their understanding of the ML risk is satisfactory overall but differs across the sectors. On the contrary, the FT risk is not properly understood, and the quality of reporting suspicious transactions remains a concern.

MONEYVAL noted that the supervisory authorities apply licensing and screening measures to prevent criminals and their associates from abusing financial institutions and DNFBPs. However, they target only new applications and not already licensed individuals. Although the competent authorities apply a risk-based approach when carrying out their supervision duties, further improvements are needed in this area. Sanctions for non-compliance with anti-ML and CTF requirements are not considered proportionate and dissuasive.

As regards the misuse of legal persons and arrangements for ML and FT purposes, the report states that Gibraltar has taken a number of measures, but understanding of the risks is limited. Therefore, the establishment of a Register of Ultimate Beneficial Owners was an important preventive measure.

Lastly, the report notes that Gibraltar's legislation has a comprehensive framework for international co-operation, which enables the authorities to provide assistance, receiving generally positive feedback from international partners.

# Articles

Articles / Aufsätze

## Fil Rouge

The ASFJ is a key policy under the Lisbon Treaty, its particular interest being the criminal law field, based on the principle of mutual recognition, in order to promote judicial cooperation between Member States. At the same time, the procedural rights of defendants in criminal proceedings and the protection of victims of crime must be respected. Organic and substantive criminal law perspectives must also be taken into account. The authors contributing to this special issue are part of a research team from different Spanish universities who have been working on these matters for a long time. For this reason, we have focused on Spain as a model in order to analyse the impact of European regulations on the country's national legal system and judicial practice.

First, Prof. *Pérez Marín* outlines a new scenario in the EU and Spain after the creation of the European Public Prosecutor's Office, which makes it necessary to build up a genuine criminal law structure. Second, Prof. *Garcimartín Montero* provides an overview of mutual recognition instruments, with a focus on the 2008 Council Framework Decision related to custodial sentences and measures involving deprivation of liberty and its implementation into Spanish law. Third, Prof. *Tinoco Pastrana* envisages the future of electronic evidence in relation to the proposed EU legislation and its possible adaptation in Spain.

Under the heading of legislative approximation, the procedural rights of defendants in criminal proceedings are addressed. In this context, the fourth contribution by Prof. *Valbuena González* gives a general overview of this topic, from the preparation of the Green Paper in 2003 to the present promulgation of six Directives on the subject, together with the required legal reforms in the Spanish Criminal Procedure Act. Prof. *Vidal Fernández* analyses one of these specific Directives, i.e. Directive (EU) 2016/1919 on legal aid and its implementation in Spain in 2018. Ultimately, Prof. *Sánchez Domingo* deals with the substantive criminal law approach in the EU and Spain using the example of protection of minors and examining specific Directives and their implementation in this area.

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# The European Public Prosecutor's Office

## Protecting the Union's Financial Interests through Criminal Law

Prof. Dr. M<sup>a</sup> Ángeles Pérez Marín\*

The protection of the financial interests of the European Union and the defence of the European financial system are two aspirations that have accompanied the European Union since its foundation. They are part of the nature of the Union, which was born to overcome the economic crisis installed in Europe after the Second World War. Today, such objectives have been recognized in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The undeniable economic imprint of the Union is shown in the different areas in which its legislative activity is carried out. The ambitious financial policy only makes sense on a solid economic and financial context, which requires the protection of the budget and the prevention and sanction of conducts undermining the economic pillars. The European Public Prosecutor's Office (EPPO) marks the turning point in criminal policy that seeks to strengthen the fight against fraud. In this legal context, it is interesting to highlight two aspects. First, the European legislator understands that criminal law is the most effective instrument to combat fraudulent activities affecting the financial interests of the Union; as a consequence, criminal law becomes a *prima ratio* barrier against crime. Second, the EPPO will be the only body to investigate and prosecute such crimes. The objective of this article is to analyse these aspects and reflect on the limits on the material competence attributed to the EPPO.

### I. Introduction

The economy is an essential pillar of the European Union, and as its development largely depends on the solidity of the financial system, it was necessary to ensure that the Member States recognised the legal requirements that justified the Union's decisions to protect the financial interests. Since its foundation, the European Union has been committed to fighting fraud, promoting different policies to prevent any criminal conduct that could affect the economic and financial pillars. We could understand, then, that the decision to provide the legal bases to implement a new criminal structure against fraud is justified by the fact that the action of a single body, with competence to investigate and prosecute in the area of freedom, security and justice, augurs a greater success for this purpose. But the Member States belong to different legal families and each national law is inspired by different legal principles. Therefore, it was essential that the EU Member States accept the anti-fraud solutions offered by the Union in their legal system. As a consequence, it would also become necessary to adopt means or instruments to resolve conflicts of jurisdiction between States and incompatibilities arising between the solutions offered by the Union and those offered by national laws. In this context, the Treaty of Lisbon entailed a qualitative breakthrough in the European Union's fight against economic and financial crime. Proof of this, is the creation of a centralised European Public Prosecutor's Office (EPPO) with exclusive competence to investigate and prosecute such offences. But, one of the most complex aspects was to reflect in Regulation (EU) 2017/1939<sup>1</sup> the nec-

essary balance between the philosophical-legal principles and postulates of the national legal systems and the Union system.

The EPPO was not conceived as an indispensable element in development of the Union's criminal policy, because, in an area based on the principle of mutual recognition and mutual trust, the recognition and implementation of judicial decisions would be very quick. Nevertheless, the States have not achieved the expected results, and the success of the anti-fraud policy has been very limited. Instead, the EPPO was presented as an instrument of added value, around which the legal architecture of future criminal policy tactics for protecting the EU's financial interests would revolve, the measures and decisions of the EPPO becoming immediately effective in the EU Member States.

This article generally aims to provide a better understanding of the importance that this new supranational body to fight EU fraud acquired in the current legal context of the protection of the EU's financial interests. Against this background, it analyses three aspects: Based on the decision of the European legislator, which raised criminal law to the category of the most effective instrument to protect financial interest, the article first examines the evolution of the fight against fraud and the legal environment in which the EPPO operates, and second, the basic concept of the fight against fraud as provided in the Treaty of Lisbon. The third section takes a closer look at EPPO's material competence before final remarks on the subject matter are made.

## II. The Legal Environment in which the EPPO Operates

To put the above-mentioned preliminary considerations in a nutshell, the fight against fraud affecting the European Union's financial interests is undoubtedly one of the most important objectives of Europe's current criminal policy.<sup>2</sup> At the moment, we have a legal system made up of administrative and criminal rules, instruments, and bodies that serves the purpose of countering fraud affecting the European Union and recovering the amounts that have been defrauded. In order to accomplish these objectives, it was necessary to involve the Member States for two reasons: first, the European Union lacked criminal sanctioning legitimacy before the entering into force of the TFEU and, therefore, it could only operate through the States; second, in order to protect the Union's financial interests, Member States remain essential for the effective functioning of the system provided for in the TFEU.

Let us briefly call to mind the most recent developments in the fight against fraud in the EU. Since the Convention on the protection of the European Communities' financial interests (PIF Convention),<sup>3</sup> with its Protocols, and the 1997 Action Plan to combat organized crime,<sup>4</sup> which took shape in Joint Action 98/742/JHA on corruption in the private sector,<sup>5</sup> the rules on fighting fraud progressed towards the current legislation. Today, Art. 325 TFEU imposes an obligation on Member States to create an internal procedural regime to protect the financial interests through the adoption of dissuasive and effective measures, without establishing specific criteria or methods in this regard. However, the introduction of the EPPO into the organizational structure of the fight against fraud and the fact that it is (exclusively) competent for investigating fraud crimes (in their many forms) means an alteration of the rules and principles in that the domestic legal order enables specification of the competent institutions and bodies for investigation and prosecution.<sup>6</sup> Following the mandate given in Art. 86 TFEU, the domestic legal authorities will be excluded in favor of the EPPO, as the centralized body of the European Union has exclusive competence to investigate crimes affecting the Union's financial interests.

We should not forget that economic crime has evolved, and this evolution has had a strong influence on the selection of legal strategies to combat such crime and prevent its results. These forms of crime entail extraordinarily sophisticated methods, and new opportunities in the financial system to mask such illicit activities are regularly found. Logically, the absence of controls on economic traffic between financial entities operating within the European Economic Area is due to mutual trust between Member States. But these circumstances have led to an increase in the use of financial channels for laundering illegally obtained profits, just as they have also been

used to finance terrorist activities within the Union's territory. The obligations for financial institutions, established by the EU's AML legislation<sup>7</sup>, to adopt a set of compulsory compliance measures,<sup>8</sup> in order to control risky financial operations, means that financial institutions have also become, to some extent, instruments of criminal law in the fight against fraud. Therefore, the degree of involvement and commitment in this area is not only binding on the European Union and on the State authorities (judicial, police, or administrative). Indeed, both public and private financial institutions (and certain professionals who manage several types of economic transactions or may be aware of doubtful aspects of their clients' financial activities) must also act as bodies of the criminal law system and are entrusted with the task of being a kind of first response in preventing fraud.

Given the need to protect the financial interests, the European legislator has been forced to regulate aspects of certain conduct that has traditionally been linked to fraudulent activities. This is the case, for example, for corruption, which is sometimes clearly linked to fraud. Thus, the Commission's report on anti-corruption policy, published in February 2014, recognised that corruption affected all Member States without exception and that its cost to the Union's economy at the time amounted to some €120 billion per year.<sup>9</sup> In the same way, and as the Commission already indicated in 2004 in its *Communication to the Council and the European Parliament on the prevention of and fight against organised crime in the financial sector*,<sup>10</sup> such corruption offences include money laundering, financial fraud, and counterfeiting of the euro. Therefore, in 2014, based on the *Pericles 2020 Programme*, Regulation (EU) No. 331/2014,<sup>11</sup> established in its Art. 12(1) that the Commission shall take measures "ensuring that (...) the financial interest of the Union shall be protected by the application of preventive measures against fraud, corruptions and any other illegal activities (...)." Art. 3 of the same Regulation also indicates that the principal objective shall be to prevent and combat counterfeiting and related fraud, thus enhancing the competitiveness of the Union's economy and securing the sustainability of public finances.

In the same vein, Directive 2014/62/EU<sup>12</sup> on the protection of the euro and other currencies against counterfeiting by criminal law was approved, providing the anti-fraud strategy with a new instrument. It stressed the need to criminally investigate acts of counterfeiting by means of more effective rules and allowing for the establishment of common penalties for the most serious offences. In 2017, the PIF Directive<sup>13</sup> specified that certain types of conduct against the common tax system, and against budget expenditure and revenue items, should be made punishable in all Member States by laying down common minimum penalties and specifying the substantive ele-

ments of criminal law that must be incorporated into national legal systems (minimum standards). In 2019, the European Parliament recognized that “many Member States do not have specific laws against organised crime, while its involvement in cross-border activities and sectors affecting the EU’s financial interests, such as smuggling or counterfeiting of currency, is constantly growing.”<sup>14</sup>

The importance of the measures outlined above has not been lost. In order to strengthen the fight against fraud, the European Union has increased its budget by €181 million for the next multiannual financial period 2021–2027. It supposes evident support for the efforts of the Member States in the fight against corruption and other irregularities affecting revenue and expenditure items.<sup>15</sup> In addition, the legislation on fraud committed through non-cash means of payment<sup>16</sup> was also recently addressed.

In this context, the provision of Art. 22(3) of Regulation (EU) 2017/1939 makes sense: “[t]he EPPO shall also be competent for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of paragraph 1 of this Article.” But the competence, with regard to such criminal offences, may only be exercised in conformity with Art. 25(3). In any case, Regulation 2017/1939 opens up a new stage in the fight against fraud.<sup>17</sup>

### III. The Fight Against Fraud for Protecting Financial Interests in the Treaty of Lisbon

The provision on the harmonisation of criminal law – Art. 83(1) TFEU –, refers to a list of criminal areas that do not explicitly include the crime of fraud against the Union’s financial interest. Paradoxically, the EPPO has been designed as the only body with exclusive competence to investigate such crimes – Art. 86(2) TFEU. We have to resort to the “Financial Provisions” of the Treaty to find the regulation concerning the fight against fraud in Art. 325 TFEU. Specifically, the referential rule contained in Art. 310(6) TFEU directs us to Art. 325, which establishes, in its first paragraph, the guidelines for building the legal architecture that will protect the EU’s financial interests. As we can read in this article, the Member States may be the first barrier to controlling crime, and the measures adopted by national legislators for this purpose may have a clear dissuasive effect. The effectiveness of the measures chosen should definitely place Member States in a position to offer the protection required by the Union.

Based on the principle of assimilation, paragraph 2 of Art. 325 TFEU demands that the Member States protect the Union’s financial interests against fraud with the same diligence and

the same measures they would apply to combating domestic fraud. For its part, paragraph 3 lays down the duty of the Member States to coordinate their actions and strategies through the Commission, which is the coordinating and monitoring body (as in the pre-Lisbon phase).

In any case, we should take into account the differences between the regulation on judicial cooperation in criminal matters – Arts. 82 to 86 TFEU – and the regulation on the fight against fraud – Art. 325 TFEU (placed in the economic context of the Treaty). It seems that the legislator intended to make an express statement on the separation between the crimes of Art. 83 and the crimes of fraud affecting the financial interests. The latter seemingly deserves special treatment within the criminal law because this is the only instrument that offers the dissuasive measures required by Art. 325. Moreover, if Art. 86(1) and (2) TFEU – the provisions on judicial cooperation in criminal matters – expressly state the competence of the EPPO to investigate fraud against the Union’s financial interests,<sup>18</sup> regardless of the fact that this legal proceeding is found in the financial provisions of the TFEU, it is easy to understand why the legislator believed that the fight against fraud must be tackled by means of criminal law, giving it such importance that a specific criminal law enforcement body was created for this purpose. The creation of such measures and bodies for crimes of different nature never had been proposed before. In conclusion, we can understand that, for these financial offences, the concept provided for in the Lisbon Treaty combines criminal cooperation with a certain nuance of criminal integration, clearly advancing the initial idea of approximation or harmonization of the legislation.

### IV. Material Competence of the EPPO

The provision on the material competence of the EPPO – Art. 22 of Regulation (EU) 2017/1939 – makes reference to the offences in the PIF Directive “as implemented in national law.” In this Article, the European legislator takes on the mandate established in Art. 83(1) TFEU, which requires the establishment of minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. However, the European legislator is also aware of the differences between national laws. This supposes that the transposition of the Directive’s rules will not be homogeneous and, therefore, the application of the original mandate of the EPPO based on the Directives will not be homogeneous either. Since Regulation (EU) 2017/1939 subjects the EPPO’s actions to the regulation of the system in which it operates, this approach must accept occurring procedural differences, e.g., the regulations on (gathering and use of) evidence, and the possibilities for participation of



victims or other parties in the criminal process. Such procedural differences may constitute obstacles that are difficult to overcome when attempting to ensure identical protection of the rights at stake. So, there will be differences in the criminal investigation (depending on the State where the EPPO investigates) and there will be differences in the judgement (depending on the transposition of the PIF Directive).

Coming back to the EPPO's material competence, we can see that there is a connection between fraud – as the generic area of crime defined in Art. 1 of the PIF Directive and Art. 22 of Regulation (EU) 2017/1939 that the EPPO is competent for – and other illegal acts. Effectively, the Union's financial interests can be damaged not only by acts that directly manifest fraud, but also through activities that mask the same fraudulent purpose or cause the same effect without, apparently, constituting fraud.

The link between other offences and fraud may lead to an alteration of the initial competence to investigate – or may even extend the EPPO's competence. The offences provided for in the PIF Directive do not usually occur autonomously and in isolation, because some of them, like money laundering, e.g., require at least a previous illicit activity whose proceeds are to be introduced into licit economic trafficking. These “laundered” amounts may be intended to finance other illegal activities. Hence, Art. 3(4) lit. d) of the 4<sup>th</sup> Anti-Money Laundering Directive<sup>19</sup> – when defining the notion of “criminal activity” as a predicate offence of money laundering that triggers measures for the prevention of the illegal use of the financial system – makes reference to “fraud affecting the financial interests of the Union” and thus indirectly refers to the PIF Directive. The PIF Directive itself states in Art. 4(1) that money laundering, as described in Art. 1(3) of the 4<sup>th</sup> AML Directive, may be one of the acts affecting the Union's financial interests. This possible link between money laundering and infringement of the Union's financial interests is the point at which the EPPO's competence with regard to such offences is triggered. We must also interpret the provisions of the PIF Directive in this context.

