



### **Focus: Protection of Whistleblowers and Collaborators with Justice**

**Dossier particulier: La protection des lanceurs d'alerte et des collaborateurs de justice**

**Schwerpunktthema: Schutz von Hinweisgebern und Informanten**

Guest Editorial

*Tiina Astola*

The European Commission's Proposal  
for Strengthening Whistleblower Protection

*Georgia Georgiadou*

A Matter of Life and Death  
Whistleblowing Legislation in the EU

Dr. *Simone White*

État des lieux des programmes de protection des témoins et des collaborateurs  
de justice dans le domaine du crime organisé et du terrorisme

*David Chiappini*

La confiance mutuelle sous pression dans le cadre du transfert  
de personnes condamnées au sein de l'Union Européenne

Dr. *Tony Marguery*

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

## Contents

### News\*

#### European Union

##### Foundations

- 142 Fundamental Rights
- 146 Schengen

##### Institutions

- 147 European Court of Justice (ECJ)
- 148 Europol
- 148 Eurojust
- 148 Frontex
- 149 Agency for Fundamental Rights (FRA)

##### Specific Areas of Crime / Substantive Criminal Law

- 150 Protection of Financial Interests
- 150 Money Laundering
- 153 Tax Evasion
- 153 Non-Cash Means of Payment
- 154 Counterfeiting & Piracy
- 154 Cybercrime

##### Procedural Criminal Law

- 155 Procedural Safeguards
- 155 Data Protection
- 157 Victim Protection

##### Cooperation

- 159 European Arrest Warrant
- 161 Customs Cooperation
- 161 Law Enforcement Cooperation

#### Council of Europe

##### Foundations

- 164 European Court of Human Rights

##### Procedural Criminal Law

### Articles

#### Protection of Whistleblowers and Collaborators with Justice

- 166 The European Commission's Proposal for Strengthening Whistleblower Protection  
*Georgia Georgiadou*
- 170 A Matter of Life and Death  
Whistleblowing Legislation in the EU  
*Dr. Simone White*
- 177 État des lieux des programmes de protection des témoins et des collaborateurs de justice dans le domaine du crime organisé et du terrorisme  
*David Chiappini*
- 182 La confiance mutuelle sous pression dans le cadre du transfert de personnes condamnées au sein de l'Union Européenne  
*Dr. Tony Marguery*

### Imprint

\* The news contain internet links referring to more detailed information. As of 2018, these links are being embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If an external website features multiple languages, the Internet links generally refer to the English version. For other language versions, please navigate using the external website.

# Guest Editorial

Dear Readers,

Many recent scandals, such as Dieselgate, Luxleaks, the Panama Papers, and Cambridge Analytica, might never have come to light if “insiders” had not had the courage to speak up about wrongdoing occurring in their workplaces. These are only a few examples of how whistleblowers help detect, investigate, and remedy violations of law that can seriously damage the public interest and the welfare of our citizens and societies.

Those who help uncover illegal activities should not have to suffer any personal or professional disadvantages or even be punished because of their actions. However, reality has repeatedly shown that whistleblowers take high personal risks with their jobs, their reputations, or even their health. They often end up paying a high price: many are fired, demoted, harassed, sued, or blacklisted. Without sufficient legal protection against retaliation and reliable avenues to report wrongdoing, it is only natural that potential whistleblowers are reluctant to come forward with their concerns.

Data from surveys and studies document this reluctance. The 2017 Special Eurobarometer on corruption, for instance, indicated that 81% of Europeans did not report corruption they had experienced or witnessed. Similar results were revealed in the Commission’s 2017 public consultation on whistleblower protection, where 85% of respondents said they believed that workers very rarely or rarely report concerns over threats and harm to the public because they fear legal and financial consequences. Last but not least, the 2017 study by Milieu Ltd, which was commissioned by the European Commission, estimated the loss of potential benefits due to a lack of whistleblower protection in the area of public procurement to be in the range of €5.8 to €9.6 billion each year for the EU as a whole.

A major factor contributing to this situation of underreporting is currently the high level of fragmentation across the EU as regards whistleblower protection. This consistently led EU institutions, civil society organisations, and trade unions to call for EU-wide legislation on the protection of whistleblowers in the EU in both the public and private sectors.

With its proposal of 23 April 2018 for a “Directive on the protection of persons reporting on breaches of Union law” (COM(2018) 218 final), the Commission sets out a much

needed legal framework for robust protection of whistleblowers across the EU. The proposed, common, minimum standards strike a balance between the need to protect whistleblowers and the need to discourage the reporting of malicious information and prevent unjustified reputational damage. At the same time, these new standards help safeguard the public’s right to access information and to media freedom by protecting those who act as sources for investigative journalists should their identity be revealed.



Tiina Astola

Once adopted, the proposed rules are bound to make a difference in workplace culture: both public servants and private sector employees will have clear and easily accessible channels for reporting. They should feel reassured that it is safe and acceptable for them to speak up in order to protect the public interest.

Providing strong whistleblower protection will contribute to the effective detection and prevention of violations of EU law that may cause serious harm to the public interest. It will also strengthen transparency, good governance, accountability, and freedom of expression in the EU.

The Commission is currently supporting negotiations on the proposal between the two co-legislators, the European Parliament and the Council, with a view towards its adoption before the end of this legislative period. Since the proposal is still under scrutiny, it is too early to say whether and to what extent the Union’s efforts will pay off. One thing is clear: in the face of recent scandals exposing weak controls in the area of banking and financial markets, nuclear safety, and environmental protection, the Union must act!

Tiina Astola  
Director-General – European Commission – Directorate-General for Justice and Consumers



### European Union\*

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

#### Foundations

#### Fundamental Rights

#### CJEU: No Rehearing for Alleged Infringements of EU Fundamental Rights

**spot light** On 24 October 2018, the CJEU published a judgment on the question of whether national legislation laying down a remedy allowing criminal proceedings to be reheard in the event of infringement of the ECHR must be extended to alleged infringements of fundamental rights enshrined in EU law ([Case C-234/17 – XC, YB and ZA](#)).

##### ► *The Legal Question*

Member States often allocate a special status to the ECHR. When it comes to criminal proceedings, national provisions may allow the reopening of finally judged cases if the ECtHR finds a violation of the ECHR or its protocols and if the national criminal court's decision might have been affected by the infringement. Sec. 363a of the Austrian Code of Criminal Procedure, for instance, does this.

Since this exception from the authori-

ty of *res judicata* is limited to the ECHR, the question arises as to whether it also covers infringements of fundamental rights guaranteed by other legal sources, in particular the EU's Charter of Fundamental Rights (CFR).

##### ► *The Facts of the Case and the Question Referred*

This question was triggered by a case in Austria that concerned several defendants who were alleged to have illegally obtained VAT refunds of over 835,000 Swiss francs. The Swiss Prosecutor's Office submitted mutual legal assistance requests to the Austrian judicial authorities, with a view to the parties concerned being questioned by the prosecution office of Feldkirch, Austria. The requested defendants XC, YB, and ZA appealed against this idea, arguing that criminal proceedings against them in the same matter had been already concluded in Germany and Liechtenstein. Therefore, mutual legal assistance is precluded because of the *ne bis in idem* principle, enshrined in Art. 54 CISA and Art. 50 CFR. The Higher Regional Court of Innsbruck, ruling at last instance, had dismissed these objections, however, and found that there were no elements

pointing to an infringement of the European *ne bis in idem* principle.

Although the order of the Higher Regional Court of Innsbruck had become final, the defendants referred to Sec. 363a of the Austrian Code of Criminal Procedure and asked the Austrian Supreme Court (*Oberster Gerichtshof*) for a rehearing of the criminal proceedings because the Higher Regional Court had wrongly neglected their fundamental rights according to EU law.

Against this background, the Supreme Court referred the question to the CJEU: whether EU law, in particular Art. 4(3) TEU in conjunction with the principles of equivalence and effectiveness inferred from it, obliges Sec. 363a of the Criminal Code of Procedure to be applied to alleged infringements of fundamental rights guaranteed by EU law (in the case at issue: Art. 50 CFR, Art. 54 CISA).

##### ► *The CJEU's Answer*

The CJEU ruled that EU law must be interpreted such that a national court is not required to extend to infringements of EU law, in particular to infringements of the fundamental rights guaranteed in Art. 50 CFR and Art. 54 CISA, a remedy under national law permitting, only in the event of infringements of the ECHR or one of the protocols thereto, the rehearing of criminal proceedings closed by a national decision having the force of *res judicata*.

