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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

On 27 November 2013, the European Commission tabled a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant (EAW) proceedings (COM(2013) 824 final). This proposal will complement the existing right to access to a lawyer by guaranteeing provisional legal aid to suspects or accused persons in criminal proceedings. It will also guarantee provisional legal aid and legal aid for requested persons who are subject to EAW proceedings.

However, the proposal reflects the limited ambition of the Commission. The criteria of access to legal aid (means and merits tests), key elements of its effectiveness, are set in a separate instrument, the Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings. In its opinion, the European Economic and Social Committee highlighted that the rights covered need to be defined and framed more precisely.

During the JHA meeting of 12-13 March 2015 the Council reached a general approach on the proposal. The text adopted by the Council contains certain modifications to the proposal submitted by the Commission, notably in order to define more precisely the scope of application of the Directive. In this respect, the Directive should not apply, under certain conditions, to minor offences (Art. 2 (3)) and to situations where the liberty of the person concerned has been restricted for precisely stated purposes (Art. 2 (4)). It however allows for a possibility of provisional legal aid in respect of less serious offences when this is required in the interests of justice, as interpreted by the case-law of the European Court of Human Rights (Art. 4 (2a)).

In turn, the LIBE Committee of the European Parliament adopted its draft report on the proposal on 26 November 2014 and its orientation vote on 6 May 2015 (Rapporteur: Dennis de Jong). The committee report was tabled for plenary 1st reading/single reading on 18 May 2015. The Committee introduced some important amendments. First and foremost, it extended the subject-matter of the Directive to the right to ordinary legal aid for suspects or accused persons in criminal proceedings (Art. 1). It limits the possibility for Member States to recover the costs relating to provisional legal aid from accused, suspected, or requested persons who do not meet the eligibility criteria for legal aid as applicable under national law (Art. 4 (5)). It also includes new provisions concerning the criteria of access to legal aid (Art. 4a) the quality of the legal aid services provided (Art. 5a). Finally, it includes a provision on the right to appeal a decision refusing legal aid (Art. 5b).

Three trilogues took place place during the Luxembourg Presidency and the negotiations are still on-going and will very likely be continued under the Dutch Presidency.

Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the

presumption of innocence and of the right to be present at trial in criminal proceedings

On 27 November 2013, the European Commission submitted a proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM(2013) 821 final). The proposal only applies to natural persons suspected or accused in criminal proceedings (Art. 2). It requires Member States to ensure that, before a final conviction, public authorities refrain from public statements that would refer to the suspects or accused persons as if they were convicted (Art. 4). Concerning the burden of proof, it specifies that any reversal of the burden of proof may be rebutted if the defence adduces enough evidence to raise a reasonable doubt regarding the suspect or accused person's guilt (Art. 5(2)). The proposal also lays down the principle that everyone has the right to remain silent as regards the facts he/she is accused of and obliges Member States to give sufficient information on the content of this right as well as the consequences of renouncing or invoking it (Art. 7). Finally, it provides that suspects or accused persons have the right to be present at their trial (Art. 8). The possibility to decide on the issue of guilt in their absence is nevertheless possible, under similar conditions to those provided for in the *in absentia* Framework Decision.

The Council adopted its general approach 4 December 2014, at the end of the Italian Presidency's mandate. It specified the personal and temporal scope of application of the Directive (Art. 2). It provides that the presumption of innocence is undermined if a public statement refers to the suspects or accused persons as if they were guilty but it introduces an exception to this principle for reasons relating to the criminal investigation or for the public interest (Art. 4). Concerning the burden of proof, it provides that presumptions must be rebuttable and that they may only be used provided the rights of the defence are respected (Art. 5(2)). Finally, the right against self-incrimination and the right to remain silent were merged into one provision, which no longer includes a rule on admissibility of evidence obtained in breach of such provision (Art. 6). The Commission has strongly opposed this deletion.

In turn, the LIBE Committee of the European Parliament adopted its draft report on 21 January 2015 and its orientation vote on 31 March 2015 (rapporteur: Nathalie Griesbeck). The Committee report was tabled for plenary 1st reading/single reading 21 April 2015. The Committee introduced some important amendments. First and foremost, it extended the scope of application of the Directive to legal persons and to criminal proceedings in the sense of the ECHR (Art. 2). It required Member States to ensure that, before a final conviction, public authorities refrain from public statements that would refer to the suspects or accused persons as if they were guilty, and it did not provide for any exception in this regard (Art. 4). It also required that in the event of breach of those requirements concerning public statements and official decisions from public authorities effective remedies be taken to ameliorate the breach (Article 4(3)). Most importantly, the Committee rejected the proposed Art. 5(2) on the burden of proof, by arguing that the reversal of the burden of proof in criminal proceedings would be unacceptable, as the principle that the burden of proof rests with the prosecution must be left untouched. Finally, the Committee reinforced the exclusionary rule proposed by the Commission by providing that any evidence obtained in violation of the right against self-incrimination and cooperation or of the right to remain silent must be inadmissible (Art. 10(3)).