As a consequence, the European legislator established a system of general protection against fraud by adopting a set of rules that both protect the financial system and prevent its misuse through laundering the illicit proceeds of crime or financing terrorist activities in operations that mask fraud. In the latter case, we can see that there is an additional connection between laundering and fraud, as terrorist organisations are financed through illegal activities, which, by their very nature, are directly linked to acts of fraud in their various forms.

Ultimately, it is worth highlighting that many cross-border criminal activities mentioned in Art. 83(1) TFEU are con-

nected to fraud, because trafficking in arms, drugs, or human beings, as well as organised crime generate a type of fraud affecting the Union's budget items. Therefore, the competence of the EPPO may also be activated in those criminal areas described in Art. 83 TFEU, if the connection between those crimes and any other activity that affects the financial interests of the Union are proved, under the condition that the other requirements foreseen in the Regulation (EU) 2017/1939 were met.

Closer inspection in this context reveals that Art. 22(3) and Art. 25 of Regulation (EU) 2017/1939, which regulate the EPPO's competence if offences are inextricably linked with the criminal offences affecting the financial interests of the Union, are provided for in the PIF Directive (Art. 22(1) of the Regulation). We learn from these provisions that the EPPO's competence is given under the following conditions:

- There is an inseparable (inextricable) link between a criminal offence and a PIF offence;
- The criminal conduct that can be subsumed in one of offences provided for by the PIF Directive (as outlined in Art. 22(1) of the Regulation) is sanctioned by the national law of the affected State with a higher penalty than the sanction provided for the linked criminal offence at issue.

However, the Regulation (EU) 2017/1939 has established one exception to the above rule: if the PIF offence were not considered the main offence, the competence to investigate will shift away from the EPPO. And this, regardless of the penalties proscribed for each of the related crimes.

If several victims are affected by the criminal offence(s), Art. 25(3) lit. b) of the Regulation attributes competence to the EPPO only when the damage caused to the Union's financial interests exceeds the damage caused to another victim. If this is not the case, the domestic authorities have competence to investigate the crime. However, this latter rule is subject to a further exception: the EPPO is always competent as regards the fraud offences referred to in Art. 3(2) lit. a), b) and d) of the PIF Directive.<sup>20</sup> Yet another exception in relation to Art. 25(3) lit. b) is provided for in Art. 25(4) of the EPPO Regulation, which recognizes the competence of the EPPO if it appears that the EPPO is better placed to investigate or prosecute.

## V. Final Remarks

The European Union's strategy in the fight against fraud has shifted towards criminal law. In order to defend the Union's financial system, dissuasive criminal measures and other advanced legal options must be used. The effectiveness of such measures is not only based on sanctioning of the criminal conduct affecting the Union's financial interests, but also on the

probability of suffering a criminal sanction. That sanctioning perspective acts as a preventive and dissuasive barrier against crime.

The prevention of financial fraud is problematic, however, and requires a multidisciplinary solution. The choice of a single type of measure, e.g. criminal measures, should not discriminate others, e.g., solutions in the administrative law field.<sup>21</sup> It is necessary to create a comprehensive protection barrier against crime. Otherwise, the barrier would be broken allowing authors of a crime to find legal loopholes or systematic vulnerabilities. Faced with this circumstance, the legislators both at the European and national levels have implemented a set of measures – *criminal compliance measures* –, that must be incorporated and managed by entities operating in the financial system. These actors are obliged to control the legality of financial operations or economic transactions, minimizing in this way crime risks to the financial system. Consequently, the effectiveness of the fight against fraud depends on the real interconnection between measures agreed in the field of criminal law and those that must be adopted in the field of civil, commercial, and administrative law. This approach especially articulates with the decision to set up the European Public Prosecutor's Office. This is not only because of the novelty that this new body implies and the expectations (and doubts)

that it generates, but also because of the special relationship between the EU Member States and the European Union. In this context, we should keep in mind that the EPPO has a double facet: it is a body of the European Union – the first body of the Union responsible for criminal prosecution<sup>22</sup> – independent from the Member States, and, paradoxically and simultaneously, requiring close cooperation with the Member States.

It is certain that the true value of the EPPO cannot be proven through theoretical analysis and studies. It is necessary to wait for its operational activity. However, today we can already observe that the European Union and the Member States have taken a step that will change the foundations of the national criminal and procedural laws. The EPPO cannot be considered an isolated body because it assumes competences that hitherto belonged to national law enforcement bodies and it exercises its powers through national law. Therefore, we are heading for a merger of Union criminal law and the national criminal laws. In the context of the fight against fraud affecting the EU's financial interests, we are witnessing a progression towards the integration of criminal law systems. Obviously, the European Union and its Member States are walking a path marked by difficulties, but it is essential to advance towards a greater degree of liberty, security, and justice.



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1 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *O.J.* L 283, 31.10.2017, 1.71.

2 See also M.A. Pérez Marín, "Instrumentos orgánicos de cooperación judicial: en especial, la Fiscalía Europea", in M. Jimeno Bulnes (ed.), R. Miguel Barrio (coord.), *Espacio judicial europeo y proceso penal*, Tecnos, Madrid, 2018, pp. 29–55.

3 Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, *O.J.* C 346, 27.11.1995, 48.

4 Report of 29 October 1997 on the Action Plan to combat organised crime (742/197 – C4-0199/97), PE 223.427/fin.

5 *O.J.* L 358, 22.12.2018, 2.

6 V. Moreno Catena, *Fiscalía Europea y Derechos fundamentales*, Tirant lo Blanch, Valencia, 2014, p. 342.

7 In this regard, see, especially, 4<sup>th</sup> Directive [Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering, repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (*O.J.* L 143, 5.6.2015, 73–117)], which was partially amended by 5<sup>th</sup> Directive [Directive 2018/843 of the European Parliament and of the Council of 30 May 2018, *O.J.* L 156, 19.6.2018, 41–74].

8 See M. Gómez Tomillo, *Compliance penal y política legislativa*, Tirant lo Blanch, Valencia, 2016; M. González, "Compliance: más allá de la Responsabilidad Penal", (2016) 919 *Actualidad jurídica Aranzadi*, 11; E. de Urbano Castrillo, "La responsabilidad penal del compliance officer", (2016) 5 *Revista Aranzadi Doctrinal*, 205–214; I. Colomer Hernández, "Régimen de exclusión probatoria de las evidencias obtenidas en las investigaciones del compliance officer para su uso en un proceso penal (1)", (2017) *Diario La Ley*, 9080 <<https://laleydigital-laleynext-es.us.debiblio.com>> accessed 1 January 2020; M. Ruiz de Lara, (coord.), *Compliance penal y responsabilidad civil y societaria de los administradores*, Wolters Kluwer, Madrid, 2018.

9 Report from the Commission to the Council and the European Parliament – EU anticorruption report, 3.2.2014, COM(2014) 38 final.

10 Communication from the Commission to the Council and the European Parliament on the prevention of and fight against organised crime in the financial sector, 16.4.2014, COM(2004) 262 final.

11 Regulation (UE) No. 331/2014 of the European Parliament and of the Council of 11 March 2014 establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (The 'Pericles 2020' programme) and repealing Council Decisions 2001/923/EC, 2001/924/EC, 2006/75/EC, 2006/75/EC, 2006/76/EC, 2006/849/EC and 2006/850/EC, *O.J.* 103, 5.4.2014, 1–9.

12 Directive 2014/62/EU of the European Parliament and of the Council

of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA, *O.J. L* 151, 21.5.2014, 1–8.

13 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud affecting the financial interests of the Union by means of criminal law, *O.J. L* 198, 28.7.2017, 29–41.

14 European Parliament resolution of 31 January 2019 on the Annual Report 2017 on the protection of the European Union's financial interests – fight against fraud (2018/2152(INI)).

15 See press release “EU Budget: €181 million to strengthen the fight against fraud affecting de EU Budget”, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_3967](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3967), accessed 2 November 2019.

16 Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, *O.J. L* 123, 10.5.2019, 18–29.

17 M.A. Pérez Marín, “La estructura orgánica de la Unión Europea en la lucha contra el fraude y contra la delincuencia organizada transnacional: presente y futuro”, (2017) 5 *Revista Internacional Consinter de Direito*, 15–17 <<https://revistaconsinter.com/es/revistas/ano-iii-numero-v/>> accessed 10 December 2019. See by the same author, *La lucha contra la criminalidad en la Unión Europea: el camino hacia una jurisdicción penal común*, Atelier, Barcelona, 2013.

18 On this same matter, see P. Csonka, A. Juszczak, E. Sason, “The establishment of the European Public Prosecutor's Office: The Road from

Vision to Reality”, (2017) *eu crim*, 125–135; L. Kuhl, “The European Public Prosecutor's Office – More Effective, Equivalent and Independent Criminal Prosecution against Fraud?”, (2017) *eu crim*, 135–143.

19 Cf. note (10).

20 Art. 3(2) lit. a) and b) of Directive 2017/1371 defines the criminal offences of fraud affecting the Union's financial interests in respect of non-procurement-related and procurement-related expenditure. Art. 3(2) lit. d) of the Directive defines the criminal conduct of fraud affecting the Union's financial interests in respect of revenue arising from VAT own resources. However, the harmonisation of this VAT fraud by the Directive only applies to serious offences. Art. 2(2) of the Directive defines as “serious offence” the necessity that intentional acts or omissions are connected with the territory of two or more Member States of the Union and involve a total damage of at least € 10.000.000. Art. 22(1) of the EPPO Regulation established corresponding restrictions on the competence of the EPPO to prosecute these VAT offences.

21 OLAF is indispensable to protect the EU budget and to prevent fraud affecting the financial interests. See “Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee of the regions and the court of auditors – Commission Anti-Fraud Strategy: enhanced action to protect the EU budget”, 29.4.2019, COM(2019) 196 final.

22 Eurojust and Europol can also be considered “criminal bodies” of the EU, however they still have only cooperation and coordination tasks in the area of criminal law.

## Mutual Recognition of Judgements in Criminal Matters Involving Deprivation of Liberty in Spain

Prof. Dr. Regina Garcimartín Montero\*

**Council Framework Decision 2008/909/JHA of 27 November 2008 “on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union” was implemented in Spain by the introduction of new rules into the Mutual Recognition Act. Achieving social rehabilitation is the core objective of the Framework Decision. This has also practical consequences for the implementation of this instrument, for example requiring ties on the part of the sentenced person with the executing State. Some of the most controversial procedural issues in Spain are analysed in this article, including the consent of the sentenced person and the grounds for the adaptation of the sentence by the executing State under Spanish law.**

### I. Legal Framework in Spain

The 1999 European Council meeting in Tampere was the starting point for the approval of a significant number of European regulations dealing with mutual recognition in criminal matters during the first decade of the new millennium. These regulations led to a change in the legislative techniques of European instruments in Spain. Previously, each mutual recognition instrument was implemented by means of an individual transposition act. After 2014, all European instruments were

included in a new statute, which aims to integrate the legislation of the different EU instruments on mutual recognition into a single act (called Mutual Recognition Act). This technique aims to guarantee better transposition and greater clarity, as claimed by the Spanish legislator in the preamble to the Act.<sup>1</sup> From 2014 onwards, every EU mutual recognition instrument has been transposed by an amendment to the Mutual Recognition Act. Every instrument is regulated in one of the titles of the Act, and three chapters can be found under each title: the first chapter regulates general provisions, the second one the

rules to be followed when Spain is the issuing State, and the third establishes the regulation to be applied when Spain is the executing State. For some instruments, there is a fourth chapter that includes additional dispositions.

Spain missed the transposition deadline for Framework Decision 2008/909/JHA, which was to have been implemented by December 2011; the implementation law was finally approved in 2014. Arts. 63 to 92 of the Mutual Recognition Act provide for the recognition and execution of criminal judgements involving deprivation of liberty. The present article assesses whether the Spanish legislator achieved the main purposes of this European instrument; it will also outline where – in my opinion – the Spanish legislator has not succeeded in properly reflecting the Framework Decision. The main features of the regulation on the mutual recognition of judgements imposing deprivation of liberty according to the Spanish Mutual Recognition Act will be explained.

## II. Links of the Sentenced Person with the Executing Member State

Framework Decision 2008/909/JHA pursues the social rehabilitation of the sentenced person. Both the Framework Decision and the Spanish Mutual Recognition Act do not define the meaning of “social rehabilitation;” therefore, it is up to the judge to decide whether the circumstances that enable the rehabilitation are met in each individual case. In my opinion, however, the Spanish law has failed to accurately reflect the connection between achieving social rehabilitation and linking the sentenced person with the executing State, i.e., Spain, which will be further elaborated in this section.

Recital 9 of the Framework Decision provides a number of guidelines that may be helpful for the authority issuing a request for the transfer of a sentenced person. In this context, social rehabilitation is easier to accomplish if the sentenced person has some links with the State in which the sentence is to be served. Recital 9 establishes that the competent authority of the issuing State has to take into account the place of residence of the sentenced person’s family, together with any linguistic, cultural, social, and economic links to the executing State. The mere place of residence of the sentenced person is not included among the criteria that the issuing authority must consider. Likewise, Art. 4 of Framework Decision 2008/909/JHA – establishing the criteria for forwarding a judgement and a certificate to another Member State – refers to the Member State “of nationality of the sentenced person in where she or he lives” as the most suitable criterion. But the proper meaning of the expression “Member State [...] where she or he lives” can be found in Recital 17, which establishes that “this indicates

the place to which that person is attached based on habitual residence and on elements such as social or professional ties.” Recital 9 was probably inspired by the ECJ’s judgement of 17 July 2008, Case C-66/08, *Szymon Kozłowski*,<sup>2</sup> in which the Court established a person’s connection with the executing State within the context of the Framework Decision on the European Arrest Warrant.<sup>3</sup> The aim of the European legislator was presumably to avoid situations, in which the mere fact of “staying” in one country is considered a stronger link rather than the sentenced person’s culture, profession, or family relations.

The meaning of the wordings “Member State where the sentenced person lives” or “where the person stays” used in Framework Decision 2008/909/JHA is not as precise as “the place of residence.” Since these former notions are undefined legal concepts, it is at the judge’s discretion to decide whether cultural, professional, and family links – which are not always readily apparent – are given in each case. This decision involves both the issuing State (which decides whether it endorses the transfer) and the executing State (which takes a decision on the acceptance of the petition of the issuing State). From the perspective of the issuing State, the significant role of prison officers and social workers should also be taken into account in its consideration, because they are required to know well the circumstances and possible benefits for the rehabilitation of the inmate. In fact, Spanish statistics show that the number of petitions for transfer varies considerably from one prison to another, depending on the initiative of prison officers.<sup>4</sup>

Given the aforementioned framework of Union law, the Spanish Mutual Recognition Act did not always take into account these nuances in meaning in the words “Member State where a person lives.” Only Art. 67 of the Act, which regulates the exceptions for the necessary consent of the sentenced person, refers to economic, professional, or family links with the executing State.<sup>5</sup> Hence, this rule imparts the proper meaning of “place of residence” or “place where the person lives” precisely in the same sense given by Framework Decision 2008/909/JHA. Unfortunately, most of the articles of the Mutual Recognition Act are not as accurate as Art. 67. As an example of this inappropriate transposition, Art. 68, which regulates the consultation about the transmission of a certificate, merely establishes that the consultation will be sent to the State where the sentenced person lives, regardless of whether his or her roots are in any other Member State. This is the case as well of Art. 71, which stipulates the criteria for forwarding a certificate: the provision only refers to the Member State of “usual residence.” And another unfortunate example can be found in Art. 91, which transposes the content of Art. 25 of Framework Decision 2008/909/JHA, referring to the enforcement of a

criminal sentence as a consequence of refusing an EAW on the basis of Arts. 4(6) and 5(3) of the Framework Decision on the European Arrest Warrant; Art. 91 does not even include “residents” but instead refers to the nationality of the sentenced person.<sup>6</sup> Of course, in this case and despite its wording, Art. 91 must be interpreted in conformity with Art. 25 of Framework Decision 2008/909/JHA in connection with Arts. 4(3) and 5(3) of Framework Decision 2002/584/JHA on the European Arrest Warrant; this means that, if the European Arrest Warrant is refused, a sentenced person who has links with Spain (even though he or she is a national of another Member State, or lives or has his/her residence in another Member State), shall serve the sentence of imprisonment in Spain in order to avoid impunity.<sup>7</sup>

### III. Spain as Issuing State: Requirements of the Judgement Forwarded from Spain

Arts. 66 to 76 of the Mutual Recognition Act regulate the situation when Spain is the issuing State. The provisions, *inter alia*, deal with the consent of the sentenced person, his/her transfer, and the procedural requirements to be met by the competent Spanish court. The opinion of the sentenced person is a particularly sensitive issue, since it is mandatory to request it (not to be confused with the consent of the sentenced person). Spain also included a provision on the absence of pending criminal proceedings that does not belong to the Framework Decision 2008/909/JHA. These two issues will be analysed in more detail in the following.

