News

Actualités / Kurzmeldungen

European Union*

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

Foundations

Fundamental Rights

CJEU Confirms Interim Measures Against Polish Supreme Court Reform

Also after having heard the arguments of the Polish government, the CJEU confirmed interim measures against the reform of the retirement age of Supreme Court judges under new Polish law. By order of 17 December 2018, the judges in Luxembourg granted the Commission's request for interim measures and upheld a provisional order of 19 October 2018 by the Vice-President of the Court (see eucrim 3/2018, 144). The full text of the order (referred to as Case C-619/18 R) is available in French.

Despite taking into account the position of the Polish government, the CJEU acknowledged that the pleas raised by the Commission were justified in fact and law. All requirements for interim relief were fulfilled, in particular the urgency requirement, which presupposes that the interlocutory order avoids serious and irreparable harm to the interests of the EU.

In its reasoning, the CJEU emphasized that the application of the national legislation at issue is likely to cause serious damage to the EU legal order. The reason for this is that the independence of the Polish Supreme Court is not ensured until the delivery of the final judgments in the infringement proceedings. Failure to ensure the independency of the Supreme Court may have several consequences, e.g.:

- Preliminary ruling mechanism does not work properly;
- Lack of authority of the Supreme Court over the lower Polish courts;
- Mutual trust of the EU Member States and their courts is undermined in the Polish system, which can lead to the refusal of recognition and enforcement of judicial decisions made by Polish courts and, in the end, disturb the cooperation mechanism in the EU.

The CJEU also examined whether weighing up the interests involved support the granting of interim measures. The CJEU concluded that the EU's general interests in the proper working of its legal order predominates over Poland's interest in the proper working of the Supreme Court, given the fact that the application of the system before the reform is only maintained for a limited period.

It should be noted that the order of 17 December 2018 did not make final judgement on the substance of the action. This will be done at a later stage. The order for interim measures is also without prejudice to the outcome of the main proceedings. (TW)

Area of Freedom, Security and Justice

CJEU Paves Way to Exit from Brexit

The United Kingdom is free to unilaterally revoke the notification of its intention to withdraw from the EU. Unanimous approval by the European Council regarding this revocation is not necessary. This was the response of the CJEU plenary to a request for a preliminary ruling by the Scottish Court of Session (Case C-621/18, *Wightman and Others v. Secretary of State for Exiting the European Union*).

The question of whether the notification of the UK's intention to withdraw from the EU (made in accordance with Art. 50 TEU) can be revoked was posed by members of the UK Parliament, the Scottish Parliament, and the European Parliament. The intention was to provide guidance to the members of the House of Commons when exercising their vote on the withdrawal agreement.

With the CJEU's answer of 10 December 2018, the UK now has three (instead of two) options since the pro-

* If not stated otherwise, the news reported in the following sections cover the period 16 November – 31 December 2018.

cedure of Art. 50 TEU was triggered by the British Prime Minister's notification to leave the EU following the Brexit referendum on 23 June 2016:

- Withdrawal from the EU without an agreement;
- Withdrawal from the EU with an agreement;
- Revocation of the notification of the intention to withdraw, with the UK remaining in the EU.

The judges in Luxembourg stressed, however, that the revocation is subject to the national constitutional requirements. Furthermore, a revocation is subject to the following:

- Only possible as long as a withdrawal agreement between the EU and the UK has not entered into force, or, if no agreement is concluded, as long as the two-year period (or any possible extension) from the date of the notification of the intention to withdraw has not expired;
- The revocation is unequivocal and unconditional;
- The revocation must be communicated in writing to the European Council.

A revocation would have the effect that the UK remains in the EU under the terms of its current status and that the withdrawal procedure is put to an end.

In its reasoning, the CJEU observed that the revocation is not expressly governed by Art. 50 TEU, but follows the same rules as the withdrawal itself. Consequently, the EU Member State that notifies its intention to withdraw can unilaterally decide not to do so, because it is the sovereign decision to retain a status as a EU Member State.

An approval of the revocation by the other EU Member States (as put forward by the Council and the Commission in the proceedings) would be counter to the principle that a Member State cannot be forced to leave the EU against its will.

The judgment of the CJEU extends the spectrum of action for UK parliamentarians and can be termed "integration-friendly." It remains rather unlikely, however, that the option of the revocation will be heeded. First, the UK must overcome the current political impasse. (TW)

Schengen

New Legal Framework for Schengen Information System

spot light

New alerts on criminals and return decisions; greater vigilance for terrorist offences; better protection for children at risk of abduction; and enhanced data protection. These are the main features of the new legal framework for the EU's largest security database, the Schengen Information System (SIS). The new rules aim at better effectiveness and efficiency of the system's second generation (SIS II), whose legal bases stem from 2006/2007 and which became fully operational in 2013.

The reform proposal presented by the Commission on 21 December 2016 (see eucrim 1/2017, p. 7) was adopted in November 2018 by the Council. The European Parliament had already agreed to the political compromise found during the trilogue negotiations in October 2018.

The new legal framework was published on 7 December 2018 in the Official Journal (O.J. L 312). It consists of three regulations:

- Regulation (EU) 2018/1860 on the use of the Schengen Information System for the return of illegally staying third-country nationals;
- Regulation (EU) 2018/1861 on the establishment, operation and use of the SIS in the field of border checks;
- Regulation (EU) 2018/1862 on the establishment, operation and use of the SIS in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU.

The three legal instruments were considered necessary because of the distinct EU Member States' participation in EU policies in the Area of Freedom, Security and Justice. The regulations emphasise, however, that this separation does not affect the principle that SIS constitutes one single information system that should operate as such.

In general, the new rules pursue the following objectives:

- Ensuring a high level of security;
- Increasing the efficiency of the SIS;
- Protecting the free movement of persons from abuse;
- Improving the exchange of information;
- Making the SIS a central tool for fighting terrorism and serious crime;
- Supporting border and migration management;
- Preparing the SIS for its interoperability with other large-scale EU information systems, such as the VIS, Eurodac, ETIAS, and EES.

The SIS continues to cover three areas of competence:

- Security cooperation, allowing police and judicial authorities to establish and consult alerts on persons or stolen objects in relation to criminal offences;
- Border and migration management, enabling border and migration authorities to control the legality of third-country nationals' stays in the Schengen area;
- Vehicle control, granting vehicle registration authorities access to information about vehicles, number plates, or vehicle registration documents in order to check the legal status of vehicles.

The following gives an overview of the new features of the legislation, in particular as regards Regulation 2018/1862 on the operation and use of the SIS for police and judicial cooperation in criminal matters:

➤*New Alerts:*

- Introduction of a new alert category of "unknown wanted persons" connected to a serious crime, e.g., persons whose fingerprints are found on a weapon used in a crime;
- Extension of the existing category of "missing persons" to "vulnerable persons who need to be prevented from

travelling," e.g., children at high risk of parental abduction, children at risk of becoming victims of trafficking in human beings, and children at risk of being recruited as foreign terrorist fighters;
- Creation of the new category "inquiry check" allowing national law enforcement authorities to stop and interview a person in order for the issuing Member State to obtain detailed information;
- Introduction of the category of "objects of high value," e.g., items of information technology, which can be identified and searched with a unique identification number.

➤*Greater Vigilance over Terrorist Offences:*
- Obligation for Member States to create SIS alerts for cases related to terrorist offences;
- Obligation to inform Europol of hits alerts linked to terrorism in order to help to "connect the dots" of terrorism at the European level.

➤*Types of Data – Use of Biometrics:*
- New rules on more effective use of existing biometric identifiers, i.e., facial images, fingerprints, palm prints, and DNA profiles;
- Use of facial images for biometric identification;
- Use of DNA profiles when searching for missing persons who need to be placed under protection;

➤*Law Enforcement Access:*
- Immigration authorities allowed to consult SIS in relation to irregular migrants who were not checked at a regular border control;
- SIS granted access to boat and aircraft registration authorities;
- SIS granted access to services responsible for registering firearms in order to allow them to verify whether the firearm is being sought for seizure in Member States or whether there is an alert on the person requesting the registration;
- Europol's access rights extended to give it full access to the system, including missing persons, return alerts, and alerts in relation to third-country nationals;
- European Borders and Coast Guard Agency and its teams granted access to all SIS categories, insofar as it is necessary for the performance of their tasks and as required by the operational plan for a specific border guard operation.

➤*Enhanced Data Protection and Data Security:*
- Introduction of additional safeguards to ensure that the collection and processing of, and access to, data is limited to what is strictly necessary and operationally required;
- Applicability of and adaptation to the new EU data protection framework, in particular Directive 2016/680 and the GDPR;
- Coordination and end-to-end supervision by the national data protection authorities and the European Data Protection Supervisor.

Regulation 2018/1860 establishes an effective system, so that return decisions issued in respect of third-country nationals staying illegally on the territory of the Member States can be better enforced and third-country nationals subject to those decisions can be monitored.