On 4 November 2015, COREPER approved a compromise text agreed with the European Parliament. Contrary to the approach adopted by the LIBE Committee, this text excludes legal persons from the scope of the Directive, assuming that it would be premature to legislate at Union level on this issue (Recital 10). In this regard, it notably recalls that the ECJ recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as to natural persons (Recital 9). It endorsed the Council's proposal to provide for an exception to the prohibition of public statements by public authorities to refer to the suspects or accused persons as if they were guilty (Art. 4 (3)). Concerning the rule on admissibility of evidence obtained in breach of right against self-incrimination or of the right to remain silent, the compromise text endorsed the Council's proposal to delete Art. 6 (4) of the Commission's proposal, but specifies that, without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to remain silent or their right against self-incrimination, the rights of the defence and the fairness of the proceedings are respected (Art. 10 (2)). Finally, concerning the burden of proof, it retained the LIBE Committee's proposal to delete Article 5(2), while retaining comparable language in the recitals. The Commission expressed reservations with respect to the latter deletion.

This text will now be submitted to the European Parliament for a vote at first reading.

Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings

On 27 November 2013, the European Commission submitted to the European Parliament and the Council a proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings (COM(2013) 822 final). This proposal sets out specific minimum rules concerning the rights of suspected or accused children in criminal proceedings to ensure that they are able to understand and follow criminal proceedings, including by having mandatory access to a lawyer at all stages. Therefore, it provides that children cannot waive their right to be assisted by a lawyer, as there is a high risk that they would not understand the consequence of their actions (Art.6). The proposal also sets out other safeguards for the child such as being promptly informed of their rights, having the holder of parental responsibility (or other appropriate persons) informed, and receiving medical examination if deprived of liberty (Art. 4, 5, and 8). These measures should also facilitate the reintegration of children into society after being confronted within the criminal justice system. The sensitive question concerning the age of criminal liability is not covered by the proposal. In its opinion, the European Economic and Social Committee made reference to the narrow definition of the term 'criminal proceedings', which is contrary to ECtHR case law.

In June 2014, the JHA Council reached its General approach. The Council made a distinction between the right of access to a lawyer - which children would have in accordance with Directive 2013/48/EU - and the right to be assisted by a lawyer, which children would have when questioned and when deprived of liberty, subject to certain derogations (Art. 6)."

On 12 February 2015, the LIBE Committee of the European Parliament adopted its draft report on the proposal. The Committee followed an approach similar to the one suggested by the European Economic and Social Committee in its opinion and proposes, for the purpose of this Directive, to take into account not only the formal classification of proceedings in national law, but also their effects on the lives and development of the children concerned (Recital 6).

It extends the scope of the Directive to suspects or accused persons subject to criminal proceedings who are under the age of 21 at the beginning of these proceedings, especially if the proceedings relate to offences allegedly committed before those persons had reached the age of 18 (Recital 10 and Art. 2 (3)). It maintained Article 6 of the Commission's proposal concerning the right to a mandatory access to a lawyer. It also introduced a new provision on remedies in the event of a breach of the rights set out in the proposal, and the right of a child, once arrested, to be visited by the holder of parental responsibility or another appropriate adult (Art. 12 (1a)).

The first trilogue took place on 4 March 2015, and the first technical meeting was held on 17 March 2015. Provisional agreement was reached on several provisions during the subsequent trilogues, On 25 November 2015, the eight trilogue took place.

EU agencies and bodies

Proposal for a Regulation of the European Parliament and of the Council establishing a European Union agency for law enforcement training (Cepol), repealing and replacing the Council Decision 2005/681/JHA

On 16 June 2014, the European Commission put forward a proposal for a Regulation establishing CEPOL (COM(2014) 465 final), repealing and replacing the Council Decision 2005/681/JHA. The proposal would boost CEPOL's role as the European Agency for Law Enforcement training, by providing better and more effective tools to train EU law enforcement officials. The Regulation would give CEPOL the appropriate legal mandate and the necessary resources to implement the EU Law Enforcement Training Scheme which the Commission proposed in March 2013.

The LIBE Committee of the European Parliament tabled a Committee report for plenary 1st reading/single reading 12 March 2015 (Rapporteur: Kinga Gál). The plenary of the European Parliament adopted its first reading position 29 October 2015. The amended text of the proposal by the European Parliament follows a compromise reached between the institutions and endorsed by COREPER on 29 June 2015. The Council should therefore be in a position to approve the European Parliament's position.

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) no. 883/201 as regards the establishment of a Controller of procedural guarantees

On 11 June 2014, the European Commission submitted a proposal for a Regulation amending Regulation (EU, Euratom) as regards the establishment of a Controller of procedural guarantees (COM(2014) 340 final). This proposal aims at further strengthening the procedural guarantees in place for all persons under investigation by the European Anti-Fraud Office and at taking into account the special way in which members of EU institutions are elected or appointed as well as their special responsibilities. For this purpose, the Regulation 883/2013 on investigations by OLAF will be amended. In this respect, a Controller of procedural guarantees is proposed to: first, review complaints lodged by persons under investigation concerning violation of procedural guarantees; second, authorise OLAF to conduct certain investigative measures with respect to members of EU institutions.

The Court of Auditors issued its Opinion on 21st November 2014. No activity in the Council has been reported, and the proposal is awaiting a decision by the LIBE Committee.

Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office

The proposal (COM(2013) 534 final) made on 17 July 2013 seeks to establish the European Public Prosecutor's Office (EPPO). It details its scope of competences and the procedure applicable to its investigations. Using the Early Warning System as provided for in Art. 7 of Protocol n°2, fourteen chambers of national Parliaments sent reasoned opinions to the Commission, thus triggering the yellow card procedure, thereby obliging the Commission to reassess the proposal. Nevertheless, considering that its proposal complied with the principle of subsidiarity and that a withdrawal or an amendment of the proposal was not necessary, the Commission decided to maintain it. Debates within the Council have regularly taken place since October 2013 at the expert group level (COPEN), within CATS and in the JHA Councils following an article by article approach.