#### 1. The sentenced person’s consent to the transfer

Art. 66 of the Mutual Recognition Act contains the criteria for forwarding a criminal judgement from Spain, whose issuing authority is the Prison Supervision Court (or Juvenile Court in case of convicted minors).<sup>8</sup> The essential element of Art. 66 is regulation of the sentenced person’s consent to the transfer.<sup>9</sup> The sentenced person must give his/her consent with legal assistance and with the services of an interpreter (if the person does not understand Spanish). In practice, it seems advisable that the sentenced person become acquainted with the circumstances of the enforcement in the executing State so that he/she can take an informed decision, although neither Framework Decision 2008/909/JHA nor the Mutual Recognition Act require provision of this information.<sup>10</sup>

Nonetheless, the provision leads to several legal questions. *Fernández Prado* concludes that consent cannot be withdrawn, but he makes an exception for cases in which a change in circumstances may justify a new decision.<sup>11</sup> Apparently,

however, the consent of the sentenced person to the transfer is the general rule. *De Hoyos* points out that Art. 67 of the Mutual Recognition Act transposing Art. 6(2) Framework Decision 2008/909/JHA includes many common exceptions to the consent, which implies that the rule specifying mandatory consent on the part of the sentenced person can be easily undermined.<sup>12</sup> It must, however, be taken into account that Art. 67(3) of the Mutual Recognition Act establishes the right of the sentenced person to state his or her opinion about the transfer, either orally or in writing (in accordance with Art. 6(3) of Framework Decision 2008/909/JHA). Even when the consent of the sentenced person is not required, the opinion of the sentenced person may be decisive, since it can provide valuable information for assessing the achievement of the purpose of social rehabilitation.<sup>13</sup> Reception of the sentenced person’s statement by the judicial authority is mandatory, and the Spanish court must strictly observe legal requirements in order to guarantee that the sentenced person’s opinion has been duly obtained (i.e., on an informed basis; if necessary, with the support of an interpreter, etc.).

#### 2. Absence of pending criminal proceedings

The Spanish issuing authority (usually the Prison Supervision Court) has to make sure that there is not another criminal conviction under appeal against the same person before any other criminal court. The court can obtain this information by means of the SIRAJ (a register for the support of the administration of justice). *Ruiz Yamuza* points out that this requirement is not found in Framework Decision 2008/909/JHA, but was added by the Spanish legislator.<sup>14</sup> This provision also triggers some legal questions. Some authors argue, for instance, that this rule includes not only conviction judgements under appeal but also pending proceedings, since the purpose of the provision, on the one hand, is to enable the defendant to attend the court hearings in pending criminal proceedings. On the other, its purpose is to reach a level of certainty about convictions against one person, given that – since the competence for all the pending convictions lies with one single court (the one that first received the petition about the transfer of the sentence) – contradictory decisions on the transfer can be avoided.<sup>15</sup>

### IV. Spain as Executing State: Consequences of Application of the Spanish Law to the Enforcement and Adaptation of the Sentence

International law on the transfer of sentenced persons regularly provides two systems if it comes to the enforcement of a sentence handed down abroad in the requested state: either the requested state (in terms of Union law: the executing State)

continues the enforcement as it was established in the sentence handed down in the requesting state (namely the issuing State) or it adapts the sentence as if the sentence had been delivered under the national law of the requested state. Framework Decision 2008/909/JHA has, as a rule, chosen the first option.<sup>16</sup> However, a sentence to deprivation of liberty may require some adjustments, since the law governing its enforcement is that of the executing State. The Framework Decision allows adaptation in two scenarios, i.e., either if the sentence is incompatible with the law of the executing State in terms of its duration (Art. 8(2)) or if the sentence is incompatible with the law of the executing State in terms of its nature (Art. 8(3)). Spain implemented these provisions in Art. 83 of the Mutual Recognition Act.

In the first scenario, the Spanish executing authority is allowed to adapt the sentence if the duration of deprivation of liberty exceeds the maximum established under the Spanish Criminal Code. According to Art. 83(1) of the Mutual Recognition Act, the judge may alter the conviction to the maximum for the same type of crime in these cases. The second scenario for adaptation of the sentence – the incompatibility of the punishment included in the criminal sentence in terms of its nature – allows the Spanish court to adapt the sentence by taking into account the crime committed. When applying the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, the Spanish Supreme Court warned about the risk of broad interpretation of these two exceptions, as it could change the current system (continuing the enforcement) and open the door for a change in the content of the criminal judgement in practice.<sup>17</sup> The same statement can be applied towards correct interpretation of the Mutual Recognition Act as far as the EU scheme is concerned.

Other problems concerning a possible change in the content of the sentence may arise under Spanish law regarding the application of the General Prison Act, even when the sentence has not been adapted. According to the Spanish regulation on criminal enforcement, each case of a person sent to prison is analysed by a committee and, as a consequence, each inmate is classified according to a three-degree system, the first degree being for the most dangerous inmates. Convicted persons who are classified as third-degree inmates are closest to their release, so that they may enjoy longer leaves and the possibility of an earlier release (not only according to the conviction of the sentence but also to their behaviour in prison). As a consequence of the decision of the committee, a sentenced person transferred to Spain for the enforcement of a foreign criminal sentence, may enjoy an open prison regime from the very outset considering the Spanish prison system of degrees.<sup>18</sup> Although this release is not the result of a legal adaptation of the sentence by the executing authority, it can be described as

a *de facto* adaptation, since there is actually a change in the enforcement of the sentence pursuant to the Spanish criminal enforcement legislation.<sup>19</sup>

The Spanish enforcement law in criminal matters may also hinder the correct application of Art. 17(2) of Framework Decision 2008/909/JHA. The problem lies in the various jurisdictional competences and is as follows: The competent authority for the execution of transfer requests in Spain is the Central Examining Magistrate's Court located in Madrid. It is responsible for the execution of sentences for the entire national territory. According to Art. 17(2) of Framework Decision 2008/909/JHA, the competent authority of the executing State may be requested to inform the issuing State about the possible provisions on early or conditional release. Depending on the answer given, the issuing State is allowed to accept these provisions or withdraw the certificate. This provision was transposed to Art. 78 of the Mutual Recognition Act with a similar wording. As mentioned above, however, criminal enforcement is entrusted to the Prison Supervision Courts.<sup>20</sup> At the moment at which the executing decision is taken by the Central Examining Magistrate's Court, the judge may not yet be aware of the prison regime that is to be applied to the sentenced person in a Spanish prison. This means that the judge at the Central Examining Magistrate's Court might not know about the possibility of an early release, because this decision is taken under the jurisdiction of the Prison Supervision Court. Therefore, at this juncture, the Central Examining Magistrate's Court cannot provide any accurate information to the issuing State in accordance with Framework Decision 2008/909/JHA. In my opinion, in order to avoid this paradoxical situation, the Spanish Central Examining Magistrate's Courts should inform the issuing State about the possible consequences of application of the General Prison Act (see above).

## V. Conclusions

Transposition of EU criminal law instruments is usually done quite literally in Spain, which avoids misinterpretations. Nevertheless, the Spanish legislator has not always achieved a successful transposition of Framework Decision 2008/909/JHA on EU mutual recognition of prison sentences and prisoner transfers. Regarding the regulation of this mutual recognition scheme, there are mismatches between the wording of the Framework Decision and the Mutual Recognition Act that transposes Union law in Spain. This particularly concerns the links of the sentenced person with the executing State. Framework Decision 2008/909/JHA stresses the importance of taking into account various criteria when linking the sentenced person with the executing State, e.g., family, work, or linguistic ties (among others), considering that the place where

the person lives is the place where he/she has these roots. The Spanish Mutual Recognition Act does not specify all these circumstances, since most of its provisions merely refer to the place of residence. Therefore, there are several conceivable issues where interpretation of the Spanish regulation in conformity with European legislation is necessary.

Interestingly, the Mutual Recognition Act adds a requirement that is not found in Framework Decision 2008/909/JHA. Whenever Spain is the issuing State, the court must inform itself about any other criminal proceedings in which a judgement of conviction is under appeal against the person to be transferred. The scope of this rule is debated in literature, however, since it intends to avoid contradictions about different convictions concerning the same person.

If we look at Spain as executing State, some problems may arise as a consequence of the peculiarities of Spanish penitentiary law. A committee analyses the circumstances of the convicted person at the moment he/she enters prison, and the decision of this committee may lead to the application of an open prison regime. This may result in a de facto adaptation of the foreign sentence. In addition, this scheme may lead to another problem: when the issuing State asks for information about the possibilities of an early or conditional release, it is impossible for the Spanish competent court, which decides on this request, to know the decision that will be taken by the committee. In practice, the court can only inform the issuing State of the possible consequences of the application of Spanish penitentiary law.

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1 Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea (BOE A-2014-12029).

2 See 2.3.2 of the Handbook on the transfer of sentenced persons and custodial sentences in the European Union, *D.J. C* 403, 29.11.2019, 2 (p. 12).

3 Para. 54 of the judgement states: “it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State”. In the case, Poland had issued an EAW against Polish national Mr Kozłowski, who “lived predominantly in Germany” at the moment of his arrest and one year prior. He occasionally had some jobs in Germany, but he had no family in the country and barely spoke German; on the other hand, he had grown up in Poland and worked there until two years before moving to Germany. Mr Kozłowski did not consent to his surrender to Poland. The ECJ upheld the arguments of the referring German court with the aforementioned argumentation.

4 F.-G. Ruiz Yamuza, “Comentario del primer supuesto práctico de transmisión de una sentencia condenatoria por un tribunal español, en aplicación de la Ley 23/2014, en relación con la Decisión Marco 2008/909/JAI sobre reconocimiento mutuo de sentencias que imponen penas u otras medidas privativas de libertad”, (2015) *Revista General de Derecho Europeo*, 13, 25.

5 See Art. 6 of Framework Decision 2008/909 for the system when the consent of the sentenced person is not required.

6 M. Fernández Prado submits that the Spanish legislator forgot to include the residence of the sentenced person in Art. 91; in strict terms, this omission would also affect the proper meaning of the State of residence or State where the sentenced person lives. See M. Fernández Prado, “Cuestiones prácticas relativas al reconocimiento de resoluciones que imponen penas o medidas privativas de libertad”, in: C. Arangüena Fanego (coord.), *Reconocimiento mutuo de resoluciones penales en la Unión Europea*, Aranzadi, Cizur Menor, 2015, p. 131.

7 Spanish legal scholars recognize the lack of clarity of the Spanish text and agree in the need to interpret the Mutual Recognition Act in conformity with Framework Decision 2008/909/JHA. See M. De Hoyos Sancho, “El reconocimiento mutuo de resoluciones por las que se impone una pena o medida privativa de libertad: análisis normativo”, in: C. Arangüena Fanego (coord.) *Reconocimiento mutuo de resoluciones penales en la Unión Europea*, Aranzadi, Cizur Menor, 2015, p. 109; J. Nistal Burón, “La «adaptación» de una condena para su cumplimiento en España

cuando ha sido impuesta por un tribunal extranjero. Criterio del Tribunal Supremo y su encaje dentro del nuevo marco legal europeo”, (2019) *Revista de Derecho Migratorio y Extranjería*, 11; and F.-G. Ruiz Yamuza, “Comentario ...” *op. cit.* (n. 4), p. 13.

8 The competence of the Prison Supervision Courts relates to all matters of imprisonment. This competence is also justified in cases of international transfer, because any petition for transfer will not suspend imprisonment once the sentence has been delivered and the defendant convicted to deprivation of liberty. There is at least one Prison Supervision Court in each province and their competences (according to Art. 94 of the Organic Law on the judiciary) are “matters concerning the enforcement of terms of imprisonment and security measures, the issue and enforcement of instruments for the mutual recognition of criminal rulings within the European Union that are assigned to them by law, judicial review of the disciplinary power of prison authorities and the protection of the rights and benefits of prison inmates.”

9 Art. 66 implements Art. 6 together with Art. 4(1) of Framework Decision 2008/909/JHA.

10 M. De Hoyos Sancho, *op. cit.* (n. 7), p. 116.

11 M. Fernández Prado, *op. cit.* (n. 6), p. 135.

12 M. De Hoyos Sancho, *op. cit.* (n. 7), p. 116.

13 F.-G. Ruiz Yamuza (*op. cit.* (n. 4), p. 17) gives the example of a sentenced person who apparently has family links in the executing State but is nevertheless in a relationship in the issuing State or in a third State. Or perhaps there is an upcoming move on the part of his family that may change the State where he has family links in the short term.

14 F.-G. Ruiz Yamuza, *op. cit.* (n. 4), p. 33.

15 M. Fernández Prado, *op. cit.* (n. 6), p. 133.

16 J. Nistal Burón, *op. cit.* (n. 7), p. 3.

17 STS 820/2013, 17 October 2013.

18 J. Nistal Burón, *op. cit.* (n. 7), p. 10.

19 J. Nistal Burón, *op. cit.* (n. 7), p. 11.

20 See *supra* n. 8.

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# The Proposal on Electronic Evidence in the European Union

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This article examines the origin, foundations, and main features of the proposal of the European Union to facilitate cross-border access to electronic evidence, which was presented by the European Commission in April 2018. The creation of advanced solutions for the transnational gathering of electronic evidence in the EU is a very current and important issue, and is complemented with other actions carried out at an international level. Respect for the principle of proportionality must be particularly relevant in order to achieve the proper functioning of the new scheme. The main idea is that certificates of judicial orders will be transmitted directly to the legal representatives of online service providers. These new instruments of judicial cooperation (consisting of a Regulation and a Directive) aim at facilitating and accelerating judicial authorities' access to data in criminal investigations in order to assist in the fight against crime and terrorism. They should reduce response times in comparison to the instruments currently in place; service providers will be obliged to respond within ten days or, in urgent cases, within six hours. The proposal comes in reaction to the acute need to provide authorities with cutting-edge instruments for obtaining cross-border access to data.