##### ► *The Reasoning*

The CJEU justified its rationale by examining the principles of equivalence and effectiveness.

\* If not stated otherwise, the news reported in the following sections cover the period 16 September – 15 November 2018.

1) The *principle of equivalence* prohibits a Member State from laying down less favourable procedural rules for actions for safeguarding rights that individuals derive from EU law than those applicable to similar domestic actions. Therefore, the CJEU has to ascertain “whether the action in question [here: action for the rehearing of criminal proceedings] may be regarded as similar to an action brought to safeguard EU law, in particular the fundamental rights enshrined by that law, taking into consideration the purpose, cause of action and essential characteristics of those actions.”

In this context, the CJEU acknowledged fundamental differences between the legal orders of the European Union and the ECHR. It observed that Sec. 363a of the Austrian Code of Criminal Procedure is an exceptional remedy – a remedy to implement the judgments of the ECtHR and thus to comply with the obligations laid down in Art. 46 ECHR.

The main cause of action is that the ECtHR deals with a matter *after* all domestic remedies have been exhausted, which implies the decision of a national court adjudicating in last instance and with the force of *res judicata*. By contrast, the legal order of the European Union establishes a different judicial system intended to ensure consistency and uniformity in the interpretation of EU law. The characteristics of this judicial system are as follows:

- The key element is the preliminary ruling procedure provided for in Art. 267 TFEU;
- The preliminary ruling procedure is based on the idea of a dialogue between one court and another;
- National courts have the widest discretion in referring a matter to the CJEU;
- Courts of last instance are, in principle, obliged to bring a matter before the CJEU if a question relating to the interpretation of EU law is raised before them.

As a result, the constitutional framework of the EU secures the protection of

fundamental rights during the proceedings, i.e. *before* a court decision comes into existence with the force of *res judicata*.

In the light of this analysis on the very nature of the legal orders, it must, therefore, be concluded that the procedure securing implementation of the ECtHR, such as that of Sec. 363a of the Austrian Code of Criminal Procedure, on the one hand, and the actions for protecting the individuals’ rights deriving from EU law, on the other, are not similar within the meaning of the principle of equivalence.

2) As regards the *principle of effectiveness*, the CJEU stated that it must be determined whether the impossibility of requesting (on the basis of said Sec. 363a of the Code of Criminal Procedure) the rehearing of criminal proceedings finally closed by a decision relying on the infringement of EU fundamental rights makes it impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order.

The CJEU first pointed out that the TFEU does not intend to make additional requests from the Member State other than those laid down by national law in order to ensure the protection of the rights that individuals derive from EU law.

Secondly, the CJEU stressed the very importance of the principle of *res judicata*, both in the legal orders of the European Union and in national legal systems. By referring to previous case law, the CJEU noted that the Union law does neither of the following:

- Oblige national courts to disapply rules of procedure conferring finality of judgements, even if this would remedy a situation that is incompatible with EU law;
- Go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of EU law delivered by the CJEU after that judgment.

The CJEU concluded that, in the present case, it could not find any indications that the Austrian legal order does

not provide for legal remedies that effectively guarantee the protection of the individual’s rights deriving from Art. 50 CFR and Art. 54 CISA.

#### ► On Focus

The CJEU upheld the national systems that only provide for a breakthrough of *res judicata* effects in the event of ECHR infringements. It justified this finding with the different mechanisms of action under EU law and the ECHR system: an individual can only take recourse to the ECtHR if national remedies have been exhausted and a national court decision has the force of *res judicata*.

By contrast, the “constitutional framework” of the EU legal order – which provides the preliminary ruling procedure for enforcing EU law – does not necessitate exceptions from *res judicata* effects.

The CJEU followed the [opinion of Advocate General \(AG\) Henrik Saugmandsgaard Øe](#) of 5 June 2018 in this case C-234/17. The AG also highlighted the different characteristics of EU law as an autonomous legal order and of the ECHR as part of international public law.

Both the CJEU and the AG clarified that individuals cannot “play another card” after having missed the opportunity to convince national judges to submit questions of interpretation to the CJEU. In the present case, this was not completely out of question, since Art. 50 CFR/Art. 54 CISA are regularly the subject of interpretation in preliminary ruling procedures. The question must be raised, however, as to which extent defendants can realistically influence the judges’ decision to file a reference for a preliminary ruling before the CJEU.

The CJEU’s ruling in this case is also relevant for the interpretation of other legal orders with similar provisions as that of Sec. 363a of the Austrian Code of Criminal Procedure. Sec. 359 No. 6 of the German Criminal Procedure Code, e.g., provides for the reopening of the proceedings if the ECtHR held a ECHR violation and the judgment was based on it. (TW)

### EP: Time Is Ripe for a Comprehensive DRF Mechanism

In a [resolution of 14 November 2018](#), the EP called on the Commission to present a proposal for a comprehensive EU mechanism on democracy, the rule of law, and fundamental rights (in short: “DRF”). Several EU Member States were not maintaining the core EU values of respect for human dignity and human rights, freedom, democracy, equality, and the rule of law. Since this, *inter alia*, threatens the rebuttable presumption of mutual trust in the area of freedom, security and justice, the EP stressed that the existing EU responses to these deficiencies are insufficient.

The EP reiterated its call for a comprehensive, permanent, and objective EU DRF mechanism as already put forward in a EP resolution of October 2016 (see [eucrim 4/2016](#), p. 154). The EP underlined that such a mechanism is more urgently needed now than ever before and regrets that neither the Commission nor the Council have taken up its proposal from 2016.

The resolution of 14 November 2018 reiterates the main elements of envisaged mechanism and calls for incorporation of existing instruments, such as the Justice Scoreboard (see [eucrim 2/2018](#), pp. 80–81), the Media Pluralism Monitor, the Anti-Corruption Report, and peer evaluation procedures based on Art. 70 TFEU.

The EP further wishes to include the proposed link between protection of the Union budget and generalised deficiencies as regards the rule of law (see [eucrim 1/2018](#), pp. 12–13). The Council is called on “to properly assume its institutional role in the ongoing procedures in the framework of Article 7(1) TEU.” (TW)

### CJEU Stops Application of New Polish Law on Supreme Court Judges

On 19 October 2018, the Vice-President (VP) of the European Court of Justice [ordered interim measures](#) in the

infringement proceedings against Poland regarding Poland’s reform of the Supreme Court. The proceedings ([case C-619/18](#)) were launched by the European Commission at the end of September 2018 (registered at the Court on 2 October 2018). The VP argued that Poland infringes the principle of the independence of judges with its reform on the retirement age of Supreme Court judges and on the wide discretion of the Polish President to extend the active judicial service of Supreme Court judges (cf. [eucrim 2/2018](#), p. 80). The VP’s order (full text only available in [French](#) and [Polish](#)) states that all conditions for interim relief are fulfilled.

First, the Commission sufficiently established that the order is justified, *prima facie*, in fact and in law (*fumus boni juris* requirement).

Second, the order is also deemed urgent, so as to avoid serious and irreparable damage to the interests of the EU, meaning that the effects of the order are justified before a final decision is reached. The VP emphasized that the provisions of national legislation have already begun to be applied. The CJEU must also ensure that decisions of the Polish Supreme Court are taken in full respect of the individuals’ fundamental right to an independent court or tribunal. In this context, the VP reiterated that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right of cardinal importance to guarantee that all the rights which individuals derive from EU law, will be protected. Thus, the very nature of the infringed right in itself gives rise to serious and irreparable damage. In the present case, it must additionally be taken into account that the Polish Supreme Court is a court of last instance and therefore has the authority to establish *res judicata* before the CJEU can decide on the infringement procedure.

Third, the VP held that the weighing-up of interests involved is also in favour of ordering interim measures, because the immediate application of the new

national legislation would mean the EU is faced with a *fait accompli* should the action to fulfil obligations be upheld by the CJEU.

As a result, Poland has been ordered, *inter alia* to act as follows:

- Suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges;
- Take all necessary measures to ensure that the Supreme Court judges affected by the provisions at issue can continue to perform their duties in the same position and enjoy the same status as before;
- Refrain from adopting any measure concerning the appointment of new judges to the Supreme Court to replace the Supreme Court judges concerned;
- Communicate to the Commission all the measures it has adopted or plans to adopt in order to fully comply with said order.