The proposal was developed substantially under the Lithuanian and the Hellenic Presidencies, and on that basis the Hellenic Presidency started to revise the Commission proposal, focusing on 19 Articles concerning mainly the structure and the competence of the EPPO. Some other key features of the proposal (in particular investigations measures, admissibility of evidence, procedural safeguards and judicial review) were the focus of the Italian Presidency. The Latvian Presidency of the Council continued the work of the Italian Presidency with a view to finalising the first three chapters of the Regulation and reached an agreement in principle on these Chapters by June 2015.

On 12 March 2014, the European Parliament adopted a resolution on the proposal containing number of suggestions for improvements, including a limitation of the European Public Prosecutor's discretion in the choice of forum through binding hierarchical criteria (Art. 27 (4)), and of the EPPO's competence concerning ancillary offences (Art.13). Regarding its structure, the European Parliament recommended, *inter alia*, that the EPPO's organizational model ensures at central level the appropriate skills, experience and knowledge of the legal systems of the Member States. The Plenary of the European Parliament adopted a resolution the 24th April 2015 reiterating the contents of its March resolution and supplementing it in view of the latest developments in the Council. In the report, the European Parliament states the underlining principles and conditions under which it might consent to the EPPO Regulation as required by the Lisbon Treaty. It stresses the need for an independent European Prosecutor, with clear division of jurisdiction between the EPPO and national authorities, and an efficient structure for the effective management of the cases. It also highlights the importance to uphold the right to a judicial review and the rights of suspects and the accused.

An important JHA Council meeting took place on 27 April 2015. Articles 1-6 (definitions, establishment, tasks, independence and accountability) were re-examined. The Latvian Presidency also issued a note to COREPER urging the delegations to lift any remaining reservations on Articles 7-12, which deal with the status and structure of the Office, and indicate their support for the proposed compromise text. The collegial structure of the Office and the concurrent competence of the EPPO and national prosecution services are maintained. The proposed compromise text seeks to strike a balance between the positions and arguments of a number of delegations in relation to rules of the supervision of work of the Office in the Member States. Indeed, some delegations wished to ensure a high level of independence in the operational activities of the European Delegated Prosecutors based in the Member States, often on the basis of efficiency arguments, whereas others wished to give the Permanent Chambers of the Central Office a strong and active role in the supervision of the operational activities of the Office at national level. At the end of the Latvian Presidency the proposed compromise on the first sixteen

articles submitted to the JHA Council received a large support from the Member States. The main concerns addressed by this agreement were the following: the need to ensure an equal distribution of workload of the Permanent Chambers, the powers of the Permanent Chambers during the investigations and prosecutions, the possibility for the Permanent Chambers to delegate decision-making powers to the European Prosecutor supervising the case, the voting-right of the European Prosecutor supervising the case in the Permanent Chamber, the powers of European Prosecutors to give instructions to the European Delegated Prosecutors, the mechanisms for substitution between the European Prosecutors, a mechanism of temporary substitution of the European Prosecutor by a European Delegated Prosecutor.

Until then, only a part of the project was discussed, and the Luxembourg Presidency still needed to reach a partial general approach, with the duty to the discuss on Articles 17 to 37 and then on other discussed issues : the obligation of the Member States to report any criminal conduct which might constitutes an offence within the EPPO competence, the modalities of reporting, including a summary report and its content, the power of the Permanent Chamber to instruct the European Delegated Prosecutor to initiate an investigation, the allocation and the reallocation of a case by the Permanent Chamber, the right of evocation and transfer of proceedings from the national authorities to the EPPO, the investigative measures and cross-borders investigations, transactions. The Luxembourg Presidency focused first on certain specific issues such as cross-border investigations, enforcement of the ordered measure and admissibility of evidence (Art. 25, 26, 27, 31).

The last JHA Council meeting took place on 8-9 October 2015. The Presidency received a large support from the Member States on a consolidated version for Articles 24, 25, 26, 26a, 27, 28, 29, 30, 31, 32, 33 and 35. These articles establish rules covering in particular the conduct of investigations and criminal prosecutions in national courts, the sensitive rules on admissibility of evidence and include the procedural rights of suspects and accused persons. As a consequence of the need to find a compromise, the list of measures that Member States shall ensure the European Delegated Prosecutors are entitled to order or request (Art. 25) has been significantly reduced in comparison to the original Commission proposal. Moreover, the conditions to order investigative measures are no longer limited to the sole condition that the offence subject to the investigation is punishable by a maximum of at least four years of imprisonment. Further conditions can be foreseen by applicable national law. As far as cross-border investigations are concerned, the principle of a single judicial authorization, in the assisting country, was adopted (Art. 26). Concerning the enforcement of the ordered measure (Art. 27), it would be governed by the law of the Member State of the assisting European Delegated Prosecutor even though some formalities could be indicated by the European Delegated Prosecutor handling the case. Concerning the admissibility of evidence (Art. 31), the principle of free admissibility of evidence of the Commission's proposal was not retained. It was replaced by a general statement according to which "evidence presented by the prosecutors of the European Public Prosecutor's Office or the defendant to a Court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State".

During the JHA Council in December 2015, the Luxembourg Presidency aims to reach a partial general approach on a package of articles dealing with the material competence of EPPO and the exercise thereof (art. 17 and 20), the reporting, registration and verification of information (art. 19), the right of evocation of cases (art. 22a) and certain aspects of referrals and transfers of proceedings to the national authorities.

Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)

On 17 July 2013, the European Commission submitted a proposal for a Regulation on Eurojust (COM(2013) 535 final). This proposal aims at providing a single and renovated legal framework for Eurojust, streamlining its functioning and structure in line with the Lisbon Treaty. Several objectives are pursued, notably providing Eurojust with a new governance structure, homogeneously define the status and powers for national Members, involving the European and national Parliaments in the evaluation of its activities, and ensuring that Eurojust could cooperate closely with the EPPO, once it is established. The proposal brings major changes to the current Eurojust Decision, especially concerning Eurojust's governance. In this regard, it introduces a clear distinction between the operational and management functions of the College (Art. 5 and 14). It introduces a provision on annual and multi-annual programming (Art. 15). It provides for the establishment of an Executive Board, thereby enhancing the Commission's participation in the management and

strategic guidance of the agency (Recital 15 and Art. 16). Finally, it details the responsibilities of the administrative director (Art. 18).

During the JHA Council meeting of 12-13 March 2015, a general approach was adopted. The operational function of the College is highlighted (Art. 5) whereas the new provision on the College's management functions is deleted (Art. 14). The general approach maintains, in essence, the homogeneous definition of the powers of national members introduced by the Commission in its proposal, while allowing Member States to grant their national member with additional powers (Art. 8 (1a)). The provisions relating to the EPPO have been excluded, as the negotiations on the Regulation for the establishment of the EPPO are not sufficiently advanced. It is envisaged that a further mandate for discussions concerning the EPPO related provisions shall be sought from COREPER at a later stage in the discussions with the European Parliament.

The European Parliament has yet to adopt its position on the proposal.

Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol)

On 27 March 2013, the European Commission submitted a proposal for a Regulation on Europol (COM(2013) 173 final). This proposal seeks to make Europol more effective at collecting and analysing information, as well as in sharing its analysis with the Member States. This would allow Europol to provide more concrete and targeted support to national law enforcement authorities involved in cross-border investigations. The project of reinforcing the link between training and operational cooperation support, by merging the European Police College (Cepol) with Europol has been abandoned.

The plenary of the European Parliament adopted its first reading position 25 February 2014, whereas the JHA Council adopted its general approach in its meeting on 5-6 June 2014. The differences between the two institutions' approaches include OLAF's access to Europol's databases, which the European Parliament has excluded in its first reading position (Art. 27). In October 2014, the Presidency of the Council presented the outcome of the first trilogue with the European Parliament on the draft Europol Regulation.

The Latvian Presidency held three technical meetings with the European Parliament on 9, 23 and 26 January 2015 and a trilogue on 4 February, at which provisions relating to information processing, data protection and Europol's relations with partners were discussed. Both the Presidency and the European Parliament presented and defended their respective positions. Certain national parliaments (i.e., British and Dutch) have raised concerns with regard to an amendment of the European Parliament which establishes a Joint Parliamentary Scrutiny Group to monitor Europol's activities. They call for Governments to defend the interests of national parliaments during the trilogue negotiations and ensure that they are not diluted as part of the trade-offs required to secure a deal with the European Parliament. Technical meetings were also held on 27 March 2015 and 26 June 2015 and trilogues on 24 March 2015 and 23 June 2015.

The Luxembourgish Presidency has held a technical meeting on 9 October 2015 and trilogues on 22 and 28 September 2015, as well as on 20 October 2015.

Processing of personal data for law enforcement purposes

Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data

The Commission proposed a new framework for data protection in the EU including two legislative proposals: the first being a proposal for a Regulation, setting out a general EU framework for data protection, and repealing the Directive 95/46/EC; and the second a proposal for a Directive on protecting personal data processed for law enforcement purposes, currently organised under Framework Decision 2008/977/JHA (COM(2012) 10 final). The Directive would apply to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Its scope would be broader than that of the current Framework Decision since domestic processing operations would also be covered in addition to "cross-border" data.

The European Parliament adopted its first reading position on 12 March 2014. The amendments to the proposal go in the sense of providing stronger

safeguards; for instance, an explicit right to erasure has been inserted. Particular protection is endorsed in relation to data transfer to non-EU countries.

Regarding the Council, the proposed Directive has been discussed in the Working Party on information exchange and data protection (DAPIX) under every Presidency since the beginning of 2012. In September 2014, the scope of the Directive was the subject of discussion.

A compromise on the main issue concerning the subject matter and objectives in Art. 1(1) and how to delimit this in relation to the General Data Protection Regulation was reached at the end of the Latvian Presidency Linked to this is the question to which bodies the Directive should be applicable.

Work on this proposed directive is continuing under the Luxembourg Presidency with the aim to reach an agreement on the whole data protection package by the end of the year.. A compromise was drafted in order to reach a general approach during the JHA Council which took place on 8-9 October. The Council agreed on this negotiating position, which allowed the Luxembourg presidency to start discussions with the European Parliament and to organise a first trilogue, on 27 October 2015. The Presidency issued a preparatory document in this view. As for the subject matter and objectives, the Council added in its scope the purpose of the safeguarding against and the prevention of threats to public security (Art. 1). As for the level of protection that this project is supposed to guarantee, the Council adopt the view that it should propose a minimum harmonization and the Member States can go further (Art. 1a). As for the scope of the Directive, the Council did not keep the extension to EU bodies made by the Commissiony (Art. 2(3b)). The agreement also permits processing by the same or another controller for other purposes than for which the data are collected, provided that this the processor is allowed to do so and that the processing is necessary and proportionate to that other purpose (Art. 4). Moreover, the data subject (notice, right of access) rights are more limited (Art. 10-16). Finally, the agreement removed the obligation to amend existing agreements involving the transfer of personal data conducted by the Member States (Art. 60) and delayed the obligation for the Commission to assess the need to align existing EU instruments with the new Directive (Art. 60 (2)).