## I. Introduction – Setting the Scene

The creation of an instrument for transnational access to electronic evidence in the EU is a pressing issue, given its relevance to the fight against terrorism, cybercrime, and transnational crime in its entirety. The Area of Freedom, Security and Justice (AFSJ) needs to be able to vigorously respond to these forms of crime; establishing security is one of top policy priorities of the EU and it is closely linked to the European Research Area, in which security concerns are of paramount importance.<sup>1</sup>

In April 2018, the European Commission proposed new rules enabling police and judicial authorities to obtain electronic evidence more quickly and more easily. They were included in the “Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters” and the accompanying “Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.”<sup>2</sup>

The fight against terrorism is the fundamental issue that drove the proposal. The background of the proposal dates back to the year 2016 and the terrorist attacks in Brussels of 22 March 2016. The “Joint Declaration of EU Ministers for Justice and Home Affairs Ministers and Representatives of EU Institutions” two days after the attacks stressed the need to “find ways, as a matter of priority, to secure and obtain more quickly and effectively digital evidence, by intensifying cooperation

with ... service providers that are active on European territory, in order to enhance compliance with EU and Member States' legislation and direct contacts with law enforcement authorities.” It was further announced that the Council meeting in June 2016 would identify concrete measures to address this complex matter.<sup>3</sup> Subsequently, on 9 June 2016, the Justice and Home Affairs Council adopted the “Conclusions on the improvement of criminal justice in cyberspace and on the European Judicial Network on Cybercrime,” which expressly highlighted the increased importance of electronic evidence in criminal proceedings, especially with regard to terrorism.<sup>4</sup> The European Council further pushed for adoption of EU legislation on e-evidence. At its meeting of 23 June 2017,<sup>5</sup> the Council emphasized that cross-border access to electronic evidence was deemed fundamentally important in the fight against terrorism. On 20 November 2017, the European Council asked the Commission to make a legislative proposal in early 2018.<sup>6</sup>

When issuing the legislative proposal on 17 April 2018, the European Commission stressed the growing importance of electronic evidence for criminal proceedings, the fact that cross-border requests for such evidence currently predominate in criminal investigations, and that criminals and terrorists cannot be allowed to exploit modern communication technologies to conceal their activities and evade justice. It was also highlighted that the authorities continue to work with complicated methods and that, although judicial cooperation and mutual assistance are necessary, the process is currently too slow and complex, enabling criminals to resort to state-of-the-art technologies. Authorities need to be equipped with 21st century techniques, given that approximately two thirds



of electronic evidence is located in another State (both within and outside the EU), a fact that hinders both the investigation and the prosecution.<sup>7</sup>

The EU is not the only actor striving for new legislative measures in the area of electronic evidence. Terrorism is a global phenomenon, and access to electronic evidence also takes on a global dimension; therefore, the measures are not limited to the European level. The conventional judicial cooperation is important in the relationship with third States, mainly with the USA, where a great part of the electronic data is circulated and/or stored. At the Justice and Home Affairs Council in June 2018, the issue of transnational access to electronic evidence was once again addressed. Consensus was reached on continuing contacts and negotiations with the USA,<sup>8</sup> given the enactment of the CLOUD Act.<sup>9</sup> On 6 June 2019, the Council gave two mandates to the Commission for the negotiation of international agreements on electronic evidence, which incorporated relevant guarantees as regards privacy and procedural rights: (1) a mandate to negotiate an agreement with the US to facilitate access to electronic evidence, taking into consideration conflicts of law and common rules for the direct and reciprocal transfer of evidence, and (2) a mandate to enter into negotiations with the Council of Europe on a second Additional Protocol to the Budapest Convention on Cybercrime.<sup>10</sup>

The connection between these international developments and the EU proposal on e-evidence builds on the fact that these measures pursue facilitating access to electronic evidence when the evidence circulates or is stored outside the EU. The aim of the aforementioned agreements is to simplify and grant greater effectiveness to the mutual legal assistance regime by reducing the deadlines for access to electronic evidence and allowing for direct cooperation with service providers. The Council highlights the need for these agreements to coexist with the Regulation and the Directive on electronic evidence currently being processed in the EU.<sup>11</sup> Therefore, the agreements being negotiated by the European Commission would additionally boost a more homogeneous international regulation in this area.

The following two sections focus on an analysis of the proposed European Production and Preservation Orders. This includes a description of their main features, the legislative technique being used for the establishment of the new orders, and the most relevant recent aspects that the plans entail in the field of judicial cooperation (II.). Furthermore, the importance of the principle of proportionality is highlighted, both as regards the EU instrument as well as the instruments discussed at the international level (III.). It will be stressed that application of the proportionality principle will lead to a major improvement in this specific field of judicial cooperation.

## II. The European Production Order and the European Preservation Order

The European production order (EPdO) and the European preservation order (EPsO) allow the judicial authority of a Member State, the issuing State, to directly order a provider offering the service in the EU to hand over or store the electronic evidence. The EPdO implies an extraordinary simplification of the procedure, with a significant reduction in deadlines for delivery of the evidence, i.e., ten days or – in emergency situations – six hours (Art. 9(1) and (2) of the text in the version of the Council's general approach,<sup>12</sup> which will be taken as a reference in this article). This considerably accelerates the obtainment of information compared to 120 days for the European Investigation Order (EIO) and 10 months in the area of (conventional) mutual legal assistance.<sup>13</sup>

These orders will be governed by an EU Regulation, which underscores that the EU is not willing to let effective use of these instruments be hampered by late transposition or even non-transposition on the part of the Member States – risks that exist within the scope of EU Directives, as recently happened with Directive 2014/41/EU on the European Investigation Order. The EU is setting a clear direction, as this legislative technique was also instrumental in Regulation (EU) 2018/1805 on freezing and confiscation orders and in the creation of the European Public Prosecutor's Office through Regulation (EU) 2017/1939. For the appointment of the legal representatives of service providers, however, who are essential for the execution of orders, a Directive with an 18-month transposition deadline has been chosen.<sup>14</sup> This could be an obstacle, since legal representatives play a fundamental role in the collection and preservation of electronic evidence.

Significant differences can be found between the EPdO/EPsO and mutual recognition instruments in place. The certificates for orders are to be notified directly to the service provider in the executing State, not to an authority there. The intervention of the executing authority is limited to one-off cases, such as notifications when the EPsO refers to data on persons not residing in its territory (Art. 7a (1) of the Council's general approach), the withdrawal of immunities or privileges (Art. 7a (3) of the Council's general approach), and the transfer of orders and certificates to the executing authority in the event that the addressee fails to comply without giving reasons accepted by the issuing authority, in which case the executing authority will decide on recognition no later than five working days (Art. 14 of the Council's general approach).

European Production and Preservation Orders are certainly not an instrument in which an authority in the executing State recognises the order issued by the authority in the issuing State,

without requiring any further formality, and executes it in the same way and under the same circumstances as if it had been ordered in the executing State – unlike the main principles for instruments of mutual recognition in criminal matters. Hence, the EPdO and the EPsO cannot as such be categorised as mutual recognition instruments,<sup>15</sup> but are instead instruments of judicial cooperation in criminal matters that require a “high level of mutual trust” for their proper functioning (Recital 11 of the Council’s general approach). There is also no reference to the classic list of 32 offences for which the double criminality check – a common element in the mutual recognition instruments – will not be carried out. In other words, the EU’s legislative approach is not an instrument of mutual recognition per se, but a new type of cooperation instrument based on advanced form of mutual trust.

In terms of the substantive contents of the proposal, the following aspects are worth highlighting: Orders should be necessary and proportionate, and they shall be issued in accordance with the principle of equivalence; they are restricted to criminal proceedings, but both orders can be issued for all criminal offences and for most types of data stored, such as subscriber data and access data, unless they relate to traffic data, transactions, and content. With regard to the latter data, and only specifically for the EPdO, the threshold is set such that the abstract penalty for the facts is at least three years’ imprisonment<sup>16</sup> or that specific offences be related to or committed through cyberspace and terrorist offences. In the case of orders issued for the enforcement of a custodial sentence or a security measure involving deprivation of liberty, the duration of the deprivation of liberty must be at least four months (Arts. 5 and 6 of the Council’s general approach).

### III. The Issue of Proportionality

With regard to the application of the principle of proportionality, I believe that it should have a fundamental position and function, constituting the backbone of the whole system in the same way as the principle of necessity. According to the proposed Regulation, these principles will be applied in accordance with the CFR.<sup>17</sup> The fundamental rights of the subjects concerned shall be preserved, and the remedies guaranteed.<sup>18</sup> The issuing authority will be responsible for ensuring the compliance of these principles<sup>19</sup> (Recitals 12, 13, 24 and 46 of the Council’s general approach). In the context of the e-evidence proposal, the application of the principles of proportionality and necessity requires an assessment in each individual case (Recital 24 of the Council’s general approach). Given the invasive nature of the measure (Recitals 29 and 43 of the Council’s general approach), this implies assessing whether the order is limited to what is strictly necessary in order to achieve its ob-

jectives, taking into account the impact on the fundamental rights of the person whose data are being requested. Personal data obtained through e-evidence may be processed only when necessary and proportionate for the purposes of prevention, investigation, detection, and prosecution of crimes; the application of criminal sanctions; and exercise of the right of defense (Recital 57 of the Council’s general approach). Thus, the principle of necessity – despite having data protection implications – is used in the context of EPdO and EPsO primarily as part of the principle of proportionality (proportionality stricto sensu).

On many occasions, the proposal for a Regulation mentions the principle of proportionality and the impact on fundamental rights. Manifestations of the principle of proportionality are the guarantees provided for and specified in the provision on the EPdO in conjunction with traffic, transaction, and content data, since they are limited to offences involving at least a three-year maximum sentence (with the exception of cybercrime- and terrorism-related offences).<sup>20</sup> While orders must include justification of necessity and proportionality according to the purpose of the particular proceedings, certificates will not include this information so as not to jeopardize investigations (Arts. 5, 6, and 8 of the Council’s general approach). Respect for the principle of proportionality is also included in the system of confidentiality and providing information to the user (Art. 11 of the Council’s general approach) and in the system of sanctions for service providers (Art. 13 of the Council’s general approach).

If we apply the proportionality principle, there is a need for detailed regulation. It should take account of the penalty limits and other specific requirements to avoid the use of orders for minor offences, as in the case of other mutual recognition instruments, e.g., the EIO.<sup>21</sup> The effective application of the principle of proportionality could be at risk if orders are allowed for all types of criminal offences. In particular, the exception made to cybercrime-related offences involving the obtainment of traffic, transaction, and content data through EPdOs is too broad. Therefore, it follows that penalty limits and specific requirements fostering proportionality no longer constitute a concept with imprecise boundaries that allows for judicial discretion, as already pointed out in the legal literature.<sup>22</sup> The application of the principle of proportionality would help integrate the element of justice and promote the fairness of the entire system. This is necessary because there is an urgent need to reconcile the preservation of security within the AFSJ – which the new legislation on e-evidence is designed for – with the elements of freedom and justice in order to prevent these commitments from being deteriorated.<sup>23</sup> As the creation of an instrument for the transnational collection of electronic evidence is considered urgent, it is all the more necessary that both justice and freedom be put to good use in the AFSJ.

Reconciliation between security and justice is also a premise at the Council of Europe level. When interpreting the European Convention on Human Rights as regards access to data and the exchange of information between Member States for the purpose of combating transnational crime and terrorism, the ECtHR, on the one hand, recognises such access and exchanges as essential, due to the sophisticated methods of data evasion by criminal networks. On the other hand, the ECtHR defines the limits and proportionality of electronic surveillance. Given the difficulties States have in combating these forms of crime, the Court accepts the legitimate interest of Member States to take a firm position, but it also stresses that both access to and transfer of data must respect the principle of proportionality.<sup>24</sup>

It is also important to take these considerations seriously if it comes to the above-mentioned establishment of cooperation schemes on e-evidence at the international level. Indeed, they are reflected in the “Addendum to the Recommendation for a Council Decision” authorizing the opening of negotiations with a view towards concluding an agreement with the USA on cross-border access to e-evidence (see also I.).<sup>25</sup> This Addendum highlights the importance of respect for the principle of proportionality and due process. It stresses the relevance of the principles of necessity and proportionality when differentiating between the various categories of data, and it additionally advocates the application of these principles in the field of privacy and data protection.<sup>26</sup> The relevance of the principle of proportionality is also expressed in the “Addendum to the

Recommendation for a Council Decision” to negotiate on a Second Additional Protocol to the Budapest Convention on Cybercrime;<sup>27</sup> it establishes that access to data shall be necessary and proportionate.<sup>28</sup>

#### IV. Conclusions

The transnational gathering of evidence remains a pending issue in the EU, which has largely shifted to electronic evidence. The link to the agreements that the EU is negotiating with the USA on electronic evidence is of particular interest. The agreement might bring civil law and common law closer together, which has been a burning issue in studies of the criminal procedure model for decades, e.g., as regards the question of whether common criteria can be established for rules on the exclusion of evidence. It was argued in this article that the principle of proportionality must play an essential role, including the situation if third States are involved in the gathering of electronic evidence. It was also stressed that the EU proposal on e-evidence is not an instrument of mutual recognition per se, since the envisaged orders are not recognised and executed by judicial authorities in another EU Member State, but by representatives of (private) service providers. This new instrument therefore highlights the evolution of judicial cooperation in the EU. One should not lose sight of the necessary links that exist outside the EU, given the global dimension of the new and more serious forms of crime.

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1 See “Proposal for a Decision of the Council on establishing the specific programme implementing Horizon Europe – the Framework Programme for Research and Innovation (2021–2027) – Partial General Approach”, Council doc. 8550/19 of 15 April 2019. The “Civil Security for Society” cluster has a leading role in the new programme. The fundamental premise is a vision of Europe that protects, empowers, and ensures security.

2 COM(2018) 225 final and COM(2018) 226 final. For an analysis of the proposals, see also S. Tosza, “The European Commissions’s Proposal on Cross-Border Access to E-Evidence”, (2018) *eu crim*, 212–219.

3 Cf. point 6 of the Joint Declaration, available at: <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/24/statement-on-terrorist-attacks-in-brussels-on-22-march/>>, accessed 20 May 2020.

4 The conclusions are available at: <<https://www.consilium.europa.eu/media/24300/cyberspace-en.pdf>>, accessed 20 May 2020.

5 Cf. <<https://www.consilium.europa.eu/es/press/press-releases/2017/06/23/euco-conclusions/>>, accessed 20 May 2020.

6 See <<https://www.consilium.europa.eu/media/31666/st14435en17.pdf>>, accessed 20 May 2020.

7 In this regard, <[https://europa.eu/rapid/press-release\\_IP-18-3343\\_es.htm](https://europa.eu/rapid/press-release_IP-18-3343_es.htm)>, accessed 20 May 2020.



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8 M. Jimeno Bulnes, “Capítulo XXXV. La prueba transfronteriza y su incorporación al proceso penal español”, in: M. I. González Cano (ed.), *Orden Europea de investigación y prueba transfronteriza en la Unión Europea*, 2019, p. 719, pp. 759–761. The reference to the USA stands out as one of the fundamental clues to the legislative proposal, given that it receives the greatest number of requests from the EU, making it the impetus for and “leitmotiv” of the proposal.

9 For the CLOUD Act, see the article by J. Daskal, “Unpacking the CLOUD Act”, (2018) *eu crim*, 220–225.

10 See <[https://europa.eu/rapid/press-release\\_IP-19-2891\\_es.htm](https://europa.eu/rapid/press-release_IP-19-2891_es.htm)>, accessed 20 May 2020.

11 Cf. <<https://www.consilium.europa.eu/en/press/press-releases/2019/06/06/council-gives-mandate-to-commission-to-negotiate-interna->

tional-agreements-on-e-evidence-in-criminal-matters/>, accessed 20 May 2020

12 Cf. Council doc. 15292/18/19 of 12 December 2018; a version of the general approach of December 2018 supplemented by respective annexes was published on 11 June 2019, Council doc. 10206/19.

13 Factsheet e-evidence, <[https://europa.eu/rapid/press-release\\_MEMO-18-3345\\_en.htm](https://europa.eu/rapid/press-release_MEMO-18-3345_en.htm)>, accessed 20 May 2020, and Arts. 1 and 2 of the general approach to Regulation of the European Parliament and of the Council on European production and preservation orders for electronic evidence in criminal matters, Council doc. 10206/19 (11 June 2019) agreed by the Council (Justice and Home Affairs) at its meeting on 6 June 2019. The references to the proposal for a Regulation allude to this latest version of June 2019.

14 Abs. 7 of the Proposal for a Directive (as agreed in the general approach of the Council, Council doc. 6946/19 of 28 February 2019, adopted on 8 March 2019).

15 As regards the European Investigation Order, there have even been questions as to whether this is really a mutual recognition instrument in the strict sense of the word; it seems that judicial cooperation in criminal matters needs to explore a reinterpretation of the mutual recognition principle and innovation as regards the forms of cooperation.

16 It is precisely the establishment of a minimum penalty limit with respect to access to data that is relevant for the application of the proportionality test. This is reflected in the ECJ judgement of 2 October 2018, case C-207/16, *Ministerio Fiscal*. In its Opinion on the seriousness of the offence and the principle of proportionality, the Advocate General noted that it is impossible to determine the proportionality solely on the basis of the abstract penalty, given the differences between the Member States. The new Regulation would therefore clarify this point.