The order is without prejudice to the final judgment of the action for failure to comply with obligations under EU law. The CJEU will rule on the substance of the case at a later stage. (TW)

### Commission Criticises Romania for Regression in Judicial Reforms and Fight Against Corruption

As part of the Cooperation and Verification Mechanism (CVM), the Commission voiced concerns over current developments in Romania regarding judicial reforms, judicial independence, and the fight against high-level corruption. [In its progress report tabled on 13 November 2018](#), the Commission stated that Romania does not fulfil the CVM benchmarks. Recent developments in Romania even led to the reopening of/ backtracking on issues that were deemed solved in the last 10 years.

The progress made in Romania since the last report of November 2017 is duly noted. The report particularly assesses the implementation of 12 recommendations as set out in the progress report of January 2017.

The Commission notes that the entry

into force of the amended justice laws, the pressure on judicial independence in general and on the National Anti-Corruption Directorate (DNA) in particular, and other steps undermining the fight against corruption have called into question the progress already made. Furthermore, Romania is currently lacking the means to guarantee a media environment in which corruption cases can be brought to light.

Instead of closing issues, the Commission set out new recommendations in the following areas:

- Justice laws;
- Appointments/dismissals within the judiciary;
- Criminal Codes.

As regards the latter, the Commission recommends freezing the entry into force of changes to the Criminal Code and the Criminal Procedure Code. It also recommends re-opening the revision of the Codes, fully taking into account the need for compatibility with EU law and international anti-corruption instruments.

[The CVM](#) applies to Romania and Bulgaria. It was established upon the accession of the two countries to the EU in 2007 in order to remedy certain shortcomings that existed in both Member States in the areas of judicial reform and the fight against corruption. These weaknesses could prevent an effective application of EU laws, policies, and programmes and could prevent Bulgarians and Romanians from enjoying their full rights as EU citizens. The Commission regularly verifies progress against specific benchmarks.

Each Commission report, as well as its methodology and conclusions, is subject to subsequent discussion in the Council of Ministers and has been consistently endorsed in Council Conclusions. The reports and methodology are also presented to the European Parliament.

In January 2017, the Commission set out the remaining steps needed to achieve the CVM's objectives. It provided concrete recommendations to both Member States, which would al-

low them to fulfil the benchmarks and close the CVM process under the current Commission's mandate.

In its report of November 2018, the Commission observed a regression of Romania in fulfilling the recommendations. Therefore, the country is far from having the supervision mechanism lifted. The Commission stressed that it will closely follow the situation in Romania until the end of its mandate in 2019. Hence – against Romania's expectations – supervision will continue during the Romanian EU Presidency starting on 1 January 2019.

In a first reaction, [Romania's governing coalition rebuffed the CVM report](#) and is considering challenging it before the CJEU. Romanian ministers and MPs argue that the recommendations have no judicial power to halt national legislation.

In a [resolution of 13 November 2018](#), however, the European Parliament also voiced "deep concerns" over the reform of the Romanian judicial and criminal laws, which risks undermining the separation of powers and the fight against corruption. MEPs also stressed the need to reinforce parliamentary control over the intelligence services, which allegedly interfered with the Romanian judiciary. Furthermore, the resolution condemned the violent and disproportionate police response to public protests. (TW)

### Positive Marks for Bulgaria in Judicial Reform and Fight Against Corruption

On 13 November 2018, the Commission presented a [progress report on Bulgaria under the Cooperation and Verification Mechanism \(CVM\)](#). The CVM assessed progress made in Bulgaria's commitments in the areas of judicial reform and the fight against corruption and organised crime since its EU accession in 2007.

The recent November 2018 report focuses on whether Bulgaria made enough progress to meet the recommendations as set out in the Commission's progress report in January 2017. Fulfilment of these recommendations is

a pre-requisite for achieving the CVM's objectives as set out in benchmarks and for finally closing the CVM procedure for Bulgaria.

The report notes that Bulgaria is on good track. Several recommendations are considered being implemented and others being very close to implementation. Hence, three of six benchmarks (judicial independence, legislative framework, and organised crime) can be considered provisionally closed.

Notwithstanding, the Commission's report indicates concern over significant deterioration in the Bulgarian media environment recently. This may risk restricting public access to information and have a negative impact on judicial independence, with targeted attacks on judges in some media. The Commission stresses that the media, as well as civil society, must be able to hold those exercising power accountable – free from pressure.

The Commission will closely monitor further progress on Bulgaria's part. It anticipates that the CVM process for Bulgaria can be concluded soon.

The developments in Bulgaria are decoupled from those in Romania, which is also subject to a CVM. In the progress report on Romania, published in parallel, the Commission found a regression of Romania's efforts to meet the CVM requirements.

[The CVM](#) applies to Romania and Bulgaria. It was established upon accession of the two countries to the EU in 2007 in order to remedy certain shortcomings that existed in both Member States in the areas of judicial reform and the fight against corruption, and – in the case of Bulgaria – the fight against organised crime. These weaknesses were thought to prevent an effective application of EU laws, policies, and programmes and prevent Bulgarians and Romanians from enjoying their full rights as EU citizens. The Commission regularly verifies progress against specific benchmarks.

Each Commission report, as well

as its methodology and conclusions, is subject to subsequent discussion in the Council of Ministers and has been consistently endorsed in Council Conclusions. The reports and methodology are also presented to the European Parliament. (TW)

### Brexit: Citizens Fail Before European Court

On 26 November 2018, the General Court (GC) delivered its judgment in an action for annulment by way of which the applicants wanted to stop Brexit progress. In the case at issue, 13 British citizens residing in EU Member States other than the UK applied to the GC to annul the decision of the Council of the European Union authorising the opening of negotiations on Brexit. The case is referred to as *Shindler and Others v. Council of the European Union* (Case T-458/17).

The applicants argued that – as expatriated UK citizens – they were denied the right to vote in the referendum of 23 June 2016 because of the so-called “15 years rule.” They underpinned their position with the following five arguments:

- The contested decision has a direct impact on the rights they derive from the Treaties, *inter alia* as regards their status as EU citizens and their right to vote in European and municipal elections; their right to respect for their private and family life; their freedom to move, reside and work; their right to own property; and their right to social security benefits;
- The contested decision is not only an interim measure, but implicitly acknowledged the UK’s irreversible “exit” from the EU on 29 March 2019;
- The contested decision, particularly its negotiating directives, produce legal effects insofar as they will likely lead to the loss of their legal status of Union citizenship after Brexit;
- The withdrawal procedure is void in the absence of definite constitutional authorisation based on the votes of all UK citizens, who are also EU citizens;
- The action before the GC is their sole

effective form of legal remedy before the inescapable loss of their status as EU citizens on 29 March 2019 as a consequence of the contested decision.

The GC, however, ruled that the action for annulment is inadmissible. It reiterated that the contested act must, at the very least, be of direct concern to the applicants (Art. 263(4) TFEU) and directly affect their legal situation. The GC argued that the decision of the Council authorising the opening of Brexit negotiations does not have a direct effect on the legal situation of the applicants. Although the status of the applicants as EU citizens may be affected by the UK’s withdrawal, this potential effect does not result from the contested Council decision.

The contested decision is instead a mere preliminary act, which cannot pre-judge the content of any final agreement, in particular as regards the scope of any provision on the protection of the status and rights of UK citizens in the remaining 27 EU Member States.

As for the argument on the lack of constitutional authorisation, the GC observed that this is part of the merits of the case and is not an argument for or against admissibility of the action.

Regarding the lack of any effective remedy, the GC states that judicial review is not only ensured by the CJEU. In particular, the argument that expatriated UK citizens had no right to vote can be challenged before UK courts.

The judgment of the GC is subject to appeal on points of law before the Court of Justice. It must be brought within two months of notification of the decision. (TW).

### Handbook on Application of Charter Published

In October 2018, FRA published a [handbook on how to apply the Charter of Fundamental Rights of the European Union in law and policymaking at national level](#). The handbook is a guide on how and when the Charter applies and targets national law- and policy-makers, i.e., those

working in governments, parliaments, and regional and local authorities.

In its various chapters, the handbook first provides a general orientation on the EU system of fundamental rights and explains how the Charter relates to national and international fundamental rights instruments. An outline with reasons for checking whether the Charter applies is provided. Furthermore, the handbook explains how to check whether the Charter applies, in which situations the charter applies, and how it is applied. In addition, the handbook contains practical tools such as a checklist on the applicability of the Charter and a Charter compliance check. (CR)

### Schengen

#### eu-Lisa: New Legal Basis – New Mandate

On 21 November 2018, the new legal basis, i.e. [Regulation \(EU\) 2018/1726](#), for eu-LISA was published in the Official Journal of the EU (O.J. L 295, pp. 99–137).