In the meantime, the European data protection supervisor issued a general Opinion on the 27th of July and an addendum on the 9th of October. These documents were related to the general package on data protection. The European data protection supervisor issued a specific opinion on 28 October 2015 on the Directive for data protection in the police and justice sectors. Several recommendations were made, such as the necessity for the Commission to present a proposal for a specific instrument for data protection at the level of the EU institutions and body, the necessity to take into account the *Digital Rights Ireland* and *Schrems* judgements. Is of a particular importance for the European data protection supervisor the principle of purpose limitation, the right to access of individuals to their personal data, on the control of data protection by independent data protection authorities and a new approach concerning the transfer of data to a third country. Moreover, in reaction to the proposal of the Council to draft only a minimum harmonisation, the opinion adopts the view that the essential components of data protection should be included. As to the scope of the proposed Directive, the opinion asserts that all activities which are not directly connected to the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties should be regulated by the general Regulation on data protection. This Regulation should also regulate the performance of law enforcement tasks by non-public-entities and organisations. Finally, the opinion, in opposition to what was proposed by the Council, urges to ensure that existing EU instruments and agreements involving the transfer of personal data concluded by the Member States are amended in order to be aligned with the new Directive.

Proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

The Commission issued on 2 February 2011 a proposal for a Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, (COM(2011) 32 final). It followed a previous proposal for a framework-decision made on 6 November 2007 and intended to provide for a reactive, real time, and proactive tool to law enforcement authorities in the fight against terrorism by using data collected by air carriers. The first proposal for a framework-decision was not adopted.

The European Data Protection Supervisor issued an Opinion on 25 March 2011, explaining that it was a better proposal but still needed changes to be considered as sufficiently balanced. Similarly, the Opinion issued by the European Economic and Social Committee on 5 May 2011 underlined the risk that this proposal steps up "security at the expense of citizens' rights". The Article 29 Working Party on Data Protection's Opinion and the European Fundamental Rights Agency's Opinion did also raise serious doubts about this proposal. The Council adopted a general approach on the text proposed by the Commission on 23 April 2012, before starting the negotiations with the Parliament. This first draft of the Directive was rejected by the LIBE Committee (Rapporteur: Timothy Kirkhope) of the European Parliament, questioning its necessity and its proportionality, on 24 April 2013 and was no longer considered as a priority.

The project regained attention at the beginning of the year after the terrorist attacks in Paris. In a resolution on anti-terrorism measures adopted on 11 February 2015, the European Parliament stated that the PNR Directive should be adopted by the end of the year. The Parliament stressed the necessity to take into account the fundamental rights principles and the Digital Rights Ireland Judgment. The LIBE Committee of the European Parliament issued on 17 February a first draft report on the proposition, and a second report on this proposal on 7 September. These new drafts narrowed the scope of the project to cover terror offences and serious "transnational" crime (Art. 1(2)), gave specific consideration for sensitive data (Art 4(1), limited the access to PNR data to four years instead of five for serious crime (Art. 9 (2a)), created the obligation for each EU member state to appoint a data protection supervisory officer (Art. 3a), and requested specific training and selection of the person who access and analyze the PNR data (Art. 3a (1)).

An informal meeting of the Heads of State or Government on 12 February 2015 asked the EU legislators to urgently adopt a strong and effective European Passenger Name Records Directive with solid data protection safeguards. Following this, the COREPER agreed on 18 February 2015, that the general approach should be used as a basis for informal trilogues with the European Parliament. The Luxembourg presidency started the discussion in order to prepare the first informal trilogue held in September 2015. The JHA Councils on 12-13 March and on 15-16 June reiterated the crucial importance of soon reaching an agreement on PNR. The document issued by the Presidency underlined the key elements that needed to be discussed. The scope of the Directive is the main issue. While the Council wanted to extend it to prevention of "serious crime" in general, the European Parliament wanted to limit it to serious transnational crime only and also to provide a list of the offences considered as being serious. Similarly, the optional inclusion by the Member States of intra EU-flights was proposed in the Council general approach because of its usefulness as regards the monitoring of foreign terrorist fighters but was rejected by the Parliament. The parliament however wished to extend the scope of the Directive to the prevention of immediate and serious threats to public security and also to data held by non-carrier economic operators. The possibility to allow EUROPOL to access these data, requested by the Parliament, is also a question. No information about the negotiations has been released.

In its second opinion on the proposal on 24 September, the European Data Protection Supervisor pointed out that in spite of the improvement made, the draft still does not comply with necessity and proportionality principles. It reiterates "the EU needs to justify on a basis of available evidence why a massive, non-targeted and indiscriminate collection of data of individuals is necessary and why that measure is urgently needed". Beyond this general lack of justification about the necessity of the project, the European data protection supervisor also underlined several shortcomings of the Proposal. Most of them are based on the *Digital Rights Ireland* case. For example, the data retention period should be justified by objective criteria and the Directive should clearly provide that the PNR data may not be used for other purposes than the prevention, detection, investigation or prosecution of terrorist offences and serious transnational crime. Moreover, court or an independent administrative body should give a prior approval upon a request of access to the data by a competent authority. Furthermore, the scope of the PNR scheme should be much more limited and framed. Finally, the criteria to justify the PNR access by the competent authorities should also be clearly defined.