Regulation 2018/1861 establishes the conditions and procedures for the entry and processing of SIS alerts on third-country nationals and for the exchange of supplementary information/additional data for the purpose of refusing entry into/stay on the territory of the Member States. Member States will, *inter alia*, be obliged to insert into the SIS any entry bans issued to third-country nationals preventing them from entering into the Schengen area.

The regulations contain specific rules as regards the EU Member States having a special status with Schengen and measures in the area of freedom, security and justice of the TFEU, e.g., Denmark, Ireland, Croatia, Bulgaria, Romania, and Cyprus.

As regards the entry into force of the new SIS rules, the regulations follow a step-by-step approach: Several improvements to the system apply immediately upon entry into force of Regulations 2018/1861 and 2018/1862 (i.e., 27 December 2018), whereas others will apply either one or two years after entry into force. The said regulations should apply in their entirety within three years after entry into force – and by 28 December 2021 at the latest. Regulation 2018/1860 will apply from the date set by the Commission.

The SIS is the most widely used security database in Europe, with over 5 billion consultations in 2017 and currently contains around 79 million records. It is estimated that further enhancement of the SIS by the new legal framework will cost the EU around €65 million by 2020. Each EU Member State will reportedly receive a lump sum of €1.2 million to upgrade its national system. The EU agency eu-LISA will be responsible for technical improvements and operation of the system. (TW)

EP Wants Temporary Border Controls Kept to a Minimum

On 29 November 2018, the European Parliament (EP) adopted its negotiating position on the revision of the Schengen Borders Code. MEPs backed amendments as proposed by rapporteur *Tanja Fajon* (S&D, Slovenia) by 319 to 241 votes (with 78 abstentions).

The reform was initiated by the Commission in September 2017 (see eucrim 3/2017, pp. 98–99) and aims at adapting rules on the temporary reintroduction of internal border controls in a targeted manner.

MEPs stressed that the revision must ensure the Schengen achievements and put an end to current misuse or misinterpretation when upholding internal border controls.

In particular, the EP advocated reducing the time periods by means of which internal borders controls can be upheld as follows:
- The initial period for border checks should be limited to two months;
- Border checks should not be extended beyond one year.

Furthermore, the EP's amendments to the proposal highlighted the following:
- Temporary border checks should only be used in exceptional circumstances and as a measure of last resort;
- Schengen countries should provide a detailed risk assessment if temporary border checks are extended beyond the initial two months;
- Subsequent extensions of border checks beyond six months require the Commission to state whether or not the prolongation follows the legal requirements and should be authorised by the EU Council of Ministers;.
- The EP must be more informed and involved in the process.

Representatives of the EP will now enter into negotiations with the Council, which adopted its approach to the Schengen Borders Code reform in June 2018.

Currently, five Schengen countries (Austria, Germany, Denmark, Sweden, and Norway) have internal border checks in place due to exceptional circumstances resulting from the migratory crisis that started in 2015. France carries out internal border checks due to a persistent terrorist threat.

The EP previously voiced criticism over the prolongation of internal border controls, which is not in line with the existing rules, unnecessary, and disproportional (see eucrim 2/2018, p. 84). (TW)

Institutions

Council

Romania Kicks off New Trio Presidency of the Council of the EU

Under the motto "Cohesion, a common European value," Romania took over the Presidency of the Council of the EU on 1 January 2019. Priorities of the Romanian Presidency in the area of security include:
- Increasing the interoperability of EU security systems;
- Protecting the safety of citizens, companies, and public institutions in the cyberspace;
- Improving the overall resilience of the Union to cyber-attacks;
- Continuing the fight against terrorism;
- Setting up the European Public Prosecutor's Office.

The Romanian Presidency is the first in a new 18-month Trio Presidency, to be followed by Finland (July–December 2019) and Croatia (January–June 2020). According to the Trio Presidency's 18-month programme, priorities for the EU's internal security are:
- To enhance police and judicial cooperation;
- To combat organised crime, including drug trafficking and human trafficking;
- To remove terrorist content online and to prevent radicalisation and extremism;
- To enhance the interoperability of information systems;
- To further develop the capacities needed to promote cybersecurity and to counter cyberrisks;
- To advance mutual recognition and commit to promote e-Evidence and e-Justice;
- To establish the EPPO and strengthen cooperation with OLAF.

The Trio programme points out that, at the beginning of the Trio, the main priority will be the finalisation of the still outstanding files of the current Strategic Agenda and in particular those listed in the Joint Declaration on the EU's legislative priorities for 2018–19. The future work will also be inspired by the outcome of the EU summit in Sibiu, Romania, which takes place on 9 May 2019, Europe Day. It will be the first summit of the national leaders of the EU-27 after Brexit. (CR)

OLAF

ECA: Planned OLAF Reform Still Has Weaknesses

On 22 November 2018, the European Court of Auditors (ECA) issued Opinion No 8/2018 on the Commission's proposal of 23 May 2018 amending OLAF Regulation 883/2013 (for the proposal, see eucrim 1/2018, pp. 5–6). The ECA observes that the proposal pursues two objectives: (1) to adapt the functioning of OLAF to the establishment of the EPPO; (2) to enhance the effectiveness of OLAF's investigative function. The ECA Opinion welcomes certain approaches and concepts in the Commission proposal, but still sees some weaknesses preventing the two objectives from being met.

Regarding the relationship with the EPPO, the ECA points out the following:
- There is a risk that evidence collected by OLAF at the EPPO's request would not be admissible before national courts if OLAF applies its own procedural safeguards but not the ones laid down in the EPPO Regulation;
- The proposal does not address OLAF's role in criminal investigations affecting the EU's financial interests, if they concern both Member States that participate in the EPPO scheme and those that do not;
- The effectiveness of "complementary investigations" on the part of OLAF is not ensured.

Regarding the second objective – enhancing the effectiveness of OLAF's investigative function – the ECA welcomed the targeted measures, but does not consider the overall issues surrounding the effectiveness of OLAF's administrative investigations resolved. The ECA makes specific recommendations for the legislative proposal, e.g., bringing OLAF reports under review by the CJEU.

Ultimately, the auditors stress the need to further action. In the short term, the Commission should address the overall issues of OLAF's effectiveness, and the Commission should reconsider OLAF's role in combating EU fraud. Hence, OLAF must be given a strategic and oversight role in EU anti-fraud actions.

In the medium term, the Commission should evaluate the cooperation between OLAF and the EPPO. This should cover:
- Possible restructuring of the EU bodies in charge of administrative and criminal investigations;
- Possible single legal framework to combat fraud in EU spending.

The ECA Opinion is not binding for the co-legislators (Council and EP), but is designed to support their work. (TW)

OAFCN Meeting at OLAF

In November 2018, OLAF hosted the annual meeting of the Anti-Fraud Communicators' Network (OAFCN). Communication experts working for anti-fraud public organisations discussed crisis communication, the importance of storytelling, and real-life communication scenarios.

The OAFCN is a European-wide network of communication officers and spokespersons from OLAF's operational partners in the Member States, such as customs, police, law enforcement agencies, prosecutors' offices, and Member States' Anti-Fraud Coordination Services (AFCOS). It is designed to communicate the threat of fraud and counter-measures to the public. It is also an important forum for awareness raising on fraud issues. (TW)

European Public Prosecutor's Office

Vacancy Notice for the European Chief Prosecutor

On 19 November 2018, the European Commission published a call for application for the first ever European Chief Prosecutor (ECP) to head the European Public Prosecutor's Office (EPPO) based in Luxembourg.

The European Chief Prosecutor is the Head of the EPPO, in charge of organising its work, directing its activities, and taking decisions in accordance with the EPPO Regulation and its internal rules of procedure. Furthermore, the ECP represents the EPPO towards EU institutions, EU Member States, and third parties. Additionally, the ECP has various duties and responsibilities with regard to the setting up of the College, the Permanent Chambers, and the EPPO's internal rules of procedure and financial rules.

Interested applicants must be citizens of one of the EU Member States participating in the EPPO. The candidate may be no more than 63 years of age at the time of the appointment and have a minimum of fifteen years of professional experience as an active member of the public prosecution service or judiciary and at least five years of experience as a public prosecutor responsible for the investigation and prosecution of financial crimes in a Member State.

After evaluation of the selected candidates by a selection panel, the European Parliament and the Council will appoint the ECP.

The vacancy notice was open until 14 December 2018. (CR)

Europol

Cooperation Europol-Japan on New Footing

On 3 December 2018, Europol and the National Police Agency of Japan (NPA) signed a Working Arrangement with the aim of combating serious, international cross-border, and organised crime such as terrorism, drug trafficking, and cybercrime. Under the arrangement, a secure communication line will be established between the agencies. Furthermore, the NPA may second a liaison officer to Europol. In this way, a secure, timely, and direct exchange of information between Europol and the NPA will be ensured.