The European Agency eu-LISA was established in 2011 and mandated with the operational management of the large-scale IT systems existing at the time in the area of freedom, security and justice, i.e. the second generation of the Schengen Information System (SIS II), the Visa Information System (VIS), and Eurodac.

The new legal framework aims at extending the mandate and making the agency fit for current and future challenges in the area of freedom, security and justice (AFSJ). It was deemed necessary after an external evaluation and following recent developments as regards migration and security.

Reinforcement of eu-LISA was one of the [top political priorities](#) of the Juncker Commission for 2018–2019.

The *tasks* of eu-LISA will include:

- Continued ensuring of the operational management of SIS II, VIS, and Eurodac;



- Carrying out the tasks deriving from newly adopted large-scale EU IT systems, e.g. ETIAS, EES, and Dublinet;
- Preparation, development, and operational management of additional large-scale IT systems adopted on the basis of Art. 67–89 TFEU, e.g. ECRIS-TCN or e-CODEX;
- Implementing technical solutions if systems are to function 24/7;
- Developing necessary actions to enable interoperability of large-scale IT systems in the AFSJ;
- Trainings on the technical use of SIS II, VIS, Eurodac, and other systems;
- Compiling and publishing statistics;
- Taking over a pro-active role in research related to the technical development of systems;
- Carrying out pilot projects of an experimental nature designed to test the feasibility and usefulness of an action and implementing other testing activities;
- Providing advice to Member States, including *ad hoc* support when dealing with migratory challenges, and assistance when creating common solutions for the implementation of Member States' obligations stemming from EU legislation on decentralized systems in the AFSJ.

The efficient functioning of the agency will be monitored by a *Management Board*. The Management Board is, *inter alia*, entrusted with adopting the annual work programme, carrying out functions relating to eu-LISA's budget, adopting the financial rules applicable to the Agency, and establishing procedures for taking decisions relating to the operational tasks of the Agency by the Executive Director. The Management Board will also appoint the Executive Director of eu-LISA.

Several *Advisory Groups* are to provide expertise to the Management Board relating to large-scale IT systems. Advisory Groups act especially in the context of the preparation of the annual work programme and the annual activity report.

Depending on the large-scale IT system concerned, Europol, Eurojust, and Frontex will have observer status at the Management Board meetings.

eu-LISA will also closely cooperate with other Union institutions, bodies, offices, and agencies, particularly those established within the AFSJ. As part of the framework of their respective competences, the institutions, bodies etc. can conclude working arrangements if an issues governs the development, establishment, use, or operation of the above-mentioned large-scale IT systems. eu-LISA is also able to cooperate with international organisations or “other relevant entities or bodies, which are set up by, or on the basis of, an agreement between two or more countries.”

Since the new Regulation on eu-LISA relates to IT systems relevant for the Schengen cooperation, it belongs – at least partly – to the *Schengen acquis*. This triggers (rather complicated) rules on the association of Schengen and non-Schengen countries to the new legal framework. The rules concern Denmark, the UK, Ireland, Iceland, Norway, Switzerland, and Liechtenstein.

The official seat of eu-LISA will still be in Tallinn/Estonia. Since some operations for SIS II and VIS, for example, are also carried out in Strasbourg/France and Sankt Johann im Pongau/Austria, these two sites are still locations in accordance with the relevant Union legal acts.

Most provisions of the Regulation apply from 11 December 2018. It replaces the former legal basis of eu-LISA, i.e. Regulation (EU) No 1077/2011. (TW)

## Institutions

### European Court of Justice (ECJ)

#### Switch to E-Curia

With effect from 1 December 2018, the IT application [e-Curia](#) is becoming the only means of exchange of legal documents between the parties of the case

and the General Court. Apart from very few exceptions relating to observing the principle of access to the courts, the change affects all parties (applicants, defendants, and interveners) and all types of procedures, including the urgent procedure. Lawyers and agents can apply for an e-Curia account by using the form for [requesting access](#). (CR)

### First Advocate General of the Court of Justice Appointed

On 11 October 2018, Mr *Maciej Szpunar* was appointed [First Advocate General of the Court of Justice](#). Mr Szpunar has been serving as Advocate General at the Court of Justice since 2013.

Prof. Dr. *Maciej Szpunar* holds degrees in law from the University of Silesia/Poland and the College of Europe, Bruges/Belgium.

Before joining the CJEU, he served as Undersecretary of State in the Polish Office of the Committee for European Integration (2008–2009), then in the Polish Ministry of Foreign Affairs (2010–2013) as well as agent of the Polish Government in a large number of cases before the European Union judicature. (CR)

### Presidents of the Chambers of Three Judges

On 11 October 2018, five [presidents were elected for the Chambers of Three Judges](#) of the Court of Justice Chambers: Judges *Thomas von Danwitz*, *Camelia Toader*, *François Biltgen*, *Küllike Jürimäe*, and *Constantinos Lycourgos*. The presidents are elected for a three-year term.

Before joining the Court as a Judge in 2006, Prof. Dr. *Thomas von Danwitz* served as Professor and Visiting Professor for German public law and European law in various universities in Germany and France.

Prof. Dr. *Camelia Toader* serves as a Judge at the CJEU since 2007. Her previous career includes positions as Head of the European Integration Unit at the Romanian Ministry of Justice (1997–1999)

and Judge at the Romanian High Court of Cassation and Justice (1999–2007).

Before joining the the Court of Justice as a Judge in 2013, *François Biltgen* served, *inter alia*, as minister in several positions in the Luxembourgish government (1999–2013).

After a career as Judge at the Tallinn Court of Appeal (1993–2004), *Küllike Jürimäe* became Judge at the General Court in 2004 and became Judge at the Court of Justice in 2013.

Before joining the Court of Justice as Judge in 2014, *Constantinos Lycourgos* held positions as Senior Counsel of the Republic of Cyprus (2007–2014) and Head of the European Union Law Section of the Law Office of Cyprus (2003–2014) as well as agent of the Cypriot government before the courts of the European Union (2004–2014). (CR)

### President Re-Elected

On 9 October 2018, *Koen Lenaerts* was [re-elected](#) to serve as President of the Court of Justice of the European Union from 9 October 2018 to 6 October 2021. Mr *Lenaerts* has been serving as President of the Court of Justice since October 2015. Prior to his first presidency, he served as Vice-President of the Court of Justice, Judge at the Court of Justice and, since 1989, as Judge at the Court of First Instance of the European Communities. (CR)

## Europol

### Cooperation with Global Lottery Monitoring System

On 15 November 2018, Europol and the Global Lottery Monitoring System (GLMS) signed a [Memorandum of Understanding](#) (MoU) to enhance the fight against sports competition manipulations and related organised crime. Under the MoU, the parties will be able to share information and jointly run activities and implement relevant projects.

GLMS is a mutualized monitoring system for sports betting by the state lot-

teries of 29 countries from around the globe. It aims to detect and analyse suspicious betting activities that could bring into question the integrity of a sports competition. (CR)

### Cooperation with UK's Cyber Defence Alliance Limited

On 27 September 2018, Europol's European Cybercrime Centre (EC3) signed a [Memorandum of Understanding](#) (MoU) with the UK's Cyber Defence Alliance Limited (CDA) to address cyber threats affecting the banking and financial sectors. Under the MoU, the parties shall organise joint activities, exchange expertise (e.g., best practices, statistical data, technical information, and trends related to cybercrime) and cooperate with each other when implementing projects.

CDA is a consortium of British-based banks and law enforcement agencies set up to collaborate in fighting, detecting, and preventing cyberattacks on financial organisations. (CR)

## Eurojust

### Cooperation Agreement with Albania Signed

On 5 October 2018, Eurojust and Albania signed a [cooperation agreement](#) to enhance their operational and strategic judicial cooperation. Under the agreement, Albania will be able to access Eurojust's information systems and to share personal data and evidence. Furthermore, Albania may appoint a Liaison Prosecutor to Eurojust. (CR)

### European Judicial Counter-Terrorism Register

On 5 November 2018, seven EU Member States (i.e. France, Germany, Spain, Italy, Belgium, Luxemburg, and the Netherlands) launched an [initiative](#) calling for the creation of a European judicial counter-terrorism register at Eurojust. The register shall provide more clarity, security, and speed to investigations after terrorist attacks. It shall be

based on Eurojust's existing case management system.