Following a request from the Parliament, the Court of Justice will give on opinion on the agreement envisaged between the European Union and Canada on the transfer and processing of Passenger Name Record data, which will clarify the compatibility of this practice with fundamental rights.

After the terrorist attack in Paris this 13 November 2015, the Council reiterates the urgency and priority to finalise an ambitious EU PNR before the end of 2015.

Approximation of substantive criminal law

Proposal for a Directive in the fight against fraud to the Union's financial interests by means of criminal law

The proposal for a Directive on the protection of the financial interests (COM(2012) 363 final) of the EU would replace the Convention on the protection of the European Communities' financial interests of 26 July 1995, including its Protocols of 27 September 1996, 29 November 1996 and 19 June 1997. It provides for the obligation to criminalise the behaviours described in the proposal and contains rules on imprisonment thresholds, types of sanctions, liability of legal persons, freezing and confiscation, jurisdiction, etc.

Whereas the proposal was initially based on Art. 325(4) TFEU (prevention of and fight against fraud affecting the financial interests of the Union), the Council changed it last in its general approach of June 2013 for Art. 83 (2) TFEU, which entails the application of specific rules regarding instruments of judicial cooperation in criminal matters (possibility for UK and Ireland to opt-out).

On 16 April 2014 the plenary of the European Parliament endorsed in its first reading position the Council's change of legal basis. Nonetheless, there are some significant differences between the two texts which have to be addressed in the course of inter-institutional negotiations, including the definition of "the Union's financial interests", whether or not VAT offences should be included in the scope of the proposal or the definition of public official, which according to the EP's first reading position is limited to "Members of bodies" and does not cover "institutions, offices and agencies".

Trilogue discussions under the Italian Presidency began in September 2014 focusing on the scope of the Directive, the definition and scope of offences covered by the Directive and extra-territorial provisions. On the 27 November 2014, the Presidency recalled that a few substantive issues remain open, in particular the exclusion of VAT-fraud from the scope of the Directive (Art. 2), the definition of fraud (Art. 3), the inclusion or not of a specific offence of public procurement fraud in the Directive (Art. 4), the level of sanctions provided and the definition of serious offences (Art. 7) and the prescription provision (Art. 12). For these reasons, the Presidency underlined the risk that the adoption of this Directive may be considerably delayed. The last trilogue was held on 2 June 2015. The Council and the Parliament still have conflicting positions on one key issue, namely the inclusion of VAT fraud in the scope of the PIF Directive.

The release of the Taricco judgment by the Court of Justice of the European Union on 8 September restarted the discussions and led the Council to reconsider its position. In this decision, the CJEU, interpreting the 1995 PIF Convention, clearly asserted that VAT fraud was included in the scope of the PIF Convention . Following this judgment, the Presidency asked delegations and Ministers whether that judgement had led them to change their positions in the ongoing negotiations. After informal exchanges, the Luxembourg Presidency decided to reopen the negotiations on that point and to propose the inclusion of major VAT fraud in the scope of the Directive. The discussed issue is now related to the definition of major VAT fraud and the extent to which the Directive should include and deal with VAT fraud.

Adopted texts

Approximation of substantive criminal law

Proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

On 7 February 2013, the Commission presented a package composed of a proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (AML Directive, COM(2013) 45 final) and a proposal for a Regulation of the European Parliament and the Council on information accompanying transfers of funds. Their main objective is to further strengthen the EU's system for prevention of money laundering and terrorist financing, by bringing it in line with the Recommendations issued by the Financial Action Task Force (FATF) of February 2012, thus ensuring the soundness, integrity and stability of the financial system. Indeed, in its Conclusions of 22 May 2013, the European Council called for rapid progress and, *inter alia*, stated that the "revision of the third Anti-Money Laundering Directive should be adopted by the end of the year".

On 13 February 2013, the joint report by the European Parliament's LIBE and ECON Committees was adopted, and the European Parliament adopted its position at first

reading on 11 March 2014. The Permanent Representatives Committee agreed on a negotiating mandate on the above mentioned proposals on 13 June 2014. On that basis, negotiations took place with the European Parliament and the Commission with a view to an early second reading agreement.

A total of five trilogues took place. On the basis of the mandate given by the Permanent Representatives Committee of 2 December 2014, the Presidency concluded the negotiations with the European Parliament on 16 December 2014, with the two parties agreeing *ad referendum* on the texts of the Regulation and the Directive. The Presidency submitted the negotiated texts to the Permanent Representatives Committee on 21 January 2015 and to the Council on 27 January 2015. All delegations endorsed the agreement reached with the European Parliament. The LIBE and ECON Committees voted on 27 January 2015 in favour of the agreed texts. On 29 January 2015 the Chairs of the LIBE and ECON Committees addressed a letter to the Presidency indicating that, should the Council transmit formally to the Parliament its position in the form that it was presented in the Annex to that letter, the Chairs of the LIBE and ECON Committees would recommend to the Plenary to accept the Council's position without amendment.

On the 2 February 2015 a political agreement was found within the Council. It resulted into the adoption of the Council's position at first reading on 20 April 2015. On 27 April the Commission issued a Communication positively commenting both the inter-institutional negotiations and the Council's position at first reading. The European Parliament approved without amendments the Council's position in second reading on 20 May. One of its major achievements is the creation of a central registry in order to facilitate the transparency of beneficial ownership information (Art. 30).