The arrangement comes in addition to the cooperation offered by the existing Agreement between Japan and the European Union on Mutual Legal Assistance in Criminal Matters. It is also designed to foster cooperation between the EU and Japan in view of the upcoming Olympic Games in Tokyo in 2020. (CR)

Cooperation with Diebold Nixdorf

On 16 November 2018, Europol and Diebold Nixdorf signed a Memorandum of Understanding (MoU) with the aim to better prevent, prosecute, and disrupt cybercrime related to self-service ecosystems. Under the MoU, Diebold Nixdorf will be able to share threat intelligence data and best practices with Europol in a secure and trusted manner.

Diebold Nixdorf Inc is a global end-to-end provider of electronic services, software, and hardware (e.g., for self-service transaction systems such as ATMs and point-of-sale technology) for the financial and retail industries. (CR)

Second Annual Conference on Drugs in Europe

On 6–7 December 2018, Europol hosted the second annual conference on "Drugs in Europe: a bold law enforcement response." Delegates from all over the EU, third states, and international organisations discussed the latest developments in illicit drug trafficking.

Faced with an increasing number of organised criminal groups and the supply of illegal drugs, delegates called on Member States to ensure adequate resources to combat them. Furthermore, emphasis was placed on the need for a coordinated response between the EU and Member States as well as the exchange of information, operational cooperation, and coordination of activities between Member States' law enforcement authorities and Europol. Lastly, delegates underlined the need for effective implementation of comprehensive asset recovery legislation. (CR)

Operational Network Against Mafia-Style Criminal Groups

At the end of November 2018, law enforcement authorities from Italy, Belgium, France, Germany, the Netherlands, and Spain kicked off a new operational network (@ON), together with Europol, to strengthen their cooperation against mafia-style criminal groups, Eurasian and Albanian criminal networks, and

Report

Conference on the Implementation of the EPPO Regulation

Bucharest, 13-14 December 2018

The Romanian National Anti-Corruption Directorate (with the assistance of the Romanian Association for the Research of EU Criminal Law) organised the conference "The impact of the EPPO Regulation at the level of the national authorities of the participating EU Member States." The HERCULE III Programme financially supported the conference. It was part of the ongoing project "Promoting the protection of the financial interests of the EU by supporting the actions of the Member States and the European Institutions in the transition towards the EPPO."

The event brought together representatives from the national prosecution offices, judges, academics, and members of the Associations for European Criminal Law and the Protection of Financial Interests of the European Union. It aimed to facilitate the sharing of experiences, challenges, and practices in order to prepare the EU and the national legal systems for the establishment of the EPPO.

The first part of the conference included presentations on the state of play of the implementation of the EPPO Regulation (*Péter József Csonka*, DG JUST), on OLAF support in EPPO investigation (*Luca de Matteis*, OLAF) and on the challenges of the implementation of the PIF Directive (*Christoph Burchard*, University of Frankfurt). The conference continued with presentations that focused on the study on the impact of the future EPPO on the Romanian judicial and legal system (*Gheorge Bocsan*, Prosecutor's Office attached to the High Court of Cassation, Romania), on the relations between the national and European Prosecutors (*Alberto Perduca*, Chief Prosecutor, Italy) and on the reporting obligations and general cooperation between the national authorities and the EPPO (*Emanuelle Wachenheim*, Ministry of Justice, France).

Additional presentations addressed the issues of admissibility and freedom of circulation of evidence during the investigation and adjudication of the EPPO cases (*John Vervaele*, Utrecht University), cross-border investigations, cooperation within the EPPO and MLA in criminal matters with third countries (*Filippo Spiezia*, Vice-President of Eurojust), and the procedural guarantees and protection of human rights during EPPO investigations (*Miguel Carmona*, magistrate, Spain).

The last part of the conference was dedicated to a hypothetical case study (*Alexandra Lancranjan*, DNA, Romania), which was subsequently discussed in detail by the participants in different working groups.

Dr. András Csúri, University of Utrecht

Outlaw Motorcycle Gangs. Within the network, specialised investigative units and special investigators will offer support to the Member States involved.

The ONNET project is financially supported by the European Commission. @ON is composed of the Italian *Direzione Investigativa Antimafia* (D.I.A.) – which plays a leading role – the Belgian Federal Police, the French National Police and *Gendarmerie Nationale*, the German Federal Criminal Police Office (*Bundeskriminalamt*), the Dutch National Police, and the Spanish National Police and *Guardia Civil*. (CR)

Fourth European Money Mule Action

Europol, Eurojust, and the European Banking Federation (EBF) reported on the fourth European Money Mule Action "EMMA 4" – a global law enforcement action week tackling the issue of money muling. According to the joint press release of 4 December 2018, the action led to the arrest of 140 money mule organisers and 168 persons. In addition, 1504 money mules were identified (for previous actions, see eucrim 1/2016, p. 6).

Thirty states took part in the action that ran from September to November 2018, together with the European institutions. Furthermore, over 300 banks supported the action.

In addition, a money muling awareness raising campaign was kicked off on 4 December 2018. Information is provided under #DontBeAMule on how these criminals operate, how one can protect oneself, and what to do if one becomes a victim.

Money mules are persons who, often unwittingly, transfer illegally obtained money between different accounts on behalf of others. They are regularly tricked by criminal organisations that promise easy money. (CR)

Eurojust

New Eurojust Regulation

spot light

On 6 November 2018, after 5 years of discussion, Eurojust's new Regulation was adopted with the aim of strengthening its capabilities to support the national authorities in their fight against serious, cross-border crime. The Regulation ((EU) 2018/1727) was published in the Official Journal L 295 of 21 November 2018, p. 138.

In the Regulation, Eurojust's competences are now clearly set out without referring to the Europol Convention (as the previous Eurojust Decision did). The forms of serious crime for which Eurojust is competent are now listed in an Annex I to the Regulation. The Regulation also defines the categories of related offences for which Eurojust is competent. It also outlines that, in general, Eurojust shall not exercise its competence with regard to crimes for which the EPPO exercises its competence. The practical details of Eurojust's exercise of competence, however, shall be governed by an additional working arrangement. Ultimately, when requested by a competent authority of a Member State, Eurojust may also assist with investigations and prosecutions for forms of crime other than those listed in Annex I.

While the distinction is still made as

to whether Eurojust exercises its function as a college or through its National Members, Eurojust's operational functions are now clearly set out under Art. 4.

Regarding the National Members, the Regulation now requests the Member States to grant them at least the powers referred to in this Regulation in order for them to be able to fulfil their tasks. Contrary to the former Eurojust Decision, the Regulation now limits the length of the term of office of the National Members to 5 years, renewable once. The Regulation now describes the powers of the National Members in detail as well as the types of national registers they shall have access to.

The College's voting rules for taking decisions changed from a two-thirds majority to a majority of its members. Furthermore, under the Regulation, the College has now been asked to adopt annual and multi-annual work programmes setting out objectives and strategic aims for their work. In addition, the new Regulation introduces an Executive Board to deal with administrative matters in order to allow Eurojust's College to focus on operational issues. A representative of the European Commission will be part of the Executive Board.

Contrary to the former Eurojust Decision, roles and tasks of Eurojust's National Coordination System and national correspondents are laid out in the Regulation. The exchange of information with the Member States and between national members is also set out in more detail, requiring the competent national authorities to inform their national members without undue delay under certain conditions.

More democratic oversight is foreseen by means of regular reporting to the European Parliament and national parliaments.

Finally, Eurojust's data protection rules have been aligned with the latest EU data protection rules, including supervision by the EDPS.

Eurojust's reform through the new Regulation is the last in a series of reforms, with new Regulations for Frontex entering into force in 2016 and Europol entering into force in 2017, and the creation of the EPPO. The Regulation replaces and repeals Council Decision 2002/187/JHA. It will be applicable by the end of 2019. (CR)

First Liaison Prosecutor for Macedonia

On 12 November 2018, Ms *Lenche Ristoska* took up her duties as the first Liaison Prosecutor for the former Yugoslav Republic of Macedonia at Eurojust. Before her secondment to Eurojust, Ms *Ristoska* served as a prosecutor at the Special Public Prosecutors' Office in Skopje. She also previously worked for the Department for International Mutual Legal Assistance in Criminal Matters of the Primary Public Prosecutor's Office of Skopje, executing incoming mutual legal assistance (MLA) requests as well as in the Department for Drugs, Sexual and Violent Crimes.

The appointment of liaison prosecutors is foreseen in the cooperation agreement between Eurojust and the former Yugoslav Republic of Macedonia, which was concluded in 2008. Liaison prosecutors play an important role in facilitating ongoing investigations of serious, cross-border, organised crime, given the increased number of cases that have connection with the Western Balkans.