As a next step, Eurojust will launch a working group as part of its counter-terrorism team to explore and prepare the implementation modalities. (CR)

### Consultative Forum

On 19 October 2018, Eurojust hosted the [13th Consultative Forum](#) of Prosecutors General and Directors of Public Prosecutions of the Member States of the EU. This year's forum focused on strategies when using the European Investigation Order, developments in the area of e-evidence and regarding counter-terrorism, Eurojust's operational activities in key crime areas, as well as Eurojust's reform under its new Regulation. (CR)

## Frontex

### Statement of Principles for Collaboration with Europol

On 5 October 2018, [Frontex and Europol](#) signed a [Statement of Principles for Collaboration](#) in order to foster their cooperation in the European area of freedom, security and justice, in particular by expanding the exchange of information between the two agencies. The statement also aims at securing two benefits, namely strengthening Europol's criminal investigations and enhancing Frontex' border management of the EU's external borders.

Under the Statement, the agencies agreed, *inter alia*, on the following:

- Avoid duplication of efforts, identify gaps, and seek for synergies;
- Make use of each other's capabilities;
- Invest in joint operational support;
- Share and, where possible, develop common procedures;
- Enhance the exchange of information in a proactive and structured way;
- Work together in the development of new capabilities, including in research and in new technologies related to the agencies' tasks;
- Cooperate at strategic level;

- Coordinate and support one another in respective activities in the external domain, including in preparation of EU and international meetings;
- Invest in providing the best training for their staff.

The two agencies are already working together on a daily basis, including the collaboration in joint operations. The new framework is designed to foster cooperation in fighting other forms of cross-border crime beyond migrant smuggling. (CR)

### Cooperation Agreement with Albania Signed

On 5 October 2018, Frontex and Albania signed a [cooperation agreement](#) on border management to tackle irregular migration. Under the agreement, Frontex will coordinate operational cooperation between EU Member States and Albania on the management of the EU's external borders. It will also carry out deployments and joint operations on Albanian territory subject to the agreement. For each operation, a plan must be agreed on between the parties. The agreement is the first in a planned series of agreements with countries neighbouring the EU. (CR)

### ETIAS Central Unit at Frontex

On 9 October 2018, the European Travel Information and Authorisation System (ETIAS) came into force, providing an electronic travel authorisation system for visitors from countries that are currently not part of the EU but have been granted visa-free access to the EU and Schengen member countries (see eucrim 2/2018, pp. 82, 84). The [ETIAS Central Unit](#) will be set up and managed by Frontex. It will, for instance, provide operational support, verification of travel authorisation applications (where necessary), and a helpdesk for travellers with questions on the ETIAS application. (CR)

### 2-Year Anniversary of New Border Agency

At the beginning of October, Frontex marked its [two-year anniversary](#) as

the European Border and Coast Guard Agency.

Today, the Agency employs approx. 600 staff members at its headquarters in Warsaw. Furthermore, it deploys around 1500 officers as well as twenty-six ships, six airplanes, four helicopters, and numerous vehicles, including 80 patrol cars, in its various operations at the EU's external borders.

In the last two years, the Agency has managed to expand its role in migration management and security-related activities, its ability to monitor the external borders and share the information gathered with EU Member States, its network of liaison officers to the EU Member States and Schengen-associated countries, and its work to address potential future challenges. (CR)

### Unmanned Aircraft for Border Surveillance Tested

At the end of September, Frontex started testing the use of [Remotely Piloted Aircraft Systems \(RPAS\)](#) to monitor the EU's external borders. The RPAS carry surveillance equipment, including thermal cameras and radars. The system is being tested for several different operations:

- Sea surveillance;
- Support of search-and-rescue operations;
- Detection of vessels suspected of criminal activities;
- Information sharing with multiple users in real time.

The tests are taking place in Greece, Italy, and Portugal. (CR)

### Agency for Fundamental Rights (FRA)

#### ETIAS Fundamental Rights Guidance Board

FRA is joining the [Fundamental Rights Guidance Board](#) of the newly established European Travel Information and Authorisation System (ETIAS). The Board will review how the processing of ETIAS applications impacts fundamental rights.

ETIAS is a central, electronic system by means of which visa-free travellers can get authorisation to board a carrier to travel to the Schengen Zone. A key feature of ETIAS is the possibility to cross-check data provided by the traveller against other large-scale EU systems for borders, security, and migration, such as the Schengen Information System (SIS), the Visa Information System (VIS), the Entry/Exit System (EES), and Eurodac as well as Europol and Interpol databases. Furthermore, ETIAS will feature a dedicated watchlist and specific risk indicators. In this way, ETIAS is expected to close information gaps and enhance the internal security of the EU. The legislation on ETIAS was adopted in September 2018 (see eucrim 2/2018, pp. 82, 84). (CR)

### Fundamental Rights Forum 2018

From 25–27 September 2018, FRA hosted its annual [Fundamental Rights Forum](#). The 3-day conference offered a wide range of topics and speakers. Over 600 participants attended. The representatives were from European and national human rights organisations, EU institutions and agencies, national authorities and parliaments, local authorities, legal practitioners, the business, sporting and arts worlds, as well as civil society and rights-holders.

During the forum, participation by the majority and variety of experts was used to collect ideas to counter the pressing human rights threats facing Europe. In particular, it addressed the following concerns:

- Increasing trust in institutions;
- Amplifying the voices of those most excluded and marginalised;
- Using local action as a catalyst for human rights and belonging;
- Implementing social rights to secure equal opportunities and fair working conditions;
- Strengthening belonging through inclusive education and employment.

Consequently, a variety of calls for action and commitments of the Agency

are outlined in the [Chair's Statement](#), which was published after the forum. (CR)

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Germany: Legislative Draft for Implementation of PIF Directive Tabled

On 11 October 2018, the Federal Ministry of Justice and Consumer Protection tabled a [ministerial draft](#) for the implementation of the PIF Directive into German law. For the PIF Directive, see eucrim 2/2017, p. 63 and the article by *Juszczak/Sason* in eucrim 2/2017, pp. 80–87. The PIF-Directive is also closely connected with the European Public Prosecutor's Office, which will prosecute offences framed in the PIF Directive in the future (see eucrim 3/2017, pp. 102–104).

The ministerial draft states that German law already broadly complies with the requirements of the Directive. The necessary adaptations ought to be made by a new law “for strengthening the protection of the financial interests of the EU” (*EU-Finanzschutzstärkungsgesetz – EUFinSchStG*).

The new law will regulate the offences of misapplication of funds or assets from the Union budget or budgets managed by the Union and those of illegal diminution of the resources of the Union budget/budgets managed by the Union. Furthermore, clarifications are to be made regarding the offences of taking and giving bribes in relation to the financial interests of the European Union. Further amendments in the context of corruption offences and adaptations to subsidy fraud will be implemented in the German Criminal Code.

The ministerial draft will next be discussed by the government, where further changes – generally not fundamental ones – can be made. After the govern-

ment officially agrees to the bill, it will be put forward to the parliament, and the legislative track starts. (TW)

#### ECA Presents 2017 Annual Report on EU Budget

On 4 October 2018, the European Court of Auditors (ECA) informed the public of its [2017 Annual Report](#). It forms the basis for the statement of assurance, which the ECA is required to provide to the European Parliament and the Council under Art. 287 TFEU.

Each year, the EU auditors check the EU accounts and give their opinion on two questions:

- Are the accounts accurate and reliable?
- To what extent is there evidence of EU money being received or paid out in error (regularity and legality of EU finances)?

As regards the first question, the ECA gave a “clean opinion,” which means that the EU accounts present a true and fair view of the EU's financial position.

As regards the second question, the ECA issued a “qualified opinion,” i.e. pervasive problems on the regularity of transactions underlying the accounts could not be identified. The qualified opinion is only the second one in a row since 1994: until last year, ECA opinions were “adverse,” i.e. indicating widespread problems.

The ECA annual report essentially found that the level of irregularities in EU spending has continued to decrease. The level of error in payments during 2017 was 2.4%, whereas it was 3.1% in 2016 and 3.8% in 2015. Moreover, in 2017, a significant part of the audited expenditure – mainly *entitlement payments* – was not affected by a material level of error. The highest error rate was incurred in cost reimbursement in the areas of natural resources and cohesion.

Sufficient information was also available to prevent or to detect and correct a significant proportion of errors.

Other key findings of the report include the following:

- The use of available resources from European Structural and Investment (ESI) funds remains most challenging;
- The Commission should make better use of its own performance information and develop an internal culture more focused on performance;
- 13 instances of suspected fraud (of 703 audited transactions) were found. Auditors reported these cases to OLAF.