17 As already noted by C. Cocq and F. Galli, “The Use of Surveillance Technologies for the Prevention, Investigation and Prosecution of Serious Crime”, (2015), 41, EUI Working Papers, Department of Law, <<https://cadmus.eui.eu/handle/1814/37885>>, accessed 20 May 2020, 1, p. 48, with respect to the European regulatory framework on privacy, data retention affects the rights to privacy and the protection of personal data, fundamental rights under Arts. 7 and 8 CFR. Any limitation or intrusion must be

clearly regulated, necessary, and proportionate to the purpose and must preserve the essence of the limited fundamental rights.

18 R.M. Geraci, “La circolazione transfrontaliera delle prove digitali in UE: La proposta di Regolamento e-evidence”, (2019) *Cassazione penale*, 3, 1340, 1353. The execution of the orders affects a plurality of subjects, such as the person who owns the data, the service providers, and, possibly, third States.

19 M. Stefan and G. González Fuster, “Cross-border Access to Electronic Data through Judicial Cooperation in Criminal Matters. State of the art and latest developments in the EU and the US”, (2018) 7, *CEPS Papers in Liberty and Security in Europe*, <<https://www.ceps.eu/ceps-publications/cross-border-access-electronic-data-through-judicial-cooperation-criminal-matters/>> accessed 20 May 2020, 1, 30. It is particularly problematic that the offences to be affected by the proposed Regulation have not been precisely determined, as there is no verification of legality, necessity, and proportionality by the judicial authorities of the executing State.

20 Recitals 29,31,32 of the Council’s general approach, *op. cit.* (n. 12).

21 See L. Bachmaier, “Prueba transnacional penal en Europa: la Directiva 2014/41 relativa a la orden europea de investigación”, (2015) 36, *Revista General de Derecho europeo*, 15–19, noted this risk in the EIO, as minor offences are not excluded from its scope.

22 On this matter, T.I. Harbo, “Introducing procedural proportionality review in European Law”, (2017) 30, *Leiden Journal of International Law*, 25, 25–26.

23 See E. Herlin-Karnell, “The domination of security and the promise of justice: on justification and proportionality in Europe’s ‘Area of Freedom, Security and Justice’”, (2017) 8 (1) *Transnational Legal Theory*, 79, 83.

24 ECtHR, 13 September 2018, *Big Brother Watch and others v. the United Kingdom*, Application. nos. 58170/13, 62322/14 and 24960/15.

25 Cf. <<https://data.consilium.europa.eu/doc/document/ST-9666-2019-INIT/en/pdf>>, accessed 20 May 2020.

26 Cf. section III (Safeguards), paras. 1, 5.b) and 6.b).

27 Cf. <<https://data.consilium.europa.eu/doc/document/ST-9664-2019-INIT/en/pdf>>, accessed 20 May 2020.

28 See in particular I.b) (Objectives) and II.4 (Stronger safeguards for existing practices of transborder access to data).

## Harmonization of Procedural Safeguards of Suspected and Accused Persons

### State of the Matter in Spain

Prof. Dr. Félix Valbuena González\*

**After giving a brief overview of the major developments in the harmonization of procedural safeguards for suspected and accused persons in the European Union, this article focuses on the legal reforms that were necessary to implement four of the six adopted EU Directives on procedural safeguards into Spanish national law. This concerns the transposition of the Directives on interpretation/translation, on information, on access to a lawyer and communication with third parties, and finally on legal aid. The main aspects of the transpositions into the Spanish legal order are explained and deviations from the requirements of the Directives pointed out. Pending developmental issues, the article enables the reader to reflect the true status of the suspect and accused person in Spain after the reforms that were triggered by the EU acts.**

## I. Brief Introduction into the Harmonisation of Procedural Safeguards in the EU

For more than fifteen years since the Commission presented its Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union in 2003,<sup>1</sup> the European Union has been trying to harmonize this area in Member States. The 2003 Green Paper closely analyzed the standards of procedural safeguards in the European Union. It was confirmed that the cited safeguards already enjoyed recognition at a legal level in most of the Member States; their application in practice was dissimilar, however, a fact that justified joint action.

From then until now, we have witnessed two different stages. The first stage is represented by the 2004 Commission proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, which remained unsuccessful because Member States could not agree on it in the Council.<sup>2</sup> After the failure of this proposal, a new course on the matter was initiated through the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.<sup>3</sup> Unlike the 2004 proposal, the Roadmap preferred to address each of the procedural guarantees separately, based on their importance and complexity, with the pretext of granting each of them an added value.<sup>4</sup> As a result of this Roadmap, a total of six Directives were adopted. However, the first three Directives were adopted in the period 2010–2013; a second development period culminated in the publication of three other Directives in 2016. One aspect from the Roadmap has not taken up yet, namely that relating to detention and provisional detention (measure f) of the Roadmap).

It should be noted that two of the three Directives adopted in 2016 have yet to be transposed into the Spanish legal system: Directive 2016/343/EU of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings,<sup>5</sup> and Directive 2016/800/EU of 11 May 2016, on procedural safeguards for children who are suspects or accused persons in criminal proceedings.<sup>6</sup> The following sections of the article will deal with the most relevant aspects of the new regulation in Spain on safeguards for suspects or accused persons in criminal proceedings, as a consequence of the already transposed four Directives.

## II. Right to Translation and Interpretation

The transposition into Spanish law of Directive 2010/64/EU of 20 October 2010 on the right to interpretation and transla-

tion in criminal proceedings,<sup>7</sup> was delayed by a year and a half and took place through amendment of the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*, hereinafter LECrim) by means of the Organic Law 5/2015 of 27 April 2015.<sup>8</sup> The law introduced a new chapter into the LECrim entitled “On the right to translation and interpretation,” (Arts. 123 to 127 LECrim). The new provisions recognize the rights enshrined in the Directive as part of those enjoyed by the suspected person (Art. 118 lit f) LECrim). Lastly, Art. 416.3 incorporates the professional secrecy of translators and interpreters; the norm stipulates the dispensation from the obligation to testify as a witness in criminal proceedings as regards the facts with respect to which the translators’/interpreters’ intervention referred to.

Prior to this reform, the right to interpretation was practically limited to interrogation by police or judge, both in the pre-trial phase and during the oral trial. The right to translation was restricted to informing the detainee of his or her rights by providing a form in the most common languages.<sup>9</sup> With the transposition of the Directive, the right to interpretation and translation is enhanced; it is designed as a guarantee for those under investigation or for accused persons who do not understand or speak Spanish or the official language (e.g., Catalan, Basque, etc.) in which the procedure is being carried out. The right also extends to persons with sensory disabilities. The assistance of an interpreter is now guaranteed from the beginning of the procedure; it is expressly mentioned that the assistance must be guaranteed at the first interrogation by the police, the courts, or the public prosecutor’s office<sup>10</sup> as well as in all court hearings. It also covers conversations that the suspected or accused person may have with his or her lawyer. Unlike the Directive – which does not specify the mode of interpretation – the Criminal Procedure Act indicates its preference for simultaneous and consecutive interpretation, both of which require the physical presence of the interpreter next to the suspected or accused person. If this is not possible, the assistance of the interpreter may be provided by videoconference or any other means of communication.

The translation of documents is limited to those that are essential to guaranteeing the right of defense of suspected and accused persons who do not speak or understand the official language (Spanish or Catalan, Basque, etc.), in which the proceedings are to be conducted. These documents include the order of imprisonment, the indictment, and the sentence – ultimately, any other document according to the circumstances of the case if it is so declared by a judicial decision. In accordance with the Directive, Art. 123.4 LECrim requires the translation to be carried out within a reasonable period of time and, to this effect, provides that the applicable procedural periods will be suspended as soon as the translation is agreed by the judge, court, or public prosecutor’s office.

Both interpretation and the translation are free of charge, meaning that expenses incurred from the exercise of such rights will be borne by the public administration, regardless of the outcome of the proceedings. Unlike the right to interpretation, however, the right to translation can be waived by the suspect or accused person. The Directive requires the waiver to be duly registered (Art. 7), an aspect that the Spanish legislator has not yet considered.

It should be noted that Spain has failed to meet the quality requirements for interpretation and translation as set out by the Directive. On the one hand, anyone who knows the required language is permitted to be involved as an interpreter, without Spanish regulations requiring a degree, the justification being reasons of urgency that are not specified. On the other hand, Spain has failed to comply with the obligation to create an official register of independent translators and interpreters who are appropriately qualified.<sup>11</sup>

### III. Right to Information

The deadline for transposing Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings<sup>12</sup> into the national law of the Member States was 2 June 2014. The transposition into Spanish law took place late and successively through different legal reforms. With a delay of almost a year, the transposition began by means of the aforementioned Organic Law 5/2015 of 27 April 2015 that modified the Criminal Procedure Act (LECrIm).<sup>13</sup> Organic Law 13/2015 of 5 October 2015 continued the transposition six months later, modifying the Criminal Procedure Act anew.<sup>14</sup> Ultimately, the Act 13/2018 of 11 June 2018,<sup>15</sup> was adopted with the aim of guaranteeing the right to information to the requested person in the case of a European Arrest Warrant.

Prior to the reform, most of the safeguards related to the right to information were already recognized in the Criminal Procedure Act. However, transposition of Directive 2012/13 on the right to information in criminal proceedings in Spain led to improvements on the position of the suspected or accused person and, in particular, the subject deprived of liberty.<sup>16</sup> With regard to the person under criminal investigation, there are two outstanding novelties: first, there is now the obligation to update information on the facts the person was charged with and on the subject matter of the investigation in the face of any relevant change emerging during the investigative procedure by the Spanish investigative judge. Second, in order to safeguard the right of defense, the Spanish legislator introduced the express recognition of the right to examine any actions in due time and, in any case, prior to the taking of a statement (Arts. 118.1 a) and b) LECrIm).

The advances made with respect to the detainee are particularly important, since the catalogue of rights about which he/she must be informed has been broadened, and the way in which the information must be provided has been significantly improved. The catalogue was extended with two new rights: the right to access the material of the proceedings that are essential to challenge the legality of the detention or deprivation of liberty and the detainee's right to communicate by telephone, without undue delay, with a third party of his or her own choice (Art. 520.2 d) and f) LECrIm). Possibility to access the essential materials of the proceedings for the purpose of challenging the detention, which is of particular relevance,<sup>17</sup> the Spanish law deviates, however, from the Directive. While Art. 7(1) of the Directive requires Member States to surrender any documents related to the specific file that are in the possession of the competent authorities and that are fundamental to effectively challenging the legality of the detention to the detainee or his/her lawyer, the Spanish law only gives the right to access these documents. Another element of the Spanish law is that the information must be provided in written form in clear language, adapted to the addressee in view of his or her personal circumstances, such that the detainee can keep the letter of rights in his/her possession and consult it at any time during the detention.

### IV. Right of Access to a Lawyer

Within the set deadline, Spain transposed Directive 2013/48/EU of 22 October 2013 “on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.”<sup>18</sup> The transposition initially took place through the amendment of the Criminal Procedure Act by means of Organic Law 13/2015 of 5 October 2015.<sup>19</sup> However, Act 3/2018 of 11 June 2018 completed an aspect omitted at the time of transposition in 2015, namely the right to double defense of the requested person in case of a European Arrest Warrant and surrender procedure; i.e., the appointment of a lawyer in the issuing country for the person detained in Spain.<sup>20</sup>

Prior to the reform, the regulation of access to a lawyer in Spanish law was already quite extensive, since representation of the defendant by a lawyer was mandatory except for minor offences.<sup>21</sup> If the suspect or accused does not appoint a lawyer, legal counsel is appointed *ex officio*. Some aspects of the right of access to a lawyer have been improved, however, following transposition of the EU instrument. This includes particularly the introduction of a confidential interview between the lawyer and the person under investigation, prior to the interrogation

of any authority, including the police authority (Art. 520.6 d) LECrim). This possibility had previously only been provided for in criminal proceedings against minors. The transposition also clarified the right by expressly stating that the presence of the lawyer must be taken into account in all statements made by the person under investigation as well as in proceedings involving identity parades, face-to-face confrontations, and reconstruction of the scene of a crime. This aims at informing the suspect of the consequences of giving or refusing consent in the face of such proceedings (Art. 520.6 b) and c) LECrim). Furthermore, the reform has been used as an opportunity to improve conditions for the provision of *ex officio* legal representation by reducing the time available to the lawyer to go to the detention facility from eight to three hours from the moment he receives the order (Art. 520.5 LECrim).

Other novelties include the requirements to be met for a waiver of access to a lawyer in order to effectively handle those cases in which the waiver is permitted, i.e., crimes against road safety. This means that clear and sufficient information must be given to the person concerned in simple and understandable language about the content of his/her right of access to a lawyer and about the consequences of the waiver; the waiver can be revoked at any time (Art. 520.8 LECrim). Finally, the confidential nature of communications between the person under investigation and his/her lawyer is expressly recognized;<sup>22</sup> an exception is made in the two following cases: solitary confinement and when there are signs that the lawyer is involved in criminal acts that are the subject of the investigation.

As the title of Directive 2013/48 indicates, the European instrument does not only cover the right of access to a lawyer but extends to other rights of defendants in connection with the possibility of communicating with the outside world during deprivation of liberty: the right to inform a third party and the right to communicate with third parties and consular authorities. Both elements have been incorporated by means of the aforementioned Organic Law 13/2015 modifying Art. 520 LECrim.

As a consequence, the detainee has the right to inform, without undue delay, a relative or person of his/her choice about his/her deprivation of liberty and the place of custody in which he/she is being detained at all times (Art. 520 e) LECrim). The detainee also has the right to communicate by telephone with a third party of his/her choice, in the presence of a police officer or similar authority designated by the judge or prosecutor (Art. 520 f) LECrim). If the detainee is a foreigner, he/she has the right to have the deprivation of liberty and the place of custody communicated to the consular office of his/her country and shall be entitled to receive visits from their representatives, to communicate with them, and to conduct correspond-

ence with them (Art. 520 g) LECrim). If the foreign detainee has two or more nationalities, he/she may choose which consular authorities to contact and with whom to communicate (Art. 520.3 LECrim). There is no exception to informing family members and consular authorities of the deprivation of liberty and the place of custody, even in cases in which solitary confinement has been ordered; this is to ensure that no secret detention is carried out.<sup>23</sup>

## V. Right to Legal Aid

The transposition into Spanish law of Directive (EU) 2016/1919 of 26 October 2019 “on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings”,<sup>24</sup> took place by the deadline. Act 3/2018 of 11 June 2018 reformed the Act 1/1996 of 10 January 1996 on legal aid.<sup>25</sup> Prior to the reform, Spanish law already offered broad coverage of free legal aid. For this reason, and also because of its close relationship with the right of access to a lawyer, transposition of the Directive has been simple and rapid. It took also advantage of the legal reform introduced in Spain on occasion of the transposition of the European Investigation Order.<sup>26</sup>

The main new aspect consists in the extension of free defense counsel and representation when the intervention of a lawyer is not mandatory (this relates to procedures for minor offences). However, it is required that the court agrees on legal aid taking into account the relevance of the offence and the personal circumstances of the applicant (reformed Art. 6.3 of Act 1/1996). Furthermore, the procedure for substitution of the initially designated lawyers at the request of the beneficiary is regulated. The substitution requires a duly justified request, whose purpose is to give effect to the right to free legal aid. The request for substitution is submitted to the competent bar association, which has to reach a decision within fifteen days; the decision denying the appointment of a new lawyer may be challenged (new Art. 21bis of Act 1/1996). Ultimately, another new aspect of the transposition is that the specific needs of persons in a vulnerable situation must be taken into account (new paragraph introduced in Art. 1 of Act 1/1996 making the Spanish Act on Legal Aid compatible with Art. 9 of Directive 2016/1919).

## VI. Final Remarks

Art. 48(2) of the Charter of Fundamental Rights of the European Union states that respect for the rights of the defence of anyone charged shall be guaranteed. Since the solemn proclamation of the Charter in December 2000, the European Union has come a long way towards harmonization of the proce-

dural safeguards in its territory, which culminated in the 2009 Roadmap to strengthen the procedural rights of suspects and accused persons in criminal proceedings. This Roadmap prioritized a series of procedural safeguards that are considered essential; consequently, six Directives were adopted from this Roadmap from 2010 to 2016, except the aspect of provisional arrest (Measure f) that is to complete the long-awaited status of the suspected and accused persons in criminal proceedings.