The appointment of liaison prosecutors from Western Balkan states at Eurojust is also part of Eurojust's efforts to build up structural, judicial cooperation in the region in the fight against serious, cross-border crime. More information on Eurojust's cooperation with the Western Balkans is available at the Eurojust website. (CR)

Frontex

FRA Opinion on Revised Frontex Regulation

At the end of November 2018, FRA published its Opinion on the revised European Border and Coast Guard Regulation and its fundamental rights implications.

In the Opinion, FRA focuses on four issues and makes suggestions on the following:

- How to strengthen Frontex' overall fundamental rights protection framework;
- How to address fundamental rights risks in specific aspects of Frontex operation;
- The Agency's activities in the return of third-country nationals;
- Challenges related to the enhanced role of Frontex in third countries.

The opinion does not cover issues such as the deployments of liaison officers and their role with regard to respect for fundamental rights or cover questions of criminal liability of deployed team members. (CR)

Risk Analysis Cell in Niger

In cooperation with Nigerian authorities, Frontex opened the first Risk Analysis Cell in Niamey, Niger at the end of November 2018. The cell will collect and analyse strategic data on cross-border crime such as illegal border crossings, document fraud, and trafficking in human beings. It will support relevant authorities involved in border management to produce analysis and policy recommendations. It is run by local analysts trained by Frontex.

The Risk Analysis Cell in Niger is the first of eight such cells that will be established within the framework of the Africa-Frontex Intelligence Community (AFIC). Over the next twelve months, these cells will be set up in Ghana, Gambia, Senegal, Kenya, Nigeria, Guinea, and Mali. (CR)

Eastern Partnership IBM Project Concluded

At the end of November 2018, after four years, the Eastern Partnership Integrated Border Management (EaP IBM) Capacity Building Project was concluded with a final meeting at Frontex premises. By offering technical as-

sistance through Frontex, the project aimed at expanding the ability of participating border agencies to effectively implement the Integrated Border Management concept. A training system on Integrated Border Management was established through the project. Countries that participated included Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine. (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

New Action Plan Against Illicit Tobacco Trade

On 7 December 2018, the Commission published the 2nd Action Plan to fight the illicit tobacco trade (Communication to the European Parliament and the Council, COM(2018) 846 final). The action plan covers the period 2018–2020. The Commission stresses that the illicit tobacco trade can only be curbed by a combination of policy and enforcement measures.

It builds on the 1st Action Plan of 2013, its evaluation in 2017, and the WHO Protocol to Eliminate Illicit Trade in Tobacco Products (FCTC Protocol). The FCTC Protocol was actively negotiated by the European Commission and entered into force on 25 September 2018.

According to the new plan envisaged by the Commission in the years to come, the following should be pursued:

- Fully exploiting the new FCTC Protocol's potential as a global instrument and forum to curb the illicit tobacco trade;
- Engaging key source and transit countries via various frameworks for cooperation;
- Focusing on some of the key input materials going into the illicit manufacture of tobacco products, ranging from raw tobacco and cigarette filters to manufacturing and packing equipment;
- Raising consumer awareness of the dangers of buying illicit tobacco products and of the direct links to organised crime as a means of reducing demand;
- Continuing to invest in intelligence gathering and analysis as a basis for effective targeting of policy and operational measures.

A concrete list of actions is contained in an Annex to the Communication.

The illicit tobacco trade is estimated to cause an annual €10 billion loss in public revenue in the EU and its Member States. (TW)

ECA Opinion on Future Anti-Fraud Programme

On 15 November 2018, the European Court of Auditors (ECA) adopted Opinion No 9/2018 on the Commission's proposal for a Regulation establishing the EU Anti-Fraud Programme for the 2021-2027 financing period (for the proposal, see eucrim 2/2018, pp. 92–93). The successor to the current Hercule III-Programme, which expires in 2020, aims at protecting the EU's financial interests and supporting mutual assistance between the administrative authorities of the Member States. It also aims at cooperation between the Member States and the Commission to ensure the correct application of the law on customs and agriculture.

The ECA recommends the following:

- Better specification of the programme's concrete objectives and indicators to evaluate its results;
- Clarification of the frequency of performance and introduction of independent evaluators to carry out evaluations;
- Improved evaluations by the Commission of the programme's added value and assessment of possible overlaps with other EU actions.

If the plans of the Commission are supported by the co-legislators (Council and EP), the new programme would have €181 million at its disposal for the entire period. (TW)

Money Laundering

Council: Anti-Money Laundering Action Plan

At its meeting of 4 December 2018, the ECOFIN Council adopted conclusions on an Anti-Money Laundering Action Plan. The ministers welcomed the progress made in preventing and combating money laundering in recent years, but call for further improvements, in particular as regards the (cross-border) exchange of information and collaboration between prudential and anti-money laundering supervisory authorities.

The action plan includes eight objectives that should be addressed in the short term:

- Identifying the factors that contributed to the recent money laundering cases in EU banks;
- Mapping relevant money laundering and terrorist financing risks and the best prudential supervisory practices to address them;
- Enhancing supervisory convergence;
- Ensuring effective cooperation between prudential and money laundering supervisors;
- Clarifying aspects related to the withdrawal of a bank's authorisation in case of serious breaches;
- Improving supervision and exchange of information between relevant authorities;
- Sharing best practices and identifying grounds for convergence among national authorities;
- Improving the European supervisory authorities' capacity to make better use of existing powers and tools.

The latter refers to the recent Commission proposal of 12 September 2018, which aims at amending existing EU rules on the supervision of banks and financial institutions (cf. eucrim 2/2018, p. 94). This proposal is currently under discussion in the Council.

An annex lists the concrete actions planned. As from June 2019, the Commission is requested to report back on the progress made in the implementation of

the Action Plan detailed in the Annex of the Conclusions every six months. (TW)

Cybercrime

12th Referral Action Day

On 20 November 2018, Europol's EU Internet Referral Unit (EU IRU) organised a joint Referral Action Day together with national referral units from seven Member States and third parties, targeting online material linked to terrorist activities. This time, 7393 items were assessed and referred to participating online platforms, requesting their review. (CR)

First European Youth Day

Europol's European Cybercrime Centre (EC3) organised a European Youth Day for the first time, which took place on 20 November 2018. Under the slogan "Digital Rights of Youth against Violence," approx. 100 youths between 12 and 15 years of age gathered at Europol to discuss online and offline safety issues. As a result, a call for action was drafted, calling on Internet governance institutions, Internet providers, policymakers, and all relevant stakeholders to create a safer Internet for children and adolescents. (CR)

Terrorism

EP Tables Recommendations for New EU Strategy to Combat Terrorism

On 12 December 2018, MEPs adopted a resolution that contains over 225 recommendations for tackling the threat of terrorism. The resolution goes back to a report from MEPs *Monica Hohlmeier* (EPP, Germany), and *Helga Stevens* (ECR, Belgium), who compiled the findings of the Special Committee on Terrorism (TERR).

The Special Committee was established in 2017 following the persistent terrorist threats that the EU has had to face in recent years. The Committee was mandated with examining, analysing, and assessing the extent of the terrorist threat on European soil. It carried out a thorough assessment of the existing forces on the ground in order to enable the EU and its Member States to step up their capacity to prevent, investigate, and prosecute terrorist offences.

The resolution of December 2018 makes recommendations in the following areas:

- Institutional framework;
- Terrorist threat;
- Prevention and countering of radicalisation leading to violent extremism;
- Cooperation and information exchange;
- External borders;
- Terrorist financing;
- Critical infrastructure protection;
- Explosive precursors;
- Illicit weapons;
- External dimension;
- Victims of terrorism;
- Fundamental rights.

The EP requests, *inter alia*, that the role of Europol and the EU agency for the operational management of large-scale IT systems (eu-LISA) be reinforced. Furthermore, improvements in information exchange and cooperation between intelligence services and authorities are necessary. Other proposals include:

- EU watch list for hate preachers;
- Allowing the police to cross-check persons renting cars against police databases;
- Anti-radicalisation measures, including programmes for prisons, education, and campaigns;
- Proper checks at all external borders using all relevant databases;
- Including private planes in the PNR Directive;
- European system of licences for specialised buyers of explosive precursors;
- Better protection of victims, including the creation of an EU Coordination Centre of victims of terrorism (CCVT), pre-paid medical costs after an attack, and smoother insurance procedures.

The work of TERR was finalized on 14 November 2018 by the committee's vote on the *Hohlmeier/Stevens* report. Further information on the work of this special committee during its mandate can be found on the committee's website. (TW)

Racism and Xenophobia

Council Shapes Rules on Fighting Terrorist Content Online

At its meeting of 6 December 2018, the JHA Council adopted its general approach to the proposed regulation on preventing the dissemination of terrorist content online. This proposal had been submitted by the European Commission on 12 September 2018, following a call by EU leaders in June. For the proposal, see eucrim 2/2018, pp. 97–98 and the article by *G. Robinson* in this issue.