In the foreword to the annual report, ECA President *Klaus-Heiner Lehne* ultimately remarked that the budgetary significance of the EU is much smaller compared to that of the Member States. The EU budget comprises only approx. 1% of the gross national income of the entire EU. Therefore, EU decision-makers should be realistic about what can be achieved with EU money. According to *Lehne*, “the EU should not make promises if it cannot deliver.” (TW)

### Money Laundering

#### New Directive on Criminalisation of Money Laundering

**spot light** On 12 November 2018, Directive 2018/1673 on combating money laundering by criminal law was [published in the Official Journal of the EU \(O.J. L 284/22\)](#). The Directive aims at closing loopholes in the definition and sanctioning of money laundering across the European Union. Furthermore, the new legal framework facilitates judicial and police cooperation to combat money laundering and terrorist financing.

As a result, the criminalisation of money laundering has been “lisbonized” and replaces the respective provisions of Framework Decision 2001/500/JHA on money laundering, which had been adopted as a third pillar instrument under the Treaty of Amsterdam. The Framework Decision was not considered comprehensive enough and the current criminalisation of money laundering and terrorist financing not sufficiently coherent to effectively combat money laun-

dering across the EU. This also resulted in enforcement gaps and obstacles to cooperation between the competent authorities in different Member States. [For further background information](#), see the 2016 Commission proposal for the Directive and eucrim 4/2016, pp. 159–160. For the negotiations in the EP and Council, see eucrim 1/2018, pp. 14–15.

The main elements of the new Directive are as follows:

- Criminal activities that constitute predicate offences for money laundering have been uniformly defined. The Directive provides for a two-layered system: first, Member States are obliged to consider predicate offences if a certain penalty threshold is met. Second, Member States are obliged to recognize 22 categories of offences listed in the Directive as criminal activity that constitutes predicate offences for money laundering. The Directive here partly refers to offences as set out in other legal acts of the Union;
- Member States are obliged to include virtual currencies under “property” that may be subject to money laundering;
- The conduct (if committed intentionally) that is punishable as money laundering is defined. This includes the conversion or transfer of property; the concealment or disguise of the true nature, source or ownership of property; and the acquisition, possession or use of property that was derived from criminal activity;
- Member States are obliged to make punishable certain types of “self-laundering,” i.e., if the money laundering is committed by the perpetrator of the criminal activity that generated the property;
- Certain factors that may hinder conviction have been excluded. In this context, the Directive foresees that conviction should be possible (1) without a prior or simultaneous conviction for the criminal activity from which the property was derived, (2) without it being necessary to establish precisely the factual elements or circumstances relating

to that criminal activity, including the identity of the perpetrator, and (3) irrespective of the fact that the criminal activity was committed in another country.

- Requirements for “knowledge” of the money launderer have been lowered. The Directive does not distinguish whether the property has derived directly or indirectly from the criminal activity and whether any intentions or knowledge of the proceeds can be inferred from objective, factual circumstances.
- Member States are obliged to punish aiding and abetting, inciting, and attempting a money laundering offence as defined in the Directive;
- Member States must ensure that the money laundering offences are punishable by a maximum term of imprisonment of at least four years;
- Member States must also provide for additional sanctions or measures against natural persons, e.g., fines; temporary or permanent exclusion from access to public funding, including tender procedures, grants, and concessions; temporary disqualification from practising commercial activities; and temporary bans on running for elected or public office;
- The Directive sets out aggravating circumstances, which the Member States must take into account when persons are sentenced. They apply to cases linked to criminal organisations or to the exercise of certain professional activities. Furthermore, Member States are entitled to define aggravating circumstances based on the value of laundered property or the nature of the offence (e.g., corruption, sexual exploitation, drug trafficking, and terrorism);
- Conditions are also set out for the liability of legal persons and possible sanctions against them;
- Member States must take the necessary measures to ensure the freezing or confiscation of the proceeds of crime in accordance with Directive 2014/42/EU;
- Finally, clearer rules define which Member State has jurisdiction and how conflicts of jurisdiction can be resolved.

The EU Member States must transpose the Directive by 3 December 2020. Denmark, Ireland, and the United Kingdom are not bound by it.

The Commission must provide an implementation report to the European Parliament and to the Council by 3 December 2022. Another report to the EP and the Council, assessing the added value of the Directive with regard to combating money laundering and its impact on fundamental rights and freedoms, is due on 3 December 2023. On the basis of the latter report, the Commission shall decide whether legislative amendments to the present Directive are necessary.

The Directive on combating money laundering by means of criminal law complements the 4th and 5th AML Directives (see, for the latter, eucrim 2/2018, pp. 93–94), which address *prevention* of the use of the financial system for the purpose of money laundering or terrorist financing. It also reinforces the EU’s efforts to build up a security Union that includes several measures to strengthen the EU’s fight against terrorist financing and financial crimes. (TW) ■

### New Regulation on Cash Controls

On 12 November 2018, [Regulation \(EU\) 2018/1672 was published in the Official Journal of the EU \(O.J. L 284/6\)](#). The Regulation introduces new rules for controls on cash entering or leaving the Union. It repeals Regulation (EC) No 1889/2005, which laid down the existing harmonized rules for the control of cash flow at the EU’s external borders and which has applied since 15 June 2007 (see eucrim 1–2/2006, p. 12).

The new Regulation takes over the €10,000 threshold from the 2005 Regulation. Travelers carrying cash of such value or more must declare it to the competent authorities of the Member State through which they are entering or leaving the Union. The new Regulation, however, extends the definition of “cash” to cover not only banknotes but also other means of transfer, extends the obligations of citizens, and widens the

control powers of national authorities. Furthermore, rules on the exchange of data and information have been clarified, including provisions on data protection and confidentiality.

By means of the new legal framework, the EU is reacting to shortcomings experienced in the implementation and application of the current rules. The new rules, which will apply from 3 June 2021, are to specifically close loopholes used to circumvent the current system in order to move and launder money.

The main elements of the Regulation are as follows:

- One of the key concepts of the new Regulation is the definition of “cash”. It now comprises four categories, i.e., (1) currency, (2) bearer-negotiable instruments (e.g., cheques or money orders), (3) commodities used as highly liquid stores of value (e.g., gold coins or nuggets), and (4) prepaid cards;

- Natural persons entering or leaving the EU are obliged to declare “cash” as defined in the Directive and to make it available for control. This obligation applies to a cash value of €10,000 or more – a threshold which is deemed appropriate to strike a balance between the right to free movement of capital and the need to reduce administrative burdens. The Regulation further sets out the information that must be declared by the carrier;

- The movement of unaccompanied cash of a value of €10,000, e.g., cash sent by postal packages, courier shipments, unaccompanied luggage, or containerized cargo has also been regulated. The competent authorities of the Member States through which the cash is entering or leaving the Union may require the sender or the recipient of the cash to make a disclosure declaration within 30 days. The declaration must cover a number of elements, such as the origin, destination, economic provenance, and intended use of the cash;

- Where the national authorities detect amounts of cash below the €10,000 threshold, they are entitled to record the

information as defined for declarations if there are indications that the cash might be linked to criminal activity;

- The Regulation confers to the competent authorities, usually (but not only) customs authorities, the power to carry out the requisite controls on both persons and any unaccompanied consignments. They are also entitled to detain cash temporarily, either where the obligation to declare or to disclose cash has not been fulfilled or where there are indications of criminal activity irrespective of the amount of “cash.”

- Member States are obliged to introduce “effective, proportionate and dissuasive” penalties in the event of failure to comply with the obligations to declare/disclose.

Other provisions of the Regulation include the passing/transmission of information to the FIUs of the Member States, which were designed to be information hubs in the fight against money laundering and terrorist financing. Furthermore, the information exchange between the customs/competent authorities and with the Commission have been specified. In this context, information must also be transferred to the European Public Prosecutor’s Office if there are indications that the cash is related to criminal activity that could adversely affect the EU’s financial interests.

By the 4 December 2021 deadline, EU Member States must transmit to the Commission the list of competent authorities, details of the penalties introduced, and anonymised, statistical data on declarations, controls, and infractions. Since the Regulation is based on Arts. 33 and 114 TFEU, it is also applicable to Denmark and Ireland. The Commission has to draft a first report on the application of the Regulation by 3 December 2021.