The Spanish legislator has already transposed four of the six Directives. Corresponding procedural rights had already been recognized before the transposition, but the implementation of the EU Directives led to several improvements in defence rights, which can be particularly observed as regards the right to translation/interpretation and the right of access to a lawyer.

The transposition of two of the six Directives is still pending (presumption of innocence/right to be present at trial and pro-

cedural safeguards for children who are suspected or accused of crimes), with Spain failing to complete transposition in time. The lack of government in Spain from March 2019 to January 2020 as well as the management of the Covid-19 crisis since March 2020 have not been helpful in furthering the implementation of these two Directives. The lack of transposition of Directive (EU) 2016/343 may be excusable, since the enshrined right to the presumption of innocence and the right to be present at a trial are already guaranteed in the Spanish Criminal Procedure Act. The transposition of Directive (EU) 2016/800, which will require the amendment of Organic Law 5/2000 of 12 January 2000 regulating the criminal liability of minors, entails more challenges. Among other issues, it will be necessary to determine how to give effect to the reinforced right to information available to children. Another issue will concern the right to an individual assessment, taking into account the personality and maturity of the child, his/her economic, social, and family context as well as any specific vulnerability.



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1 COM(2003) 75 final.

2 COM(2004) 328 final. In connection therewith, see F. Valbuena, “Adaptation of the Proposal for a Council Framework Decision on Procedural Safeguards to the Spanish Legal System”, in: M. De Hoyos (ed.), *Criminal proceedings in the European Union: essential safeguards*, 2008, p. 163, 165–168; M. Jimeno-Bulnes, “The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union”, in: E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union*, 2008, pp. 171–202.

3 O.J. C 295, 4.12.2009, 1.

4 For further information on this matter, see M. Jimeno-Bulnes, “The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings”, (2009) *eu crim*, 157–161.

5 O.J. L 65, 11.3.2016, 1.

6 O.J. L 132, 21.5.2016, 1.

7 O.J. L 280, 26.10.2010, 1.

8 Boletín Oficial del Estado (henceforth BOE) 101, 28.4.2015.

9 C. Arangüena, “EU Directives on harmonization of procedural safeguards of suspected and accused persons. Their implementation into the Spanish Law”, (2019) 1 *REE*, 5, 7. <<http://www.ree-uva.es/images/numeros/2019-1/2019-em-1-5-40.pdf>> accessed 2 December 2019.

10 The need for interpretation may be necessary even before the first interrogation for any proceedings are carried out in the presence of the

accused with the assistance of his/her counsel, so that the suspected person may receive their advice and know the scope of the proceedings beforehand. See, in this context, M. López, “La modificación de la Ley de Enjuiciamiento Criminal en materia de derechos y garantías procesales”, (2015) 8540 *Diario La Ley*, 1, 8.

11 Cf. Art. 5(2) of Directive 2010/64. The first final disposition of Organic Law 5/2015 set a maximum deadline of one year (28 April 2016) for the submission of a respective bill. This bill has not been published to date.

12 O.J. L 142, 1.6.2012, 1.

13 This Organic Law gave new wording to Arts. 118, 302, 505, 520 and 775 LECrim.

14 BOE 239, 6.10.2015. This Organic Law reformed Arts. 118 and 520 again, introduced the new Art. 520 ter, and modified Art. 527 LECrim.

15 BOE 142, 12.6.2018. This Law reformed Art. 50 of Act 23/2014 of 20 November 2014 on mutual recognition of judicial decisions in criminal matters in the European Union.

16 C. Arangüena, (2019) 1 *REE*, *op. cit.* (n. 9), p. 5, 15.

17 M. Serrano, “Directiva relativa al derecho a la información en los procesos penales”, in: M. Jimeno (ed.) and R. Miguel (coord.), *Espacio judicial europeo y proceso penal*, 2018, p. 219, pp. 241–245.

18 O.J. L 294, 6.11.2013, 1.

19 This Organic Law modified Arts. 118, 509, 520, 527 LECrim and introduced the new Art. 520 ter.

20 Art. 50 of Act 23/2014 of 20 November 2014 on mutual recognition of judicial decisions in criminal matters in the European Union.

21 C. Arangüena, (2019) 1 *REE*, *op. cit.* (n. 9), p. 5, 20–23.

22 F. Valbuena, “Directiva relativa al derecho a la asistencia letrada en los procesos penales”, in: M. Jimeno (ed.) and R. Miguel (coord.), *op. cit.* (n. 17), p. 249, 254–257.

23 This follows from a joint interpretation of Arts. 520.2 e) and 527.1 LECrim.

24 O.J. L 297, 4.11.2016, 1. In this regard, S. Cras, “The Directive on the Right to Legal Aid in Criminal and EAW Proceedings. Genesis and Description of the Sixth Instrument of the 2009 Roadmap”, (2017) *eu crim*, 34.

25 Specifically, a last paragraph was introduced in Art.1, Art. 6.3 was modified, and a new Art. 21 bis was introduced under the heading Substitution of the assigned professional.

26 C. Arangüena, (2019) 1 *REE*, *op. cit.* (n. 9), p. 5, 32. For the transposition of the legal aid Directive into Spanish law, see also the article by B. Vidal Fernández, in this issue.



# Implementation of the Legal Aid Directive in Spain

Prof. Dr. Begoña Vidal Fernández\*

The vast differences among the national standards for granting legal aid pushed the European Commission to propose common minimum rules in order to harmonize this right. This initiative was intended to ensure the effectiveness of the right of access to a lawyer, because the right of access to a lawyer can only be genuine if free legal aid is guaranteed when necessary. On the one hand, the implementation of the (finally adopted) Directive 2016/1919 into national law raises new questions; on the other hand, it has also been useful in resolving legal inconsistencies. This is the case in Spain, where the parliament implemented the Directive in 2018. This article informs the reader about the main contents and deficiencies of this implementation and on how Spanish judges have influenced the Spanish legislator with their jurisprudence by applying European standards even before the entry into force of Directive 2016/1919.

## I. Introduction

Following the adoption of the 2013 Directive on the right of access to a lawyer,<sup>1</sup> both the Council and the European Parliament urged the Commission to present a legislative proposal on free legal aid at its earliest convenience. The Commission's initiative was consolidated as a "Proposal for a Directive of the European Parliament and of the Council on legal aid for suspects or defendants in custody and free legal aid in European arrest warrant proceedings."<sup>2</sup> The diversity of national standards for the recognition of this legal aid (such as personal scope, time, or extent of its recognition and application as well as on the organisation of the service or the systems of remuneration for the work carried out,<sup>3</sup> among others) initially led the Commission to focus on harmonisation when providing due legal aid to any person deprived of liberty or arrested while a European Arrest Warrant (EAW) is being executed. However, Member States asked for this guarantee to be extended to all persons suspected or accused of a criminal offence within the European Union.<sup>4</sup> The Commission's initiative finally resulted in the adoption of Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.<sup>5</sup>

This Directive should increase confidence between Member States in national criminal justice systems and thus facilitate the mutual recognition of decisions in criminal justice matters. To that end, States undertake to give effect to the right to free legal aid as part of the fundamental right of defence.

A definition of "legal aid" can be found in Art. 3 of Directive 2016/1919 as "funding and assistance from the Member State ensuring the effective use of the right of access to a lawyer." This concise definition includes two very important points: First, legal aid assistance is state-funded, thus the States determine both the conditions and requirements for granting legal

aid and the amounts for and organisation of implementing the EU rules. Secondly, the subject matter of free legal aid is so closely linked to the right of access to a lawyer that the scope of Directive 2016/1919 cannot be separated from the scope of Directive 2013/48. The following takes up these two considerations and examines them especially against the background of the implementation of the legal aid Directive into the Spanish legal system.

## II. Implementation of the Legal Aid Directive: The Spanish Case

Directive 2016/1919 was to be transposed into national law by 5 May 2019. Spain did so by means of Law 3/2018 of 11 June 2018, which implemented Directive 2014/41/EU regarding the European Investigation Order.<sup>6</sup> The Spanish legislator implemented the Directive within the framework of the two aforementioned premises: (1) the right to free legal aid is closely linked to the fundamental right to defence through its relation to the right of access to a lawyer, and (2) the State is committed to assuming the costs and to establishing a payment system. In the following, section 1 deals with the extension of the right to legal aid in criminal proceedings for minor offences (despite the fact that the assistance of a lawyer is not mandatory here), with how Spanish law provides for the right to request replacement of the appointed lawyer, and with the new problem on the right of legal persons to legal aid that arose during the course of implementation. Section 2 outlines the solution adopted by the Spanish legislator to finance legal aid services.

### 1. The right to legal aid as to enable the right to access to a lawyer being effective

Concerning the first premise of Directive 2016/1919, the Spanish Law of Free Legal Aid (hereinafter LAJG<sup>7</sup>) met almost all

the requirements of the Union legislation and only needed to be amended in three respects:

- To include special consideration of the specific needs of persons in vulnerable situations;
- To extend the right to legal aid and representation to defendants accused of minor offences in criminal proceedings (where legal assistance is not mandatory), if the defendant requests for legal assistance or if the court requires legal assistance in order to guarantee equality in the proceedings;
- To recognize the right of the applicant of legal aid to request the replacement of the designated lawyer.

Basically, the last two modifications have led to changes in the Spanish system by filling legislative gaps, some of which had already been highlighted and resolved by the jurisprudence of the lower courts. But there is a new problem not yet solved: the right to legal aid of all legal persons with no financial resources for litigation.

#### a) Right to free legal defence and representation in criminal proceedings for minor offences

Art. 2(1) of Directive 2016/1919 states that it applies to suspects or defendants in criminal proceedings who are entitled to access to a lawyer under Directive 2013/48. Directive 2013/48 provides for the right to access to a lawyer in all criminal proceedings. A contradiction arose in Spanish criminal proceedings for minor offences. This is a simplified procedure, provided for the prosecution of minor offences of injury or ill-treatment, “petty theft *in flagrante delicto*”, threats, coercion, and of insults. The procedure is based on an oral hearing, at which the complaint or claim, if any, is read out. Then the witnesses presented by the accusing party are heard first, followed by the statement of the accused and witnesses on his/her behalf.<sup>8</sup> On the one hand, the assistance of a lawyer is not required in such trials for minor offences when it carries a penalty of a fine of no more than six months.<sup>9</sup> On the other hand, as the criminal proceedings are conducted before a criminal court, the Spanish regulation falls within the scope of Directive 2013/48. The Directive requires the assistance of a legal professional before the accused is questioned by the police or by another law enforcement or judicial authority,<sup>10</sup> unless he/she validly waives, i.e. if there is evidence of his/her express wish to waive and if the waiver is informed and unequivocal.

In this situation, Spanish Provincial Courts had considered that, if an entitled person exercises the right to legal assistance requesting a counsel, then the right to legal assistance deploys all its effects even in cases where domestic legislation provides that assistance of a lawyer is not mandatory. This means that the defendant can request free legal assistance if he or she proves to have insufficient resources for litigation.<sup>11</sup> Thus,

the Provincial Court of Madrid allowed an appeal stating that “the right to legal counsel [...] is fully effective in the trial of a misdemeanour [...] as in any other criminal proceedings. The specialty [...] is that the right to legal assistance is optional or waivable, which is not possible in proceedings for a crime. But if you choose to be assisted by counsel, this right is fully effective.”<sup>12</sup> This line of case law has been taken into account by the Spanish legislator. The inclusion of the right to free legal assistance in criminal proceedings for minor offences required an amendment of the LAJG. In this point, the Spanish legislator adopted the approach that the lower courts had taken towards European standards even before their implementation, based on the close link of the right to legal aid with the right to access to a lawyer. The amended law establishes that the right to legal aid includes free defense and representation by a lawyer and a procedural representative in judicial proceedings, when the intervention of these professionals is legally required or when their intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings.<sup>13</sup>

#### b) Right of the person receiving free legal aid to request the replacement of a designated counsel

According to the Legal Aid Directive,<sup>14</sup> Member States shall adopt the necessary measures, with due respect for the independence of the legal profession, to ensure that legal aid services are of an appropriate quality to safeguard the fairness of proceedings. And if needed, they shall take the necessary measures to ensure the right to have the lawyer providing legal aid services assigned to them replaced.<sup>15</sup> The Union rule therefore entails the competence of the judge to act of his or her own motion, if necessary, to guarantee quality assistance, the simple appointment of a lawyer not being sufficient. This way of acting was already followed by Spanish judges, even before the entry into force of the Directive, whenever they considered it necessary to safeguard the fundamental right of defence.<sup>16</sup>

The LAJG incorporates the right to request the replacement of a designated counsel into the new Art. 21 *bis*,<sup>17</sup> as a measure linked to the quality of the assistance provided. This amendment raises the level of protection, since this right had not previously been contemplated. Spanish law also enables to request substitution by another *ex officio* lawyer or to appoint a lawyer of the defendant’s own choice,<sup>18</sup> although this one is not an unlimited right. The right of defence entitles the defendant to change his/her lawyer if he/she has lost confidence in the person originally appointed (or wishes to appoint a lawyer of his/her own choice). However, this request can be rejected, without infringing the right of defence, if the request is arbitrary in the court’s opinion, i.e., unreasonably motivated or unjustified.<sup>19</sup>

- Because the *ex officio* defence in the case does not indicate any lack of work before the court;
- Because the shortcomings or disagreements are irrelevant or manifestly unjustified;
- Because a delaying strategy is evident or because there is a calculated lack of attention to the right of defence.

Although the reform provided for the *ex officio* appointment of the lawyer, and his/her replacement at the request of the defendant, Spanish law says nothing about the possibility of the judge to order the lawyer to be replaced, by his or her own decision rather than at the request of the defendant (be it that the lawyer was chosen by the defendant or be it that he/she was appointed *ex officio*). The reform therefore did not seize the opportunity to take up the respective case law of the lower Spanish courts to resolve this question.

### c) Legal persons' right to legal aid in the Spanish criminal justice system

The right of legal persons to legal aid triggered new challenges that arose from implementation of the Legal Aid Directive. The problem emerged as a consequence of the criminal liability of legal persons if it is established and the legal person qualifies for free legal aid within the framework of the right of access to a lawyer. According to Art. 4(1) of Directive 2016/1919, 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 if so required in the interest of justice. The Directive neither includes legal persons into its scope nor excludes them from its scope. In particular in Spain, this leads to several legal questions.

Criminal liability of legal persons is known in Spain since 2010.<sup>20</sup> Spanish legislation only provides for legal aid to legal persons in so far as they pursue purposes of social or public interest and who lack sufficient resources for litigation.<sup>21</sup> Furthermore, Associations aiming at the promotion and defence of the rights of victims of terrorism and associations aiming at the promotion and defence of the rights of persons with disabilities are also entitled to free legal aid, regardless of the resources for litigation.<sup>22</sup> The question now arises as to what the situation of legal persons is other than those included in the law. Should they be entitled to free legal aid if they are accused in criminal proceedings without having the resources to litigate? The answer should be in the affirmative, as legal representation is certainly necessary from the moment that the criminal liability of legal persons is established. However, granting legal aid to all legal persons does not seem possible at the moment in Spain, unless the Spanish legislator expressly provides for the respective legislation to include all legal persons in the national legal aid scheme.

## 2. Financing legal aid

As mentioned above, the second major point of Directive 2016/1919 deals with the obligation of States to bear the costs and establish a system of payment for free legal aid services. Free legal aid is included as a compulsory service in the Spanish law for lawyers and procedural representatives and, consequently, payment for the services is regulated as compensation: "the professionals who provide the compulsory legal aid service shall be entitled to compensation in the form of indemnification."<sup>23</sup> This means that this amount is not subject to VAT.<sup>24</sup>

Setting the right fees for lawyers providing legal aid services is closely related to the quality requirement. If the fees are too low, lawyers will not be willing to devote the time and effort to providing high-quality service. Practice shows that providing legal aid as a service is onerous, and the question arises as to how to pay for this service. Since the costs of legal aid could prevent it from being effective, the European Economic and Social Committee proposed the creation of a European solidarity fund to cover the costs at the European level.<sup>25</sup>

The Spanish legislator has chosen to regulate the financial support as a subsidy from the budgets of the Autonomous Communities (abbreviated in Spanish as CC.AA.), whose public administrations are responsible for the implementation, care, and operation of the free legal aid services provided by the Bars and Lawyers' Associations.<sup>26</sup> The decentralization may lead to significant differences in the amounts of the fees, depending on the Autonomous Community. Such a scheme risks breaking with essential principles, such as equality before the law, the right to judicial protection, and the right to defence. In order to mitigate friction, a proposal was introduced to amend the Free Legal Aid Regulation (RAJG) implementing the Legal Aid Act, in order to establish a State Advisory Council in which all public administrations and bodies involved are represented. This proposal is still debated.