The aim of the planned legislation is to establish binding rules for hosting service providers (HSPs) offering services in the EU (whether or not they have their main establishment in the Member States) to rapidly remove terrorist content, where necessary.

HSPs will have to remove terrorist content or disable access to it within one hour of receiving a removal order from a national authority. If HSPs do not comply with removal orders, financial penalties can be imposed on them.

Furthermore, service providers will have to apply certain duties of care to prevent the dissemination of terrorist content on their services. This may vary, depending on the risk and level of exposure of the service to terrorist content.

The establishment of points of contact to facilitate the handling of removal orders and referrals has been designed to improve cooperation between law enforcement authorities and service providers.

With the adopted general approach, the Council is ready to start negotiations. (TW)

Collection of Case Law on Hate Crime

In December 2018, FRA published a paper looking at the evolution of the ECtHR's case law relating to hate crime.

The paper looks at the Court's rulings regarding the duty of state authorities to effectively investigate possible racist motivation under Article 2 ECHR and beyond. Furthermore, it analyses the Court's rulings on hate crimes committed by private persons. Lastly, the paper looks at the duty to investigate when other bias motivations besides racism come into play such as bias related to religious hatred, disability, political opinion, sexual orientation, or gender-based discrimination. (CR)

Online Tool Against Muslim Hatred

At the beginning of December 2018, FRA published a new online tool to assist Member States, policymakers, and stakeholders when confronted with anti-Muslim hatred.

The database offers information on international, European, national, regional, and local-level case law and rulings relating to hate crime, hate speech, and discrimination against Muslims. It includes the courts' reasoning, findings, and considerations as well as key facts for each case. In addition, the database contains relevant national, European, and international human rights organisation decisions, and reports as well as findings by human rights and equality bodies and organisations.

Users can access research, reports, studies, data, and statistics on these issues. As an online tool, it offers a unique street-level view of victim support services in all 28 EU Member States. It also provides guidance on where to find appropriate information, support, and protection. (CR)

New Structures at FRA

With the aim of responding better to its strategic priorities, FRA started working in a new configuration on 16 November 2018. The agency created a new Institutional Cooperation and Networks Unit as well as a new Technical Assistance and Capacity Building Unit next to the existing Research and Data, Communications and Events, and Corporate Services Units. The Institutional Cooperation and Networks Unit shall work closely with FRA's EU, international, and national partners to reinforce human rights systems and frameworks. The Technical Assistance and Capacity Building Unit shall help improve FRA's realtime assistance and expertise. (CR)

Procedural Criminal Law

Data Protection

New Data Protection Framework for EU Institutions

spot light

The European Union has a new legal framework for the protection of personal data processed by Union institutions, bodies, offices, and agencies. The underlying Regulation (EU) 2018/1725 was published in the Official Journal of 21 November 2018 (L 235/39). It repeals Regulation (EC) No 45/2001 and Decision No 1247/2002/EC which date back to the pre-Lisbon era and did not cover the processing of personal data within all Union institutions and bodies.

The main aim of the new Regulation is to adapt its rules to the modern General Data Protection Regulation (Regulation (EU) 2016/679), which has been fully applicable since May 2018. Hence, Regulation 2018/1725 establishes a coherent framework, while guaranteeing the free flow of personal data within the Union. It also sets out provisions on the European Data Protection Supervisor (EDPS). The EDPS is entitled to monitor the application of the provisions of this Regulation to all processing operations carried out by a Union institution or body. He is also the first port of call if complaints are lodged against infringements of an individual's data protection rights.

The Regulation is divided into 12 chapters, including the following:

- General provisions, including scope and definitions;
- General data protection principles;
- Rights of the data subject;
- Controller and processor, including provisions on security of personal data;
- Transfers of personal data to third countries or international organisations;
- EDPS;
- Remedies, liabilities and penalties;
- Review.

Chapter IX contains specific rules on "the processing of operational personal data by Union bodies, offices and agencies when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU." In other words, this concerns activities of Union bodies/offices/agencies (as their main or ancillary tasks) exercised for the purposes of the prevention, detection, investigation, and prosecution of criminal offences. In this event, the tailor-made rules of Chapter IX apply as a *lex specialis*.

It must be noted, however, that the Regulation does not apply to Europol or to the European Public Prosecutor's Office until the legal acts establishing Europol and the European Public Prosecutor's Office (i.e., Regulations No 2016/794 and No 2017/1939) are amended with a view to rendering this chapter (on the processing of operational personal data) applicable to them as adapted. Whether the legal basis of these institutions must be adapted to the Regulation will be assessed in a review process in 2022.

The rules of the Regulation apply from 12 December 2018, with an exception for Eurojust: the Regulation applies to the processing of personal data by Eurojust from 12 December 2019.

In the aftermath of the adoption, the EDPS *Giovanni Buttarelli* welcomed the new data protection rules for EU institutions (see press release of 11 December 2018). He pointed out:

"The new Regulation, which applies

from today, brings the data protection rules for the EU institutions and bodies (EUI) in line with the standards imposed on other organisations and businesses by the General Data Protection Regulation (GDPR). Under the new rules, which we may refer to as the EUI-GDPR, the EDPS remains responsible for ensuring the effective protection of individuals' fundamental rights and freedoms whenever their personal data is processed by the EU institutions or on their behalf, whether this is to ensure EU markets work better, to evaluate and supervise medicines in the EU or to fight against terrorism and organised crime."

He also added that the EU institutions should take the lead by example in ensuring the individual's protection of personal data. (TW)

The Awakening of EU Data Retention Rules

At the Council meeting of 6–7 December 2018, the JHA ministers of the EU Member States reiterated their support for EU-wide legislation on data retention. They encouraged the continuation of work at the expert level to develop a new concept after the 2006 Directive "on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks" was declared void by the CJEU in 2014 *("Digital Rights Ireland"*, see eucrim 1/2014, p. 12). In *"Tele2 Sverige",* the CJEU further prohibited Member States from maintaining national data retention regimes if they entail a general and indiscriminate retention of data (see eucrim 4/2016, p. 164).

After these judgements, an expert group was established in 2017 with the task of exploring avenues to reconcile the demand for effective law enforcement access to retained data (stored for commercial purposes by telecommunication service providers) with the requirements of necessity and proportionality set by the CJEU. (TW)

FRA Handbook on Profiling

In December 2018, FRA published a handbook aiming to contribute to the prevention of unlawful profiling.

The handbook explains what profiling is, when it is unlawful, and what the potential negative impacts of unlawful profiling for law enforcement and border management could be. Furthermore, it explains the principle and practice of lawful profiling and looks at algorithmic profiling and its data protection framework.

The handbook is primarily designed for those responsible for training law enforcement and border management officials. Nevertheless, it may also help officers in mid-level positions to implement profiling techniques lawfully. (CR)

Freezing of Assets

Regulation on Freezing and Confiscation Orders

spot light

The European Parliament and the Council adopted a regulation on the mutual recognition of freezing orders and confiscation orders. The new legal framework (Regulation (EU) 2018/1805) was published in the Official Journal of the EU of 28 November 2018 (O.J. L 303/1).

The Regulation replaces the provisions of Framework Decision 2003/577/JHA as regards the freezing of property and Framework Decision 2006/783/JHA as of 19 December 2020. It should be noted, however, that the existing framework continues to apply to Denmark and Ireland, which are not bound by the new Regulation.

The Regulation aims at making the freezing and confiscation of criminal assets across the EU quicker and simpler. The reform was considered necessary because the existing pre-Lisbon legal framework was underused and complex. Depriving criminals of their assets is an important tool in fighting organised crime and terrorism. According to a 2016 Europol study, however, only an estimated 1.1% of criminal profits are currently confiscated in the EU.

The legislative proposal was controversially discussed; eucrim closely monitored the development of the legislation. See: eucrim 4/2016, p. 165 (Commission proposal), and eucrim 2/2017, p. 73; eucrim 3/2017, p. 117; eucrim 4/2017, p. 176; eucrim 1/2018, p. 27; and eucrim 2/2018, p. 102.

The major "innovation" is that, for the first time, the EU legislator chose a Regulation and not a Directive to govern future cooperation in an area mutually enforcing Member States' orders. Against the opposition of several Member States (including Germany), which favoured a Directive, the provisions of the Regulation will be directly applicable, thus hindering Member States from implementing the EU instrument into their national legal orders. Recital 53 concedes, however, that "(t)he legal form of this act should not constitute a precedent for future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters."