Case Law

Case C-237/15 PPU Lanigan, Judgment of 16 July 2015 (Grand Chamber)

This case involves the interpretation of Art. 17 of the EAW Framework Decision regarding the timeframe within which a EAW must be executed. The facts are the following: in January 2013, Mr. Lanigan, an Irish national, was arrested pursuant to an EAW issued by UK authorities regarding criminal proceedings brought against him for criminal offences he had committed in 1998. During the examination of his case by the Irish High Court a year and a half later, he submitted arguments for the assessment of which additional information on behalf of the issuing authority was required. In December 2014, he made a bail application, but since he did not meet the terms, Mr. Lanigan remained in custody. At that time, he further submitted that the request of surrender should be rejected since the time limits set out in the Framework Decision had not been complied with. The High Court decided to refer two questions to the CJEU; what is the effect of a failure to meet the time limits of Art. 17 and whether failure to meet them gives rise to rights on the part of the individual who is placed into custody.

The Grand Chamber considered both the context and the objective of the EAW, in particular Art. 15 and 17, and held that the expiry of the time limits to take a decision on the execution of a EAW does not signify that the competent court is freed from its obligation to carry out the execution procedure and adopt a decision in that regard. Both articles do not provide for any indications as to a limitation of the temporal validity of that obligation and an interpretation according to which national judicial authorities could no longer pursue the execution of the warrant after the prescribed time has expired would run counter to the objective of the Framework Decision.

Furthermore, as regards the placement into custody, the Court pointed out that no provision of the Framework Decision provides that the person being held in custody must be released once the time limits have expired. Besides, a general and unconditional obligation to release the person upon expiry of these time limits could reduce the effectiveness of the surrender system and jeopardise the attainment of its objectives. However, the Grand Chamber stressed that the Framework Decision must be interpreted in the light of the EU Charter of Fundamental Rights, particularly Art. 6 on the right to liberty and security. In this regard, the Court took the view that a person may be held into custody as long as the total duration of this custody is not excessive, an issue that the executing judicial authority must examine by taking into consideration factors all relevant factors (such as the sentence potentially faced by the requested person, the risk of absconding and the fact that the requested person has been held in custody for a period exceeding the timeframe of the Framework Decision). Finally, the Court noted that if the executing judicial authority decides to end the requested person's custody

it is required to accompany the provisional release of that person by any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his surrender remain intact until a final decision on the execution of the EAW is taken.

C-105/14 Tarrico and Others, Judgment of 8 September 2015 (Grand Chamber)

Mr. Taricco and several others defendants are prosecuted in Italy for having formed and organised, in the period from 2005 to 2009, a conspiracy to commit various offences in relation to VAT. Italian legislation prescribes a fairly limited period for prosecuting such criminal acts, which according to the referring judge results in that de facto impunity and indirect authorisation of unfair competition have become the norm. In this context, the CJEU was asked whether the Italian system is compatible with Italy's commitments under EU law, in particular the obligation to protect competition, the prohibition against state aid, the exhaustive nature of the list of VAT exemptions, and the principle of sound public finances.

The Grand Chamber focused on the third question. It recalled the general principle of EU law, as stressed in *Åkerberg Fransson*, that Member States are obliged not only to take all legislative and administrative measures appropriate for ensuring collection of VAT due on their territory, but also fight against tax evasion. Then, it reiterated its finding in that case that there is a direct link between the collection of VAT revenue and the availability to the EU budget of the corresponding VAT resources (see in this regard the Advocate General's opinion). In order to highlight the need for imposition of effective, proportionate and dissuasive criminal penalties it made reference to the PFI Convention, which in Art. 1 includes VAT fraud within the concept of PIF fraud. This remark is particularly timely in the light of the ongoing negotiations for the future PIF Directive and the Council objections to including tax fraud within the scope of the directive (as this will have repercussions regarding the competence of the future EPPO). In this framework, the Court held that the Member States must ensure that such cases of serious fraud are punishable by effective and dissuasive penalties and that is for the referring Court to assess whether this is the case in Italy. The Grand Chamber hinted though that if the referring Court concludes that the application of the national provisions have the effect that in a considerable number of cases, the commission of serious fraud escapes criminal punishment, then 'it would be necessary to find that the measures laid down by national law … could not be regarded as being effective and dissuasive', which would be incompatible with At. 325(1) TFEU, the PFI Convention and Directive 2006/112. In addition, the referring Court must also establish whether the discussed provisions apply to cases of VAT evasion in the same manner as they apply to fraud affecting Italy's own financial interests.

As for the consequences of incompatibility of the national provisions with EU law, the Court stated that the provisions at stake should be disapplied, but the fundamental rights of the persons concerned must be respected. In reply to several observations regarding the retroactivity of criminal law rules, the Grand Chamber opined that a disapplication of the Italian rules would not infringe the suspect's fundamental rights as it would not lead to a conviction for an act or omission that did not constitute an offence at the time when it was committed or to an application of a sanction which at that time was not prescribed by domestic law.

C-216/14 Covaci, Judgment of 15 October 2015 (First Chamber)

This is the first judgment released by the CJEU regarding the interpretation of the Roadmap Directives, in particular Directive 2010/64/EU on the right to interpretation and translation and Directive 2012/13/EU on the right to information. In a nutshell, Mr. Covaci, a Romanian national, was fined for road traffic offences he committed in Germany. He had no fixed domicile there, thus he issued an irrevocable written authorisation for court officials to accept service of documents addressed to him. According to national legislation the prescribed period for bringing appeals against any judicial decision begins to run from service on the authorised persons. Furthermore, the imposed penalty is subject to a simplified procedure, which results in a provisional decision that may be challenged by the accused within a period of two weeks starting from the date of service and only in German language.