## III. Concluding Remarks

The implementation of Directive (EU) 2016/1919 forced the Spanish legislator to amend its legislation on legal aid. As a result, the transposition improved the quality of the regulation, filling gaps and including some solutions already rendered by Spanish courts in their case law. The right to free legal aid provided by defence representatives was extended to criminal proceedings for minor offences. The right of the person receiving legal aid to request the replacement of a designated legal counsel was included. A new problem in relation to the right of legal persons to legal aid arose, however, as the Spanish

law on legal aid explicitly only includes certain legal persons and associations, but not all of them. The Spanish courts may decide otherwise on the basis of the text of the Directive; however, an amendment of the Spanish law in this point is strongly

recommended. Regarding the financing of legal aid, the Spanish legislator still has to find solutions in order to mitigate friction that might arise from the decentralization of free legal aid support.



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1 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *O.J. L 294*, 6.11.2013, 1.

2 COM(2013) 824 final of 27 November 2013.

3 In some Member States, lawyers are paid directly, by the hour, or by the State budget; in yet other States, lawyers are paid directly by the bar associations.

4 Note by the Chair 15490/14. DROI PEN 129 COPEN 278 CODEC 2241, 17 November 2014. Adopted by the EU JHA Council of 4–5 December 2014.

5 *O.J. L 297*, 4.11.2016, 1.

6 Spain has chosen to incorporate all the directives on judicial cooperation in criminal matters into a single regulation: Law 23/2014 on the Mutual Recognition of Decisions in Criminal Matters in the European Union (*Ley 23/2014, of 20 November, de reconocimiento mutuo de resoluciones penales en la Unión Europea*). The implementation of the EIO Directive was used to bring Spanish legislation on legal aid into line with the European standard.

7 *Ley 1/1996* of 10 January, de *Asistencia Jurídica Gratuita*.

8 Art. 969 of the Spanish Criminal Procedural Law.

9 Art. 967.1 of the Spanish Criminal Procedural Law: “In the summonses issued to the complainant, the injured party and the person under investigation for the trial shall be informed that they may be assisted by a lawyer if they so wish (...) for the prosecution of minor offences carrying a fine of at least six months, the general rules of defense and representation shall apply” (i.e., legal assistance is then required). Translation provided by the author.

10 Art. 3(2) lit.-a) Directive 2013/48/EU.

11 Art. 4(1) Directive 2016/1919: “Member States shall ensure that suspected or accused persons who do not have sufficient resources to pay for the assistance of legal counsel are entitled to free legal aid when the interests of justice so require.”

12 Judgement of the Audiencia Provincial (AP) of Madrid 768/2016 of 28 December 2016. In 2016, the AP Madrid resolved an appeal against a sentence handed down in proceedings for a minor offence of ill-treatment in which the appellant had been sentenced to a one-month fine. The accused was summoned in accordance with the requirements established by law, which included the information that he could be assisted by a lawyer if he so requested, even if in this case legal assistance was not mandatory. The appellant sent a fax to the court stating that he wanted the assistance of a lawyer but that, due to insufficient resources, he was requesting one ex officio. The request was denied because the law does not require the assistance of a lawyer in such trials for minor offences (see Art. 962.1 of the Criminal Procedural Law).

13 Art. 6 LAJG: “The right to free legal aid includes the following benefits: (...) 3. Free defense and representation by a lawyer and a procedural representative in judicial proceedings, when the intervention of these professionals is legally required or when, in the absence of such intervention, any of the following circumstances arise:

(a) their intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings;

(b) in the case of minor offences, the person against whom the criminal proceedings are directed has exercised his or her right to be assisted by a lawyer and it is so agreed by the court or tribunal, having regard to the nature of the offence in question and the personal circumstances of the applicant for legal aid.” (Translation provided by the author).

14 Art. 7(1) lit. b) Directive 2016/1919.

15 Art. 7(4) Directive 2016/1919.

16 Judgement of Audiencia Provincial of Navarra (Section 1) 265/2017 of 13 December 2017 (ECLI:ES:APNA:2017:522): “The duty of the judicial courts to ensure that the defencelessness of the defendant is avoided is protected especially in the criminal process [...]. The Constitutional Court has affirmed in numerous decisions the positive duty to ensure the effectiveness of the defense of the accused or convicted person in criminal proceedings by professionals designated ex officio.” (Translation by author).

17 New Art. 21 bis LAJG: “(1) The person receiving free legal aid shall have the right to urge the appointment of new professionals by means of a duly justified request, which shall not suspend the appointment of the professionals already agreed upon.” (Translation by the author).

18 Spanish Supreme Court Judgement 821/2016 of 2 November 2016, ECLI:ES:TS:2016:4737. The accused was detained in Cádiz (Andalusia) and the trial was to take place in Irun (on the border of France), so the ex officio lawyer did not communicate with him until a few minutes before the trial, which prevented him from providing information to prepare the defense properly. His right to defense was violated because a lawyer was appointed to him at the place where the trial was taking place (Irun) and not where he was being detained, and he was neither given the opportunity to appoint a private lawyer, nor was the trial suspended when he resigned his ex officio lawyer during the trial.

19 Judgement of Audiencia Provincial of A Coruña, Section 6, No. 14/2019 of 7 February 2019, ECLI:ES:APC:2019:302.

20 By means of Organic Law 5/2010, the Spanish Criminal Code was modified to include a new Art. 31bis establishing criminal liability of legal persons for offences committed by its legal representatives on behalf of and for the benefit of the legal person, and for offences facilitated by the legal person through failure to exercise due control over its employees.

21 According to Art. 3.5 LAJG, the phrase “insufficient resources for litigation” refers to a legal person with no sufficient assets and an annual income less than three times the “public revenue index” (Indicador Público de Renta a Efectos Múltiples – IPREM).

22 Art. 2. lit. c) and lit. i) LAJG.

23 New Art. 22 LAJG.

24 Art. 1 LAJG: “The free legal aid service shall be compulsory under the terms provided in this law. The professional associations may organize the service and exempt the member when there are reasons that justify it.”

An appeal was lodged with the Supreme Court (SC) against the proposal to amend the Regulations on the organization and operation of free procedural representation, which established the universal and compulsory assignment of its members to the free legal aid service. The SC dismissed the appeal, stating that “the exercise of proxy, a profession in which membership is mandatory, implies the assumption of a series of collegiate obligations, including that of representing in court those who have the right to free legal aid under the terms established by the Bar” (Supreme Court judgement 3242/2014, 29 January 2016, ECLI:ES:TS:2016:413). This statement on the obligatory nature of the service was made by the SC in response to doubt, voiced especially by solicitors, as a result of the interpretation given by the Spanish Directorate-General for Taxation to the ECJ ruling of 28 July 2016 (ECLI:EU:C:2016:605) in case C-543/14 *Ordre*

*des Barreaux francophones et germanophone*. On the basis of this ruling, the Directorate-General considered this payment to be a taxable event for VAT. Spanish VAT legislation stipulates that services provided free of charge and which are compulsory for the taxable person are not subject to VAT (Art. 12(3) Law 37/1992).

25 Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings COM(2013) 824 final – 2013/0409 (COD), *O.J. C* 226, 16.7.2014, p. 63–67: 1.4. “... It would point out that legal aid in such proceedings must not be jeopardised because of the budgetary difficulties facing some Member States, and it wonders to what extent resources could be made available at European level, say in the form of a European fund”.

26 This Council will include all administrations with competence in the field of the administration of justice and lawyers/solicitors through their general associations. Its aim is to harmonize, unify and share practices and criteria for action.

## Legal Protection of Minors

### Implementation of EU Directives in Spain

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**The indiscriminate use of social networking for interpersonal relationships has increased the possibilities to engage in behaviour that affects the private and personal lives of citizens in general and minors in particular. Offences such as child grooming have been incorporated into the Spanish Criminal Code, in compliance with international and community commitments. This paper aims to analyze the changes made by the Spanish legislator to the Spanish criminal law system as a result of the transposition of EU directives on sexual crimes against minors.**

#### I. Introduction

The development of new information and communication technologies (ICT) and, above all, the increase in data transmission networks – basically the internet – offer numerous advantages and improve people’s quality of life by reinforcing personal and work relationships. They considerably influence the private sphere, however, and, in turn, their indiscriminate use entails risks that must be minimized by adequate responses to the new demands. Indeed, the use of social networks has multiplied the possibilities for types of behaviour to develop that affect the private and personal lives of citizens and, in particular, of minors.

The use of ICT by minors, as a form of social interaction, involves certain risks for various reasons. They include the ease with which minors can access the internet, inappropriate use

of these new forms of communication between minors, and simple lack of knowledge of the dangers involved in the use and dissemination of private images of other minors on the internet, all of which is linked to the vulnerable situation in which minors find themselves. These risks are associated with certain forms of crime committed by sex offenders, such as child grooming, cyber-bullying of minors under the age of sixteen and sexting – a term used to describe behaviour involving the sending of images with sexual content to minors. They victimize minors by damaging their legal rights, e.g., image and privacy rights and the right to sexual indemnity, understood as a process of formation and development of the minor’s personality and sexuality.

Today’s society is concerned about these types of behaviour and strongly rejects them. Hence, effective measures to combat this phenomenon in order to prevent such behaviour from

going unpunished must be established. These responses are not only established by the Member States but also by European or international institutions. On the one hand, the aim is to prevent minors from the new dangers associated with the virtual world and, on the other, to dissuade sex offenders from attempting the sexual indemnity of minors through ICT. Among the multiple criminological manifestations of the use of ICT that can cause harm to minors, the so-called crime of child grooming – the crime of sexual harassment of minors through the internet – stands out. This form of crime consists of the use of new technologies to contact a minor for the purpose of performing sexual acts as well as the act of tricking a minor into providing the offender with pornographic material.

The Spanish legislator reacted to this form of sexual harassment of minors performed through social networks by reforming the criminal law with an act in 2010, namely Organic Law 5/2010 of 22 June 2010. The new law integrated provisions, which specifically typifies the criminal conduct of cyber grooming into the Spanish Criminal Code. In so doing, the Spanish legislator complies with the European and international commitments

This article analyses the regulations that were drawn up, both at the international and European levels, with the aim of establishing a legal framework for the effective protection of minors against sexually abusive and exploitative behaviour (II.). It outlines the way in which the Spanish criminal legislator has addressed this protection in the Spanish Criminal Code (III.) before a summary assessment of the reforms is made in the final remarks (IV.).

## II. Normative Instruments to Combat Child Sexual Abuse

The response, both at European and international levels, to certain behaviours that affect both the development and the sexual formation of minors, is reflected in various normative instruments. At the international level, the most prominent response is the United Nations Convention on the Rights of the Child of 20 November 1989,<sup>1</sup> in which Art. 19 urges States Parties to take all appropriate measures to protect the child from all forms of physical or mental violence, including sexual abuse.<sup>2</sup>

At the European level, several instruments have been developed to combat the phenomenon of sexual exploitation of children, e.g., the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (the “Lanzarote Convention”).<sup>3</sup> In its preamble, the Convention stresses the need for protection of children not only by their families but also by society and the State, in

view of the fact that the welfare and best interests of children are fundamental values shared by all Member States. Art. 1 sets out the purposes of the Convention:

- To prevent and combat sexual exploitation and sexual abuse of children;
- To protect the rights of child victims of sexual exploitation and abuse;
- To promote national and international cooperation against sexual exploitation and the abuse of children.

The criminal law aspects of the Convention that are relevant for the crime of child grooming are contained in Chapter VI under the heading “Substantive criminal law.” Art. 23 requires States Parties to criminalise the conduct of those who, by means of IT technologies, propose to meet a child under the minimum age of sexual consent<sup>4</sup> for the purpose of committing an act against him or her constituting sexual assault or abuse or the production of child pornography, provided that the proposal was followed by material acts leading to the meeting.<sup>5</sup>

As far as substantive criminal law at the EU level is concerned, Art. 83(1) TFEU includes the possibility of laying down minimum standards for definitions of criminal offences and sanctions of particular gravity and cross-border dimension. They arise from the nature or impact of such offences or from the “special need” to combat them, according to common criteria. This provision is of particular relevance when the Treaty itself describes those “areas of particularly serious crime,” in which Member States must approximate their domestic criminal law in order to comply with their obligations under Union law, including conduct relating to the sexual exploitation of minors.

On the basis of Art. 83(1) TFEU, the European Parliament and the Council established Directive (EU) 2011/93 of 13 December 2011 on combating sexual abuse and exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA of 22 December 2003.<sup>6</sup> This Directive provides, *inter alia*, for a general legal framework to combat serious criminal offences with regard to the sexual exploitation of children; the Directive states that these offences require the adoption of a “comprehensive approach covering the prosecution of offenders, the protection of child victims and prevention of the phenomenon.”<sup>7</sup> In addition, the child’s best interests must be a primary consideration when carrying out any measures to combat these offences in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child. The Directive calls on the Member States to declare both child grooming (using information and communication technologies) and the solicitation of children (without using the internet) criminal offences, by ensuring that the perpetrators of such offences are prosecuted in such a way that the conduct does not go unpunished.<sup>8</sup>

The first articles of the Directive contain definitions relating to “minor,” “age of sexual consent,” and “online solicitation of children for sexual purposes.” With reference to the latter concept, Art. 6 of the Directive calls on Member States to take the necessary measures to ensure that the following intentional conduct, carried out by means of information and communication technologies, is punishable: a) a proposal by an adult to meet a minor who has not reached the age of sexual consent;<sup>9</sup> b) this proposal for contact must be for the purpose of performing a sexual act with a minor who has not reached the age of sexual consent (Art. 3(4)) or producing child pornography (Art. 5(6)), and c) the proposal must be accompanied by material acts aimed at meeting the minor. Similarly, Art. 6(2) of the Directive punishes any attempt by an adult to commit, by means of information and communication technologies: (a) the acquisition or possession of child pornography (Art. 5(2)); (b) knowing accession to child pornography by any technological means (Art. 5(3)) or tricking of a minor below the age of sexual consent into providing child pornography depicting himself/herself. For all the above-mentioned behaviours, inducement and complicity are punished, too (Art. 7(1)). Art. 9 of the Directive refers to a number of aggravating circumstances for the offence of solicitation of children for sexual purposes by technological means, which the States themselves must provide for in their domestic criminal laws, in so far as they do not form part of the constituent elements of the offences. Aggravating circumstances could be: the offence was committed against a child in a particularly vulnerable situation; the offender deliberately or recklessly endangered the life of the child; the offence was committed using serious violence or caused serious harm to the child; the offence was committed within the framework of a criminal organisation.

### III. Child Grooming in the Spanish Criminal Law

As mentioned in the introductory remarks, the Spanish legislator has complied with the above-mentioned texts (both European and international) by including Art. 183 *bis* into the Spanish Criminal Code in the 2010 reform.<sup>10</sup> Art. 183 *bis* refers to the crime of child grooming by taking up Art. 23 of the Council of Europe Lanzarote Convention and transposing Council Framework Decision 2004/68 of 22 December 2003 on combating the sexual exploitation of children and child pornography,<sup>11</sup> which was later replaced by the above-mentioned Directive 2011/93/EU. The Directive itself was transposed by a subsequent reform in 2015 that introduced a series of novelties, among them, it reflected the content of the child grooming offence from Art 183 *bis* in Art 183 *ter*. The amending act (Organic Law 1/2015) specifies that abuse of minors committed via the internet or by other means of telecommu-

nication is easy, due to the ease of access and anonymity they provide, and counteracts it with a new paragraph in Art. 183 *ter* of the Criminal Code. This provision foresees punishment to anyone who, through technological means, contacts a minor under the age of fifteen and carries out acts intended to trick him or her into providing pornographic material or showing pornographic images to him or her.