The key features of the new Regulation are as follows:

- The scope has been formulated broadly. According to recital 14, "(t)his Regulation should cover freezing orders and confiscation orders related to criminal offences covered by Directive 2014/42/EU, as well as freezing orders and confiscation orders related to other criminal offences." Thus, the Regulation is not limited to particularly serious crimes with a cross-border dimension.
- It is only decisive that the issuing State issue a freezing or confiscation order "within the framework of proceedings in criminal matters." On the one hand, orders issued within the framework of proceedings in civil and administrative matters have been excluded from the scope of the Regulation. On the other hand, so-called "non-conviction based orders" must be recognised even if such orders might not exist in the legal system of the executing State (cf. recital 13).

■ Grounds for non-recognition and non-execution are provided for in Art. 8 (for freezing orders) and Art. 19 (for confiscation orders). The most hotly debated issue during the negotiations was whether the Regulation should include a (more or less general) refusal ground if fundamental rights were infringed in the issuing state. Germany (in the Council) and the EP favoured the introduction of such a refusal ground; however, the final text was a compromise: Art. 8(1)(f) and Art. 19(1)(h) formulate a refusal ground in the style of the recent CJEU case law in *Arranyosi & Căldăraru* containing a similar refusal ground in cases of European Arrest Warrants. As a result, non-recognition because of fundamental rights infringements will only be possible in exceptional situations.

■ The Regulation foresees several time limits for the recognition and execution of the freezing and confiscation orders respectively. They have been designed to ensure quick and efficient cooperation. As regards freezing orders, for instance, the executing authority should start taking concrete measures necessary to execute such orders no later than 48 hours after the decision on the recognition and execution thereof has been taken. The text of the Regulation does not, however, mention any legal consequences in case of delay.

■ The Regulation contains only a few rules on legal remedies. In essence, reference is made to national law. According to Art. 33, "affected persons" have the right to effective legal remedies in the executing State against the decision on the recognition and execution of freezing orders pursuant to Art. 7 and confiscation orders pursuant to Art. 18. The right to a legal remedy must be invoked before a court in the executing State in accordance with its law. This also includes challenges against measures during the process of execution of the orders (Art. 23(1)). However, the substantive reasons for issuing the freezing order or confiscation order must be challenged before a court in the issuing State (Art. 33(2)).

■ The Regulation pays special attention to the restitution of frozen property to victims. Accordingly, the compensation and restitution of property to victims should have priority over the disposal of frozen or confiscated property (recital 45). The notion of "victim" is to be interpreted in accordance with the law of the issuing State, which should also be able to provide that a legal person could be a victim for the purpose of this Regulation.

■ Property claims must be demanded in the issuing State (Art. 29(1)). If there is a decision to restitute frozen property to the victim, the issuing authority must inform the executing authority. The executing authority must then take the necessary measures to ensure that the frozen property is restituted to the victim as soon as possible, in accordance with the procedural rules of that State. However, this obligation is subject to three conditions: (1) the victim's title to the property is not contested; (2) the property is not required as evidence in criminal proceedings in the executing State; and (3) the rights of affected persons are not prejudiced (Art. 29(2)).

■ In order for the affected person to assert his/her claims, he/she must be informed by the executing authority on the execution of a freezing or confiscation order (Art. 32). "Affected person" is defined in Art. 2(10) as "the natural or legal person against whom a freezing order or confiscation order is issued, or the natural or legal person that owns the property that is covered by that order, as well as any third parties whose rights in relation to that property are directly prejudiced by that order under the law of the executing State."

The annexes of the Regulation contain standardized forms for freezing and confiscation certificates. As other standard forms in EU's judicial cooperation instruments they are designed to ensure that EU states act faster and communicate more efficiently. (TW)

Cooperation

Judicial Cooperation

Council Conclusions on Mutual Recognition

At their meeting of 7 December 2018, the EU Member States' Ministers for Justice adopted Council conclusions on mutual recognition in criminal matters. The conclusions contain several calls on the Member States, including the following:

■ To implement the procedural rights Directives in a timely and correct manner and to ensure independence and impartiality of the courts and judges;

■ To restrictively apply the fundamental rights exception for non-execution of requests in accordance with CJEU case law;

■ To make use of alternative measures to detention in order to reduce the population in detention facilities;

■ To promote training of practitioners (e.g., judges, prosecutors) and exchanges between practitioners from different Member States;

■ To establish (non-binding) guidelines on the application of the EU mutual recognition instruments;

■ To make better use of the EJN's possibilities and platforms;

■ To encourage executing authorities to enter into dialogue and direct consultations with the issuing authorities, in particular before considering the non-execution of a decision or judgement;

■ To consider the withdrawal of reservations on MLA instruments;

■ To set up, as a matter of priority, the e-Evidence Digital Exchange System to ensure the effective exchange of European Investigation Orders and MLA requests.

The Commission has, *inter alia*, been invited to provide practical guidance on the recent CJEU case law, notably regarding the *Aranyosi* case (see eucrim 1/2016, p. 16, and 2/2018, pp. 103 et seq.) and to give reliable and updated in-

formation on penitentiary establishments and prison conditions in the Member States. The latter includes translations of the CoE's fact sheets on detention conditions and treatment of prisoners.

Furthermore, the Commission has been invited to further develop the handbook on the European arrest warrant (see eucrim 4/2017, p. 177) and to communicate notifications by Member States on EU mutual recognition instruments to the EJN, so that they can be published on the EJN website. (TW)

CJEU: Obligations of MS if Extradition Sought to Enforce Custodial Sentence for Union Citizens

On 6 September 2016, the CJEU rendered an important judgment in the *Petruhhin* case, giving guidance on whether the extradition of Union citizens from an EU country to non-EU countries is in line with the Union's prohibition of discrimination (see eucrim 3/2016, p. 131). This decision triggered several follow-up references for preliminary rulings, e.g., the *Pisciotti* case (eucrim 1/2018, p. 29) and the *Adelsmayr* case (eucrim 3/2017, pp. 116–117).

Another reference was brought to Luxembourg by the *Korkein oikeus* (Finnish Supreme Court), which essentially wanted to know whether (and, if yes, how) the concept established in *Petruhhin* not only applies to extraditions for the purpose of prosecution but also to those for the purpose of enforcing custodial sentences. The Grand Chamber of the CJEU delivered its judgment in this case (C-247/17 – *Denis Raugevicius*) on 13 November 2018.

➤*Facts of the Case and Questions Referred*

In the case at issue, the Russian authorities requested extradition of Mr. Denis Raugevicius, a Lithuanian and Russian national, from Finland for the purpose of enforcing a custodial sentence of four years' imprisonment for drug possession. Mr. Raugevicius challenged his extradition, arguing that he had lived in Finland for a considerable length of time and that he is the father of two children residing in Finland and having the Finnish nationality. The *Korkein oikeus* was unsure whether the CJEU's *Petruhhin* judgment posed legal barriers to extradition. On the one hand, Finnish law prohibits the extradition of own nationals to countries outside the EU, but not of citizens having the nationality of another EU Member State (here: Lithuania). On the other hand, international agreements and Finnish law make provision for the possibility that a custodial sentence imposed by a third country on a Finnish national may be served on Finnish territory.

Therefore, the Finnish court, in essence, posed the question of whether Union law also requires extradition alternatives to be applied to Union citizens, so that the effects are less prejudicial to the exercise of the right to free movement.

➤*The CJEU's Answer*

First, the CJEU posits its main findings in the *Petruhhin* judgment:

- A national of an EU Member State (here: Lithuania) who moved to another EU Member State (here: Finland) exercised his right to free movement; therefore this situation falls within the scope of Art. 18 TFEU, which lays down the principle of non-discrimination on grounds of nationality;
- The national rule that prohibits only own nationals from being extradited, and not nationals from other EU Member States, gives rise to unequal treatment;
- This is a restriction on the freedom of movement, within the meaning of Art. 21 TFEU;
- This restriction can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions.

Second, the CJEU reiterated that extradition is a legitimate means to avoid the risk of impunity. In the *Petruhhin* case, however, it was possible to settle the conflict with the Union's non-discrimination rule by giving the EU country of nationality the opportunity to exercise jurisdiction first.

Although this avenue is barred if extradition (by a third country) is sought for the purpose of enforcing a sentence, the requested EU Member State must consider mechanisms that are consistent with the objective of non-impunity, but are less prejudicial to the person's status as Union citizen.

In this context, the CJEU observed that Art. 3 of the Finnish Law on International Cooperation provides foreigners who permanently reside in Finland with the possibility to serve criminal law sanctions imposed abroad in Finland. In fact, Finnish law already provides for comparable situations in which permanent residents who demonstrate a certain degree of integration into the State's society can be treated as Finnish nationals (provided the person concerned as well as the requesting State consent).

The CJEU therefore concluded that Arts. 18 and 21 TFEU require that nationals of other Member States who reside permanently in Finland and whose extradition is requested by a third country for the purpose of enforcing a custodial sentence should benefit from the provision preventing extradition from being applied to Finnish nationals and may, under the same conditions as Finnish nationals, serve their sentences on Finnish territory.