The referring Court raised two issues before the CJEU; first, whether it was compatible with the Directive on the right to interpretation and translation (Directive 2010/64/EU) that the objection must be lodged in

German; and second, whether the Directive on the right to information (Directive 2012/13/EU) precluded a provision of national law according to which the period to challenge a decision begins to run upon service of a court document by the person authorised by the accused.

With regard to the first question, contrary to the Advocate General's view, the CJEU found that the rights provided by Art. 3(1) and (2) of Directive 2010/64 do not cover the written translation into the language of the proceedings of a document such as an objection lodged against a penalty order even if the accused is not in command of that language. However, it noted that according to Art. 3(3) of the directive competent authorities are allowed to decide that a document other than those prescribed is essential to safeguard the exercise of right of defence and the fairness of the proceedings. Therefore, it held that national rules that do not allow an objection to be submitted in a language other than that of the proceedings, although the individual concerned does not have command of it, provided that the competent authorities do not consider that in the light of the proceedings concerned and the circumstances of the cases, such an objection constitutes an essential document. As for the second question, the Court concluded that Member States may oblige an accused to appoint such a person to accept service, provided that the accused has the benefit of the whole of the prescribed period for lodging an objection against the penalty order.

Academic activities

Research Projects

"Study on minimum sanctions in the EU Member States" *JUST/2013/JPEN/PR/0047/A4*

ECLAN is involved in this project (sub-contractor) with Ecorys NL.

With a view to the new legal framework for criminal law legislation under the Lisbon Treaty, the objective of the study is to achieve a better understanding of the basic legislative structure and – based on statistics – of the practice of the national criminal law systems on minimum sanctions in the 28 Member States.
The result of the study will assist the EU legislator in ensuring added value and improving consistency and coherence whenever the adoption of minimum criminal sanctions is considered.
The final report was submitted in July 2015 and accepted by the Commission.

Framework Contract on Impact Assessment, Evaluation and Evaluation related services in the area of Migration and Home Affairs, with the European Commission, DG Home

ECLAN is involved in this contract (partner) with the Odysseus Network and Deloitte (BE).

The above-mentioned partners have been awarded a Framework Contract, starting from October 2015, and running for four years. During this period, ECLAN and its partners may receive assignments for DG Home and for the agencies connected to DG Home (Europol, CEPOL, eu-LISA, EASO, Frontex, EMCDDA).

Publications

Valsamis Mitsilegas, Peter Alldridge and Leonidas Cheliotis (eds), *Globalisation Criminal Law and Criminal Justice,* Hart, January 2015, 252 pages.

Sonia Morano-Foadi and Lucy Vickers, *Fundamental Rights in the EU. A Matter for Two Courts,* Hart, March 2015, 278 pages.

Emma Lees, *Interpreting Environmental Offences, The need for certainty,* Hart, May 2015, 256 pages.

Fiona de Londras, Josephine Doody (eds.), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism,* Routledge, May 2015, 256 pages.

Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law,* Intersentia, July 2015, 402 pages.

Christopher Michaelsen (ed.), *Comparative perspectives on Theory and Practice of Preventative Detention,* Hart, August 2015, p.

Carlos Gómez-Jara Díez, *European Federal Criminal Law, The Federal Dimension of EU Criminal Law*, Intersentia, October 2015, 256 pages.

Michiel Luchtman (ed.), *Sharing Sovereignty in the European Union?*, Intersentia, November 2015, 336 pages.

Upcoming Events

Conference, *ECLAN 10th Anniversary, The needed balances of EU Criminal Law: Past, Present and Future*, ECLAN, Brussels. Due to the exceptional circumstances in Brussels, the Conference has been reported. Further information will be provided in due course on the ECLAN website.

Seminar, *Electronic Evidence in Criminal Proceedings,* ERA, 29 February – 1st March 2016, Lisbon. Link.

Seminar, *Better understanding the role of the European Court of Justice in Criminal Matters,* ERA, 29 February – 1 March 2016, Trier. Link.

Summer School, *The EU Area of Criminal Justice*, co-organised by ECLAN and the IEE - ULB, 4 – 8 July 2016, Brussels. Link: http://www.summerschool-ulb-criminaljustice.eu

New Journal of European Criminal Law

The *New Journal of European Criminal law* is the leading international journal on European Criminal Law.

It aims at analysing, discussing, defining, developing and improving criminal law in Europe and in particular criminal law as it is drawn up by the European Union and the Council of Europe. It embraces an encompassing approach as to the matter, which is not limited to what is traditionally considered as criminal law but it extends to and complements environmental law and competition law. As regards the latter it is the first ever legal journal to treat criminal and competition law disciplines related at their interface.

Having two patrons, namely ECLAN and ECBA, it serves as a forum for both legal practitioners and academics interested in issues related to European Criminal Law. Its editorial board comprises as wide a cross-section of the legal profession as possible.

The most recent issue of the Journal has been published in **September 2015**, and focuses on **EU restrictive sanctions on individuals**. This special issue has been edited **by S. Crosby, F. Galli, S. Hufnagel**.

The Journal solicits contributions from all those involved in criminal law in its European dimension. It seeks a large variety of articles, ranging from short case notes with little or no comment, to opinionated comments on developments to long in-depth critiques of judgments and legislative measures with proposals for reform or change and to scientific publications on the theoretical developments of this specific branch of law.

Contributions should be sent to: Irene.wieczorek@vub.ac.be. A blind peer review system will be carried to ensure the quality and the originality of the Journal.

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