With the 2015 reform of the Spanish Criminal Code, the Spanish legislator reproduced the content of Art. 183 *bis* in the first number of Art. 183 *ter*,<sup>12</sup> keeping the same typical structure as well as the penalty of Art. 183 *bis*. However, Art. 183 *ter* (1) extends the concept of victim by including minors under sixteen years of age, in response to the Spanish legislation that raised the age of sexual consent. Consequently, the Spanish Criminal Code presumes that consent given by a minor for the performance of acts of a sexual nature is irrelevant if the minor is under the age of sixteen. Raising the age of sexual consent by the Spanish legislator came in response to the suggestion made by the United Nations Committee on the Rights of the Child, which urged it to reform the Spanish Criminal Code in order to bring the age of sexual consent in line with the UN Convention on the Rights of the Child. The aim was to intensify the framework for protection of minors against conduct of a sexual nature. The most relevant novelty introduced by LO 1/2015 is the introduction of a new criminal type in section 2 of Art. 183 *ter*. It stipulates the offence of swindling the minor through new information technologies with the purpose of providing the offender with pornographic material or showing him/her pornographic images in which a minor is represented or appears.

#### 1. The offence of child grooming in Art. 183 *ter* (1)

As far as the offence of child grooming in Art. 183 *ter* (1) is concerned, the Spanish legislator established the following elements of crime:

- Contact with a minor under the age of 16;
- Contact must be made through the internet, by telephone, or by means of any other information and communication technology;
- A proposal to meet the minor with the purpose of committing one of the offences of Arts. 183 (sexual abuse of a minor under sixteen) or 189 (child pornography offence);
- The proposal must be accompanied by material acts aimed at bringing the minor closer, i.e., acts tending to the physical encounter between the two.<sup>13</sup>

Thus, the objective elements of crime first require contact with a minor. In the opinion of most criminal law scholars, this contact must be responded to by the minor.<sup>14</sup> The requirement of

contact with the minor specifically described in the criminal type under the expression “contact with a minor” is actually neither determined in Art. 23 of the Lanzarote Convention nor in Art. 6 of Directive 2011/93. Both texts only refer to the meeting proposal, provided that such proposal has been accompanied by material acts leading to such an encounter. This means that the Spanish legislator goes beyond the terms of the Directive and the Convention.

Second, the wording of Art. 183 *ter* (1) implies that the proposal should lead to arranging a meeting and must be arranged by one of the means indicated in this regard, namely through the internet, telephone, or any other means of information and communication technology. The specific allusion to these technological means has led legal doctrine to question whether Art. 183 *ter* only covers virtual contacts and not direct, personal contacts.<sup>15</sup> A criminal law response, however, cannot be understood as covering only cases in which the perpetrator establishes personal contact with the minor through the aforementioned means, leaving out traditional types of approaches to the minor for sexual purposes carried out in the physical environment.<sup>16</sup> The reasons that may have led the legislator to create this loophole are difficult to discern; omitting contact in the real world is problematic, as it is just as dangerous for the sexual indemnity of the minor as the virtual world.

Third (and along with the act of contacting a minor for sexual purposes), the criminal offence of child grooming requires the making of a proposal to meet the minor in order to commit material acts aimed at becoming physically closer. It is not fully clear what these types of acts really are, since the Spanish legislator does not provide any explanation on this matter. The legislator just specifies its nature, which has to be material, and its purpose aimed at bringing the minor closer. As a result, a reasonable limitation of the types of acts is not possible. In my opinion, the introduction of this element of “material acts” does not provide information on which acts are to be performed by the subject in order to approach or maintain contact with the child. If the acts involve approaching the child, one interpretation is to strengthen trust with the victim. Even if the physical encounter is intended, determining the place where the encounter will take place or the way in which it should be carried out could be accepted as a material act. The problem arises in determining what kinds of acts are covered by the criminal law. Therefore, failure to specify the material acts intended for the encounter with the child may lead to confusion in legal practice by obliging law enforcement to specify and determine what these “material acts” should be.<sup>17</sup> This inaccuracy runs counter to the principle of legal certainty and has been criticized by criminal law experts for its lack of precision and its ambiguity.<sup>18</sup>

Ultimately, the crime of child grooming includes the subjective requirement of a transcendent internal tendency, namely the ultimate purpose of arranging a meeting with the minor in order to commit any of the crimes contained in Arts. 183 and 189. This requirement poses problems of interpretation. The reference to Art. 189, which describes conduct relating to child pornography, leaves open what must be determined: (1) must the contact and proposal of contact with the child by technological means be carried out with the aim of performing the conduct described in Art. 189 or (2) must the criminal forms of conduct described in Art. 189 constitute the aim of approaching children by technological means? Art. 189 (1) lit. a) refers to the conduct of recruiting a minor for exhibitionist or pornographic purposes or performances, whether public or private, or for the production of any pornographic material. The difficulty therefore lies in distinguishing the conduct of abducting a minor in Art. 189 (1) lit. a) from that of contacting a minor in Art. 183 *ter* (1). If the subject engages in the conduct of contacting a minor for the purposes set out in Art. 189 (1) lit. a), the conduct in Art. 183 *ter* would be a preparatory act with respect to the conduct in Art. 189.

## 2. The preparation of child grooming in Art. 183 *ter* (2)

In accordance with the Directive, Art. 183 *ter* punishes the conduct of contacting a minor under the age of 16 by performing acts intended to deceive him or her in order to obtain pornographic material and or show him or her pornographic material depicting or showing images of a minor. Unlike Art. 6(2) of the Directive, Art. 183 *ter* (2) does not punish the attempt of an adult to engage in the conduct of acquiring, possessing or accessing child pornography, which requires conning a minor in order to obtain the pornographic material. Art. 183 *ter* (2) instead defines a preparatory act for the commission of a crime of child pornography. Preparing for the performance of one of the types of conduct constituting the crime of pornography, the offender must contact the minor to be provided with the pornographic material. If the offender contacts the minor and the minor does not provide the material, the conduct will not be considered an attempt at a pornographic crime, but rather a preparatory act to the crime of child pornography.<sup>19</sup>

The dictionary of the Royal Academy of the Spanish Language specifies that the act of deceiving consists of an act taking advantage of the inexperience or lack of inhibitions of the deceived. Therefore, the act of deception entails the need for deception which manifests itself in the use of certain tricks by the offender to attract the minor. The structure of the offence of deception is similar to that of Art. 183 *ter* (1) – child grooming –, as both offences coincide in the conduct of contacting a minor under the age of sixteen through the internet,



by telephone, or by any other technological or communication means. However, there is a difference in relation to the acts to be performed by the subject, as Art. 183 *ter* (2) specifies that they must be aimed not at meeting, but at tricking the minor into providing him or her with pornographic material.

As regards its compatibility with the Directive, however, there are some differences in the wording of Art. 183 *ter* (2) when comparing it with Art. 6(2) of Directive 2011/93. Firstly, with reference to the active subject, the Directive applies the term “adult,” a fact that is obviated by the Spanish legislator when using the wording “the person who.” Moreover, Art. 6(2) of the Directive mentions the act of tricking a minor with the aim of obtaining pornographic material from the minor with whom the adult is in contact, a precision not covered by Art. 183 *ter* (2), which merely refers to “a minor.” By using this expression “a minor”, it seems that the offence of solicitation of children for sexual purposes will apply in cases in which the pornographic material or pornographic images provided by the minor with whom the offender is in contact do not belong to him but to another minor. The Spanish Criminal doctrine has criticised the configuration of the conduct in Article 183 *ter* (2) because it establishes criminal liability not only for the provision of images of the minor who is the subject of the request, but also for images representing any minor. Thus, *Tamarit Sumalla* points out that the extension of criminal liability is too excessive, as it goes beyond the mere request for pornographic images of the victim. Therefore, *Tamarit Sumalla* opts for a restrictive interpretation by arguing that any reference to the elements of “pornographic material” and “pornographic images” should be understood as pornographic in the strict sense, without considering such images with a provocative or exotic character.<sup>20</sup> Considering the problems of interpretation and delimitation of Art. 183 *ter* (2) with the crime of Art. 189 (child pornography), we can indeed question whether the creation of this criminal offence in the Spanish Criminal Code is justified.

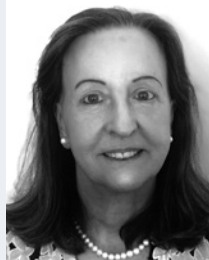
#### IV. Final Remarks

The reform carried out by the Spanish legislator with regard to the crimes of sexual harassment of minors must generally be viewed positively. It responds to the need to criminalise behaviours that affect the process of formation and development of the personality and sexuality of the minor, that is to say his or her sexual indemnity. So far, the Spanish legislator is following the approach marked by the European legislator who established the protection of the sexual integrity of minors in different instruments.

This article especially examined the offence of solicitation of children for sexual purposes by means of information and

communication technology, as defined in Art. 6 of Directive 2011/93/EU. We can observe here that there were some flaws in the transposition of Union law into Spanish legislation. The Spanish legislator was not very accurate when establishing the criminal elements of child grooming in Art. 183 *ter* (1) of the Spanish Criminal Code. The Spanish legislator, for instance, opted for a *numerus apertus* when making reference to “the material acts” that must accompany the proposal to meet a minor. If the intention is that these material acts aim at an encounter with the minor, the legislator should have delimited these acts, specifying them exhaustively or at least introducing a definition of what is to be understood by “material acts.” This technical deficiency in the concept of criminal liability is sure to create legal uncertainty, as it will need to be interpreted by the Spanish courts. The new Art. 183 *ter* (2) which is to transpose Art. 6(2) of the Directive, entails problems of interpretation and delimitation, since the references to the criminal offence of child pornography as defined in Art. 189 of the Spanish Criminal Code are unclear. A restrictive interpretation is advocated here by limiting the terms “pornographic material” and “pornographic images”.

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1 Ratified by Spain on 30 November 1990, BOE n. 313 of 31.12.1990. See also the “Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography”, signed in New York on 25 May 2000.

2 Following its Preamble: “Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in Arts. 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in Art. 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children”.

3 CETS No. 201, ratified by Spain on 5 August 2010, entered into force for Spain on 1 December 2010.

4 With reference to the age of consent of the child, Art. 18 specifies that it is up to each State to determine the age below which sexual activity with a child is not permitted.

5 Likewise, the European Charter of the Rights of the Child (*O.J. C 241*, 21.9.1992), which provides for the protection of children from all forms of sexual exploitation, and the 1997 European Parliament resolution on

the protection and rights of the child also deserve mention (O.J. C 371, 8.12.1997, 210).

6 O.J. L 335, 17.12.2011, 1.

7 Recital 6 of Directive 2011/93.

8 Cf. Recital 19 of Directive 2011/93.

9 Under the heading “Definitions”, Art. 2(b) of the Directive defines the age of sexual consent, specifying that it is the age below which, in accordance with national law, it is prohibited in all cases to perform acts of a sexual nature.

10 More precisely, Organic Law 5/2010 of 22 June 2010 included Art. 183 bis under Title VIII of Book II (Criminal Law, Crimes against sexual freedom and sexual indemnity), Chapter II bis (entitled: “On the abuse and sexual aggressions to minors under thirteen years of age”).

11 O.J. L 13, 20.2.2004, 44.

12 Article 183, ter provides that: 1. Anyone who, through the Internet, telephone or any other information and communication technology, contacts a minor under the age of 16 and proposes to arrange a meeting with him for the purpose of committing any of the offences described in articles 183 and 189, provided that such a proposal is accompanied by material acts aimed at bringing him or her closer, shall be punished by one to three years’ imprisonment or a fine of twelve to twenty-four months, without prejudice to the penalties corresponding to the offences, if any, committed. The penalties shall be imposed in their upper half when the approach is obtained by means of coercion, intimidation or deception. 2. Anyone who, through the Internet, telephone or any other information and communication technology, contacts a person under the age of 16 and engages in acts intended to deceive him or her into providing pornographic material or showing pornographic images depicting or featuring a minor, shall be punished by imprisonment for a term of six months to two years.

13 See. C. Díaz Morgado, “Delitos contra la libertad e indemnidad sexual”, in M. Corcoy Bidasolo, (Dir.), *Manual de Derecho Penal, Parte Especial*, vol 1, 2019, pp. 294–295.

14 See J.M. Tamarit Sumalla, “Los delitos sexuales. Abusos sexuales. Delitos contra menores (Arts. 178, 180, 181, 183 and 183 bis)”, in: G. Quintero Olivares, (ed.), *La reforma penal de 2010: análisis y comentarios*, 2010, p. 165, pp. 165–171; it is understood that the child is not contacted simply by sending messages (for example, via e-mail) without receiving a response.

15 Vid, M.J. Dolz Lago, “Un acercamiento al Nuevo delito child grooming. Entre los delitos de pederastia”, (2011), *Diario La Ley*, n. 7575, 23 February 2011, 1, 13, for whom this contact would be ruled out if it were not followed by technological contact.

16 In this regard, reference is made to L. Nuñez Fernández, “Presente y futuro del mal llamado delito de ciberacoso a menores: análisis del Art. 183 bis CP y de las versiones del Anteproyecto de Reforma del Código Penal de 2012 y 2013”, (2012), *Anuario Derecho Penal y Ciencias Penales*, 65(1), 179, 193.

17 J.M. Tamarit Sumalla, “Los delitos sexuales ...”, *op. cit.* (n. 14), p. 172, who specifies that such an act would, for example, be an act that transcends simple virtual contact.

18 L.M. Díaz Cortés, “Aproximación criminológica y político criminal del contacto TICS preordenado a la actividad sexual con menores en el Código penal español—Art. 183 bis CP”, (2012) 8 *Revista de Derecho Penal y Criminología*, 289, 290.

19 This is the view held by the criminal doctrine. On this matter, see E. Orts Berenguer, *Derecho Penal. Parte Especial*. Gonzalez Cussac, J.L. (Coord.), 2016, p. 228.

20 J.M. Tamarit Sumalla, “Los delitos sexuales...”, *op. cit.* (n. 14), p. 351.

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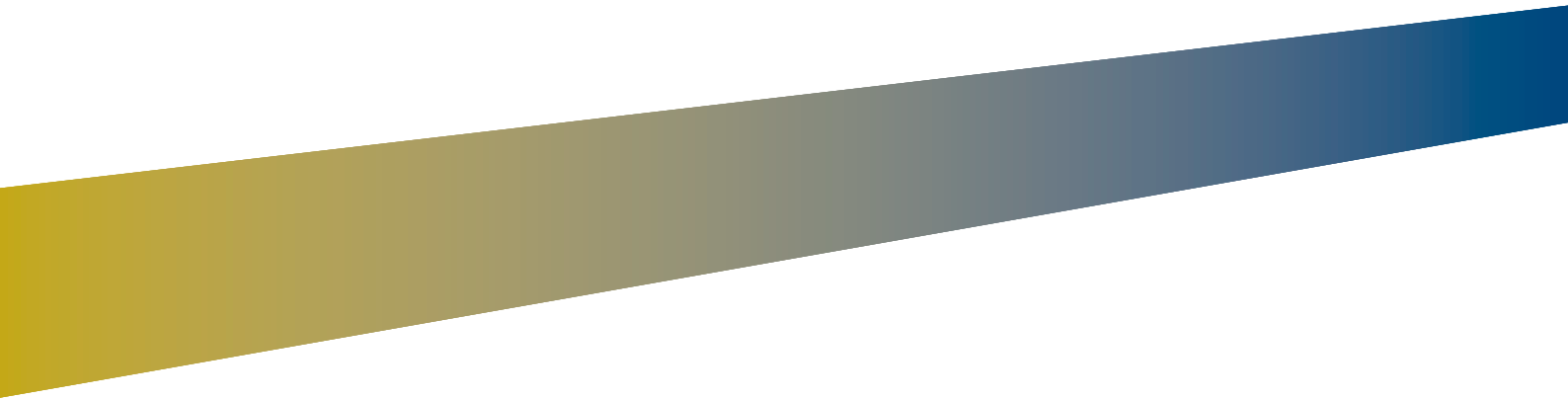
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