➤*Put in Focus*

In further development of the *Petruhhin* doctrine, the CJEU's judgment first means that, in situations in which extradition requests from third countries collide with issues of enforcing custodial sentences, EU Member States must also pay attention to the rights of nationals of other EU Member States. The CJEU made clear that alternative, mechanisms less prejudicial to extradition, which apply to own nationals, must also be extended to Union citizens.

In a second line of reasoning, however, the CJEU established an important restriction: Member States may apply

this equal treatment on the condition that the Union citizen is a permanent resident and has demonstrated its integration into the Member State's society. In this context, previous CJEU case law on who can be considered a "permanent resident" must be recalled. The CJEU also emphasised that the person concerned may face extradition "on the basis of applicable national or international law" if the courts of the requested Member State cannot establish a "permanent residence."

This ruling and the exception to it may trigger further references for preliminary rulings. The present ruling seems fitting for the Finnish case, specifically the situation of the person sought (Mr. Raugevicius) and the particular circumstances of Finnish law that include foreigners in the cross-border enforcement of custodial sentences.

Several questions remain:

- What if national law only confers the possibility to serve foreign custodial sentences to its own nationals?
- Which degree of integration must a Union citizen have in the requested EU Member State?
- To what extent does the State's obligations go under the traditional principle of *"aut dedere aut iudicare"*? (TW)

European Arrest Warrant

CJEU: Surrender of Resident if Executing State Unable to Enforce Custodial Sentence

On 13 December 2018, the CJEU decided on a request for a preliminary ruling that concerned the interpretation of Art. 4 No. 6 FD EAW in conjunction with the divergent levels of sanctioning among the EU Member States.

➤*Facts of the Case*

In the case at issue (C-514/17 – *Sut*), Belgium was requested to execute a one-year-and-two-month custodial sentence against *Marin-Simion Sut* for having driven a vehicle without valid licence plates and without, for not having a valid driving licence, and for having caused an accident. Mr. Sut is a Romanian national, but has lived in Belgium since 2015 where he is working with his spouse. In the proceedings on the execution of the Romanian arrest warrant, the Belgian Public Prosecutor argued that the Belgian provision implementing Art. 4 No. 6 FD EAW cannot be applied. According to Art. 4 No. 6 FD EAW, the execution of an EAW may be refused "if the EAW has been issued for the purposes of execution of a custodial sentence, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence in accordance with its domestic law."

➤*The Legal Question*

The Belgian Public Prosecutor affirmed that Mr. Sut is a "resident staying in the executing Member State" within the meaning of Art. 4 No. 6 FD EAW. According to Belgian law, however, the offenses at issue can be punished by fines only, but conversion of a custodial sentence into a fine is expressly prohibited. Therefore, the Romanian sentence cannot be enforced in Belgium and the EAW must be executed, hence Mr. Sut surrendered.

The referring *Cour d'appel de Liège* (Court of Appeal, Liège) had doubts on this interpretation with regard to previous CJEU case law, which stresses the importance of the requested person's reintegration into society when the sentence imposed on him expires.

➤*Decision and Reasoning of the CJEU*

The CJEU pointed out that the optional ground for non-execution according to Art. 4 No. 6 FD EAW requires two conditions to be satisfied in the case at issue:

- The person requested must be a "resident" of the executing Member State;
- The custodial sentence passed in the issuing state against that person can actually be enforced in the executing state (while the latter can consider that there is a legitimate interest which would justify the execution of the sentence).

The CJEU further noted that Union law allows a certain margin of discretion when implementing Art. 4 No. 6 FD EAW. In addition, the more the national legislator limits the situations in which its national authorities may refuse surrender, the more they reinforce the surrender system in favour of building up an area of freedom, security and justice.

Against this background, the CJEU recognised the importance of potentially increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires, but this cannot prevent a Member State from limiting the refusal grounds such to give effect to the fundamental principle of mutual recognition enshrined in Art. 1(2) FD EAW. Therefore, the executing authority may give effect to an EAW if the executing state is not able to actually enforce the custodial sentence.

This is a rather unfavourable result for the requested person. The CJEU, however, left one back door open: the Belgian courts must ascertain whether the consequence in the case at issue (i.e., Belgium not being in the position of enforcing the custodial sentence) is really indispensable under Belgian law. In this context, two issues must be considered:

- Art. 4 No. 6 FD EAW does not give any indication that the executing authority is precluded from refusing the execution of a EAW if the law of this state provides only for a fine in response of the offence to which the EAW relates;
- The margin of discretion for the national legislator when implementing Art. 4 No. 6 FD should be taken into account.

As a result, it is ultimately up to the referring court whether the Romanian EAW must be executed, even though the defendant has economic and family ties in Belgium and enforcement is only be hindered because Belgium foresees a lighter penalty for the offense at issue. The case shows the repercussions of the different levels of sanctioning in the EU. (TW)

CJEU: Consequences of Failure to Refer to Additional Sentence in EAW

On 6 December 2018, the CJEU delivered its judgment in Case C-551/18 PPU, which concerns the execution of a European Arrest Warrant (EAW) issued against IK. The judgment mainly concerns the interpretation of Art. 8 FD EAW (entitled "content and form of an EAW"), but also Art. 15 (communication of supplementary information) and Art. 27 (rule on speciality).

➤*Facts of the Case*

In the case at issue, IK was sentenced to a primary custodial sentence of three years for sexual assault (main sentence). In the same judgment, the court ordered an "additional sentence of release conditional to placement at the disposal of the *strafuitvoeringsrechtbank* (Court for the enforcement of custodial sentences) for a 10-year period." Under Belgian law, this additional sentence takes effect after the expiry of the main sentence and, for the purpose of its enforcement, the Court responsible for the enforcement of custodial sentences is to decide whether the convicted person must be deprived of liberty or whether he can be released conditionally. Accordingly, the person "shall be deprived of his liberty if there is a risk of him committing serious offences that undermine the physical or psychological integrity of third parties which, in the context of release under supervision, cannot be offset through the imposition of special conditions."

Since IK had left Belgium, the Belgian judicial authorities issued a EAW against him for the enforcement of the sentence. They indicated the main sentence, the nature and legal classification of the offences and the relevant legal provisions, and outlined the facts, but did not mention the additional sentence imposed on IK. The *Rechtbank* Amsterdam/the Netherlands, ordered the surrender of IK to Belgium for the purposes of serving the custodial sentence in Belgium for the offense of sexual assault.

IK was surrendered and put in custody for the main sentence. In the subsequent proceedings before the Court for the enforcement of custodial sentences in Antwerp/Belgium, which decided on the additional sentence, IK claimed that the court cannot take this decision because the additional sentence was not subject to the surrender by the Dutch authorities.

In the following, the Dutch authorities denied a request by the Belgium authorities, which sought additional authorisation in respect of the additional sentence pursuant to Art. 27 FD EAW. The Dutch authorities argued that Art. 27 concerns the sentencing or prosecution of an offence other than the one for which surrender was authorized, which did not apply to the present case.

The Antwerp court then rejected IK's arguments and ordered the maintenance of his deprivation of liberty.

➤*Reference for the Preliminary Ruling*

Upon appeal, the *Hof van Cassatie* (Court of Cassation) decided to refer the case to the CJEU, asking about the impact of the failure to mention the additional sentence in the EAW on the further proceedings regarding this sentence in Belgium.

The main question was, in essence, whether non-compliance with Art. 8(1)(f) of the FD EAW, which provides for the necessity to include in the EAW request the penalty imposed, precludes the enforcement of the additional sentence.

➤*Decision and Reasoning of the CJEU*

At first, the CJEU reiterated the main principles of the EAW scheme that had already been mentioned in previous judgments:

- The EAW is based on mutual trust that requires each of the EU Member States, save in exceptional circumstances, to consider all the other Member States to be in complyiance with EU law and particularly with the fundamental rights recognised by EU law;
- Based on the principle of mutual recognition, the EU system of surrender replaces the conventional multilateral system of extradition;
- The FD EAW seeks to facilitate and accelerate judicial cooperation by contributing to the attainment of the Union's objective of becoming an area of freedom, security and justice;
- The FD EAW pursues the policy that the crime committed does not go unpunished;
- Refusal to execute a EAW is only possible on the grounds for non-execution exhaustively listed in the FD EAW (Arts. 3–5); accordingly, execution of the EAW is the rule, whereas refusal is the exception.

Although the CJEU decided that failure to comply with the formal requirements of Art. 8(1) FD EAW can result in the executing authority not giving effect to a EAW (cf. Case C-241/15, *Bob-Dogi*, eucrim 2/2016, p. 80), the CJEU observes that it must be examined to what extent failure to indicate an additional sentence in a EAW affects the exercise of jurisdiction that the executing authority derives from Arts. 3–5 FD EAW.