The new Regulation complements the AML Directives on the prevention of the use of the financial system for purposes of money laundering and terrorist financing (for the 5th AML Directive, see eucrim 2/2018, pp. 93–94). It is

considered a necessary tool, since an increase in cash movements for illicit purposes was feared as a repercussion of the tighter transparency and record-keeping rules for financial institutions introduced by the AML Directives. In addition, the new legal framework is an integral part of the EU’s Agenda on Security, which includes the improved fight against money laundering, terrorist financing, and other financial crimes. (TW)

### Further Infringement Proceedings for Non-Transposition of 4th AML Directive

The Commission is going ahead with infringement proceedings against Member States for not completely implementing the 4th Anti-Money Laundering (AML) Directive (see also eucrim 2/2018, p. 93). All Member States had to comply with the provisions of the Directive by 26 June 2017.

On 8 November 2018, the Commission reported that it [referred Luxembourg to the European Court of Justice](#) for only transposing part of the Directive into national law. The Commission proposed that the Court charges a lump sum and daily penalties until Luxembourg takes the necessary action.

Furthermore, the Commission [sent a reasoned opinion to Estonia and a letter of formal notice to Denmark](#) for failing to completely transpose the 4th AML Directive. Although these Member States have declared their transposition, the Commission assessed the notified measures and concluded that some provisions are missing. Estonia and Denmark now have two months to respond and take the necessary action. Otherwise, the European Commission may take the next infringement steps, including referral to the CJEU. (TW)

### Commission Urges Maltese Watchdog to Comply with EU’s AML Rules

On 8 November 2018, the Commission sent a [formal opinion to the Maltese anti-money laundering supervisor](#) (Financial Intelligence Analysis Unit – FIAU), in which it calls for compliance with the

obligations under the 4th Anti-Money Laundering (AML) Directive. The opinion goes back to a [recommendation by the European Banking Authority \(EBA\)](#), which identified several shortcomings in the supervision of the EU's anti-money laundering rules in Malta on behalf of the Commission.

The Commission's action is based on the [EBA Regulation](#), which empowers the Commission to address the national authority (in charge of implementing anti-money laundering rules in the financial sector) to take the necessary measures to fully comply with Union law where it has failed to do so. This is the first time that the Commission has used this mechanism, which is without prejudice to infringement proceedings against the Member State of Malta for not having correctly transposed the 4th AML Directive (for these infringement proceedings, see [eucrim 2/2018](#), p. 93).

An important role was conferred to the European Banking Authority with the EBA Regulation: promoting the convergence of supervisory practices to ensure a harmonised application of anti-money laundering supervision rules. Currently, the EBA also conducts enquiries on the competent authorities in Latvia, Denmark, and Estonia. Recent cases had raised concerns about the effective enforcement of the anti-money laundering rules by the national authorities in these countries. (TW)

## Tax Evasion

### Council Adopts Directive Allowing Generalised Temporary Reversal of VAT Liability

On 20 December 2018, the Council adopted a [Directive amending Directive 2006/112/EC](#) on the common system of value added tax. It concerns the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a

certain threshold. A [general approach](#) on this new EU measure had already been reached by the ECOFIN Council on 2 October 2018.

The legal framework will allow temporary derogations from normal VAT rules in order to better prevent VAT fraud. Under the Directive, proposed by the Commission in 2016, EU Member States most severely affected by VAT fraud can temporarily apply a generalised reversal of VAT liability if they meet a number of very strict conditions. By applying this so-called generalised reverse charge mechanism (GRCM), liability for VAT payments is shifted from the supplier to the customer. This measure is intended to better combat carousel fraud, while a comprehensive and EU-wide solution is put in place.

The GRCM is only applicable to non-cross-border supplies of goods and services above a threshold of €17,500 per transaction. Its applicability is also time-restricted (until 30 June 2022). Any Member State wishing to use the GRCM must fulfil several legal and technical requirements. It must, *inter alia*, establish appropriate and effective electronic reporting mechanisms for all taxable persons, in particular those to which the GRCM would apply. A Member State's request must be authorised by the Council. Ultimately, the application of the measure is subject to strict EU safeguards. (TW)

### Commission Takes Action Against Italy and the UK for Illegal VAT Practices

As a follow up to the Paradise Paper leaks, the Commission launched infringement proceedings against Italy and the United Kingdom on 8 November 2018. The proceedings concern VAT practices in the yacht and aircraft sectors that are not considered in line with EU rules.

Italy is at fault for not levying the correct amount of VAT on the leasing of yachts. Second, the Commission found that Italy has illegal rules in place that favour the exemption of excise duties

for fuel in chartered pleasure crafts used for personal purposes.

The UK abused VAT practices in the Isle of Man with regard to supplies for and the leasing of aircraft.

If Italy and the UK do not properly react within two months, the Commission can further proceed with the infringement proceedings. (TW)

## Non-Cash Means of Payment

### Statistics on Card Fraud in 2016

On 26 September 2018, the [ECB presented figures on card fraud in 2016](#). It is the fifth report of this kind. The main results are as follows:

- The total value of fraudulent transactions conducted using cards issued within the Single Euro Payments Area (SEPA) amounted to €1.8 billion in 2016 (a slight decrease of 0.4% compared to 2015);
- 73% of the value of card fraud resulted from card-not-present (CNP) payments, i.e. payments via the Internet, post or telephone;
- CNP losses amounted to €1.32 billion – by far the largest category of fraud in absolute value;
- The largest drop in the level of fraud concerned card fraud committed at automated teller machines (ATMs), with 12.4% less fraud in 2016 compared with 2015, while fraud committed at point-of-sale (POS) terminals went down by 3.0%;
- From a geographical perspective, domestic transactions accounted for 90% of all transactions, but only 35% of fraudulent transactions. Cross-border transactions within the SEPA made up 8% of all transactions, but 43% of fraudulent transactions. Although only 2% of all transactions were performed outside the SEPA, they accounted for 22% of all fraud;
- There are higher fraud losses on non-SEPA issued cards used inside the SEPA than there are on SEPA-issued cards used outside the SEPA.

In summary, the observation was made that online card fraud increased only slightly in 2016, whereas it had been growing at much higher rates in previous years. Furthermore, a drop in card-present fraud (card use at ATMs or POS terminals) is evident.

This trend can be explained by increased security measures in the industry, as encouraged by EU regulators. A significant decrease in counterfeit card fraud and fraud using lost or stolen cards, combined with the adoption of “Chip and PIN” (the EMV standard), explains the significant decrease in fraud at ATMs and POS, particularly for transactions outside the EU. Since 2015, the “two factor” customer authentication adopted by banks and supported by merchants has helped limit online card fraud. (TW)

## Counterfeiting & Piracy

### Annual Report on Counterfeit Seized Goods – 2017 Results

On 27 September 2018, the Commission presented its [annual report on EU customs enforcement of intellectual property rights in 2017](#).

The report contains statistical information about the detentions made under customs procedures and includes data on the description, quantities, and values of the goods; their provenance; the means of transport; and the type of intellectual property right (IPR) that may have been infringed.

Fake products entering the EU is still high on the agenda of criminals and remains a major concern, although the total figures have decreased in 2017 compared to 2016. This decrease can be viewed in the context of recently enacted EU legislation, which encourages European companies to invest more in innovation and creativity in order to make it easier to act efficiently against breaches of IPR, facilitate cross-border litigation, and tackle the import of counterfeit or pirated goods into the EU.

In 2017, customs authorities detained over 31 million fake and counterfeit products at the EU’s external border having a street value of over €580 million.

Products for daily use and products that would be potentially dangerous to the health and safety of consumers (i.e. suspected trademark infringements relating to food and beverages, body care articles, medicines, electrical household goods and toys) accounted for 43.3% of the total amount of detained articles. This is a significant increase compared to the two previous years.

The following were at the top on the list of detained articles: foodstuffs (accounting for 24% of the overall amount of detained articles), followed by toys (11%), cigarettes (9%), and clothes (7%).

As regards the means of transport, the report indicates the following:

- 65% of all detained articles entered the EU via the maritime route, usually in large consignments;
- 14% of fake articles were transported by means of air traffic;
- Courier traffic and postal traffic together still accounted for 76% of all detentions (mainly consumer articles ordered via e-commerce);
- As regards provenance of fake goods, the following data were reported:
  - China remains the main country of origin for fake goods entering the EU;
  - The highest amount of fake clothing originated from Turkey;
  - The most counterfeit mobile phones and accessories, e.g. ink cartridges and toners, CDs/DVDs and labels, tags and stickers came from Hong Kong and China;
  - India was the top country of origin for fake and potentially harmful medicines.

Furthermore, the report reveals that, in 90% of detentions, goods were either destroyed or a court case was initiated to determine an infringement or as part of criminal proceedings.