The CJEU put forth that the purpose of Art. 8(1)(f) is to give information, so that the executing authority can decide whether it has to refuse the EAW because the thresholds of Art. 2(1) FD EAW for the execution of a custodial sentence (min. four months) have not been ascertained. In the present case, this threshold was unproblematic (the main sentence against IK was three years' imprisonment). Hence, the executing authority could do nothing but grant the surrender.

As a result, the CJEU ruled that, in circumstances such as those at issue in the main proceedings, the fact that the European arrest warrant did not indicate the additional sentence cannot affect the execution of that sentence in the issuing Member State following surrender.

Subsequently, the CJEU dealt with several counterarguments and dismissed them. In particular, it reasoned as follows:

- The rule of speciality, as referred to in Art. 27 FD EAW, does not apply in the present case, because it only concerns

offences other than those on which the surrender was based;

- Failure to indicate the additional sentence does not trigger the reporting mechanism of Art. 15(3) FD EAW; therefore, the executing judicial authority need not be informed of the additional sentence in advance.

Ultimately, the CJEU pointed out that the rights of the person concerned were guaranteed. He can challenge the maintenance of the deprivation of liberty before the Belgian courts.

➤*Put in Focus*

After the *Bob-Dogi* judgment, the CJEU delivered another judgment on the consequences of failure to comply with the formal requirements of an EAW. In essence, it links the requirements of Art. 8 FD EAW with the substantial refusal grounds in Art. 3 et seq. FD. If the failure to comply formally has no effect on the jurisdiction of the executing authority, enabling it to apply one of the listed refusal grounds, the formal failure is negligible. The person concerned is referred to the legal remedies as provided for in the legal order of the issuing state.

The judgement also clarifies the applicability of the rule on speciality (Art. 27 FD EAW) and the scope of the reporting mechanism of Art. 15(3) FD EAW. (TW)

Law Enforcement Cooperation

Council Pushes for E-Evidence Law, EP Applies the Brakes

On 7 December 2018, under the Austrian Presidency, the JHA Council agreed on its position on a proposal for a regulation on European production and preservation orders for e-evidence in criminal matters (for the proposal, see eucrim 1/2018, pp. 35–36 and the article by *S. Tosza* in this issue). The new legal framework foresees that judicial and law enforcement authorities can quickly obtain and efficiently secure evidence stored electronically by directly sending respective orders to service providers. If service providers do not comply with the orders, they can be sanctioned. The location of the data should no longer play a role.

Debate in the Council was controversial, however, with seven Member States, including Germany, disagreeing with the general approach of the Council. The countries particularly raised concerns about overly harsh infringements of the fundamental rights to privacy and the protection of personal data.

The major amendment proposed by the Council in comparison to the Commission is the establishment of a – limited – notification system: if content data are concerned and if the issuing authority believes the person whose data are sought is not residing on its own territory, the issuing authority must inform the enforcing state and give it an opportunity to flag whether the data requested may fall under the following categories:

- Data protected by immunities and privileges;
- Data subject to rules on determination and limitation of criminal liability related to freedom of expression/the press;
- Data whose disclosure may impact fundamental interests of the state.

The issuing authority shall take these circumstances into account, and it shall not issue or adapt the order. The notification does not entail a suspensive effect. Such notification procedure was requested from several parties, since it follows similar rules in international cooperation in criminal matters, e.g., the interception of telecommunication data without the need for technical assistance of a requested state.

Meanwhile, the European Parliament dampened expectations that it will finalise the legislation by the end of the parliamentary term in May 2019. During a hearing organised by the (mainly responsible) LIBE Committee, MEPs voiced critical concerns over the Commission proposal. In a working document, the main rapporteur, *Birgit Sippel* (S&D, Germany), took up the criticism already put forward by legal experts, practitioners, and NGOs (also see in this regard eucrim 1/2018, p. 36; 2/2018, pp. 107–108, and 3/2018, pp. 162–163). She pointed out that the serious legal questions must be addressed in a comprehensive manner and concluded:

"With regards to the numerous consultations conducted so far (in shadows' meetings, the LIBE hearing, as well as in bilateral meetings with involved parties), but also publications received (in particular An assessment of the Commission's proposals on electronic evidence, commissioned by the EP Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee), the Rapporteur together with the shadows has identified several legal areas that will need further clarification, in order to guarantee the drafting of a legally sound legal instrument regarding the production and preservation of e-evidence." (TW)

Civil Society Organisations Voice Concerns over Council Plans on E-Evidence

Eighteen civil society organisations urged Member States to seriously reconsider its draft position on law enforcement access to "e-evidence" on the eve of the vote on the general approach in the Council. In a letter of 5 December 2018, the organisations point out that the draft presented by the Austrian Presidency fails to solve the fundamental concerns of the e-evidence proposal (for the proposal, see eucrim 1/2018, pp. 35–36 and the article by *S. Tosza* in this issue; for other critical reactions, see eucrim 2/2018, pp. 107–108, and 3/2018, pp. 162–163). In particular, the following issues have been raised:

- Considerable reduction in the possibility for enforcing authorities to refuse recognition and enforcement of an order on the basis of a violation of the Charter of Fundamental Rights;
- Erroneous assumption that non-content data is less sensitive than content

data, contrary to CJEU and ECtHR case law;
- Contemplation of the possibility to issue orders without court validation, disregarding CJEU case law (e.g., in Tele 2 Sverige);
- Failure to provide legal certainty;
- Undermining of the role of executing states, thereby undermining judicial cooperation.

In sum, the concerns over fundamental rights already raised have grown even more with the new text. (TW)

US CLOUD Act: EU Wants Executive Agreement with the U.S.

With the "CLOUD Act" of March 2018, the U.S. rushed ahead in facilitating law enforcement access to data held by U.S. service providers, such as Microsoft, Facebook, and Google. It also gave foreign law enforcement authorities the possibility to bypass existing MLA procedures and to directly request communication content of "non-U.S. persons" located outside the U.S. from U.S.-based providers, subject to specified requirements (see eucrim 1/2018, p. 36).

One pre-condition is the conclusion of an "executive agreement" with the "foreign government," which must meet a number of criteria (e.g., adequate substantive and procedural laws on cybercrime and e-evidence, respect for the rule of law, non-discrimination and respect for human rights, accountability and transparency mechanisms, etc.). Requests must be limited to "serious crimes." For the U.S. CLOUD Act and the executive agreements, see the article by *J. Daskal* in this issue.

The conclusion of an executive agreement is subject to a positive determination by the U.S. Attorney General before it is submitted to the US Congress. The EU and the U.S. agreed that the U.S. will negotiate one agreement with the EU instead of bilateral agreements with individual Member States. The Commission and the Council are preparing the mandate in order to start the negotiations. (TW)

New Measures to Disrupt Migrant Smuggling Networks

With the aim of disrupting migrant smuggling networks, both inside and outside the EU, the Council approved a set of measures with a law enforcement focus on 6 December 2018. These new measures shall enhance the inter-agency approach, both at EU and national levels, make the best use of synergies among the operational tools available, and maximise the use of the external assets of the EU.

Hence, the operational and analytical capacities of the European Migrant Smuggling Center (EMSC) at Europol shall be increased and a stronger link between frontline information and information analysis capacities established. Furthermore, a joint liaison task force on migrant smuggling shall be set up within the EMSC. In order to better disrupt online communications, Europol's EU Internet Referral Unit shall be strengthened. (CR)

Council of Europe*

Reported by Dr. András Csúri

Foundations

European Court of Human Rights

20th Anniversary of European Court of Human Rights

On 1 November 2018, it was the twentieth anniversary of the entry into force of Protocol No. 11 and the setting up of a single, full-time ECtHR. The protocol also established the right of individual petition to over 800 million Europeans. Following the entry into force of Protocol No. 11 on 1 November 1998, the new, permanent Court replaced the existing European Commission and Court of Human Rights in order to strengthen the efficiency of the protection of human rights and fundamental freedoms. In the last 20 years, the new Court has dealt with more than 800,000 applications, delivering nearly 21,000 judgments.

Speaking at a seminar organized during the Finnish presidency of the CoE on 26 November 2018, ECtHR President *Raimondi* hailed the establishment of the new Court as a landmark in the development of international human rights protection. He further noted that only a little over 58,000 applications are currently pending before the Court, which is down from the high number of 160,000 applications pending in 2011.

First Case for Advisory Opinion under Protocol No. 16

On 3 December 2018, the Grand Chamber panel of five judges accepted a request for an advisory opinion under Protocol No. 16. This is the first case (received on 16 October 2018 from the French Court of Cassation) since the entry into force of Protocol No. 16 to the ECHR on 1 August 2018 (see eucrim 2/2018, p. 109). The case raises questions on legal mother-child relationship and compliance with the requirements of Article 8 of the Convention when regis-

* If not stated otherwise, the news reported in the following sections cover the period 16 November – 31 December 2018.