For the 2016 report, see [eucrim 3/2017](#), p. 109. (TW)

## Cybercrime

### Internet Organised Crime Threat Assessment Published

Europol published its fifth [Internet Organised Crime Threat Assessment \(IOCTA\)](#), which gives a comprehensive overview of current and future threats and identifies trends in crime conducted and/or facilitated online.

The 2018 IOCTA looks at the threats and trends with regard to four crime priorities:

- Cyber-dependent crime;
- Child sexual exploitation online;
- Payment fraud;
- Online criminal markets.

Furthermore, it examines the convergence of cybercrime and terrorism, cross-cutting crime factors, and the geographic distribution of cybercrime. For each area, the report provides key findings and recommendations.

In its summary, the report outlines the following eight key findings for the year 2018:

- Ransomware remains dominant;
- Production of Child Sexual Exploitation Material (CSEM) continues;
- Distributed-Denial-of-Service (DDoS) continues to plague public and private organisations;
- Card-not-present fraud dominates payment fraud, but skimming continues;
- As criminal abuse of cryptocurrencies grows, currency users and exchangers are becoming targets;
- Social engineering is still the engine of many cybercrimes;
- Cryptojacking sparks a new cybercrime trend;
- Shutters close on major Darknet markets, but business continues.

The report also describes a number of key legislative and technological developments, such as the introduction of the General Data Protection Regulation (GDPR), the Network and Information Security (NIS) directive and 5G technology. Ultimately, the report makes a number of recommendations on the above mentioned crime areas. (CR)



## EU Cybersecurity Organisations Agree on Roadmap

On 6 November 2018, Europol, the European Union Agency for Network and Information Security (ENISA), the European Defence Agency (EDA), and the Computer Emergency Response Team for the EU Institutions agreed on a [roadmap](#) outlining activities and projects for their cooperation in 2019 in order to avoid duplication of efforts. In particular, the agencies plan to work together more closely in 2019 in the areas of training and cyber exercises. (CR)

## Procedural Criminal Law

### Procedural Safeguards

#### CJEU: EU Directive Does Not Cover Procedure for Reviewing the Lawfulness of Pre-Trial Detention

On 19 September 2018, the CJEU [rendered a judgment](#) on the interpretation of Directive (EU) 2016/343 on the presumption of innocence and Arts. 47 and 48 CFR ([Case C-310/18 PPU – Emil Milev](#)).

The judgment is based on a request for a preliminary ruling by the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria) in criminal proceedings against *Emil Milev*. He had been prosecuted for armed robbery and applied for withdrawal of the pre-trial detention imposed on him. The Bulgarian court was in doubt as to whether the Bulgarian law and court practice to order or continue pre-trial detention is in line with EU law.

According to Bulgarian case law, the prerequisite for pre-trial detention, namely the existence of “reasonable grounds” for having committed a criminal offence, is understood as a mere *prima facie* finding. Furthermore, national case law only requires stating the reasons for a decision to vary the coercive measure of “pre-trial detention,” without comparing the incriminating

and exculpatory evidence, even if the accused’s lawyer submitted arguments to that effect. Hence, the referring Specialised Criminal Court sought guidance as to whether these two lines of Bulgarian case law are compatible with the requirements of Arts. 3 and 4 of Directive 2016/343 and with the procedural safeguards on the presumption of innocence as laid down in the CFR.

The CJEU first clarified the scope of Arts. 3 and 4 of the Directive. These provisions require Member States to ensure that:

- Suspects or accused persons are presumed innocent until proved guilty according to law (Art. 3);
- For as long as a suspect or an accused person has not been proved guilty according to law, judicial decisions in particular, other than those on guilt, do not refer to that person as being guilty (Art. 4(1)).

Art. 4(1) is, however, subject to the proviso that it be “without prejudice to preliminary decisions of a procedural nature which are taken by judicial authorities and which are based on suspicion or on incriminating evidence.”

Read in the light of recital 16 of the Directive, this reservation is interpreted as widely excluding pre-trial detention from the Directive’s harmonisation objective. Therefore, the CJEU concluded that the Directive only requires pre-trial court decisions not to refer to the person in custody as being guilty. It does not govern the circumstances under which such a decision on pre-trial detention may be adopted. The posed questions concerning the degree of certainty that a court must have, the rules governing the examination of evidence, and the extent of the statement of reasons fall solely within the remit of national law.

The CJEU deviates here from AG *Melchior Wathelet* in his [opinion of 7 August 2018](#). The AG found that the Directive, read in conjunction with Arts. 6, 47 and 48 CFR, also contain substantive, positive rules on pre-trial detention. He further concluded that a judge exam-

ining an appeal against pre-trial detention must take exculpatory evidence into account unless it appears implausible or frivolous.

It is also worth mentioning that the present reference for a preliminary ruling is the second one in criminal proceedings against *Emil Milev*. In a first reference procedure ([Case C-439/16 PPU](#)), the CJEU had to decide whether case law of the Supreme Court of Cassation of Bulgaria on continued custody during the trial phase compromised the attainment of the objectives prescribed by Directive 2016/343. For this decision, see eucrim 4/2016, p. 163. (TW)

### Data Protection

#### CJEU Backs Police Access to Retained Data in Minor Offences

On 2 October 2018, the CJEU delivered another important judgment on data protection and on access by public authorities to retained provider data. The CJEU ruled on the [Case C-207/16 \(\*Ministerio Fiscal\*\)](#), which was presented together with the Opinion of the Advocate General (AG) in eucrim 1/2018, pp. 21–23.

The CJEU followed the AG’s opinion and concluded that law enforcement authorities can also access personal data retained by providers of electronic communications in cases of criminal offences that are not particularly serious. It is a pre-condition, however, that access does not constitute a serious infringement of privacy.

#### ► *Facts of the Case and Legal Questions*

The case at issue concerned a request by Spanish police authorities to obtain information on communication data in order to identify the owners/users of SIM cards that were allegedly activated by means of a stolen mobile phone. As part of their investigations of the robbery of the mobile phone and a wallet, they asked various telephone operators to release names, telephone numbers; and ad-



dresses of persons who used the mobile phone to activate SIM cards. The Spanish Public Prosecutor's Office (*Ministerio Fiscal*) appealed against the decision of the investigative judge who denied the request for access to said data. The judge believed that the acts giving rise to the criminal investigation in question are not serious enough to justify the collection of data under Spanish law.

The appeal court (*Audiencia Provincial de Tarragona*) sought guidance from the CJEU on whether EU law fixes a certain threshold for the seriousness of offences, above which interference with the individuals' fundamental rights of privacy and of protection of personal data through the access of competent authorities to personal data retained by service providers may be justified.

The request for a preliminary ruling particularly concerned the interpretation of Art. 15(1) of Directive 2002/58/EC as amended by Directive 2009/136/EC – in short, the Directive on privacy and electronic communications. It allows Member States to restrict citizens' rights when such a restriction constitutes a necessary, appropriate, and proportionate measure within a democratic society in order to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system.

#### ► *Admissibility of the Request*

First, the CJEU had to deal with an objection by the Spanish government that questioned the jurisdiction of the Court. The Spanish government argued that access to telecommunication data is part of national authorities' exercise of *jus puniendi*. This, however, constitutes activity on the part of the State in areas of criminal law, which makes EC Directives regulating data protection or retention inapplicable in accordance with Art. 1(3) of Directive 2002/58 or Art. 3(2) of Directive 95/46.

The CJEU stated that provisions limiting the scope of said EC Directives

only mention activities of the State or of State authorities unrelated to fields in which individuals are active. The Directives also, however, cover legislative measures that govern the activities of providers of electronic communications services. By referring to *Tele2 Sverige and Watson and others* (see eucrim 4/2016, p. 164), the CJEU set forth that the activities of service providers are also affected if legislative measures relate to access of national authorities to data retained by those providers. As a result, it is irrelevant – in contrast to the remarks of the Spanish Government – that the request for access was made in connection with a criminal investigation. It is also irrelevant that the access at issue “only” relates to data in connection with SIM cards. In sum, the CJEU held the request for a preliminary ruling admissible.

#### ► *Reasoning in Substance*

The CJEU gave the following arguments to substantiate its findings:

- National authorities' access to personal data retained by providers of electronic communications services constitutes an interference with the fundamental right of respect for private life (Art. 7 CFR). It is irrelevant whether the interference is defined as “serious,” the information in question is sensitive, or the persons concerned have been inconvenienced in any way;

- Such access also constitutes interference with the fundamental right to the protection of personal data (guaranteed by Art. 8 CFR), as it constitutes processing of personal data;

- The list of objectives in the directive capable of justifying national legislation governing public authorities' access to such data and thereby derogating from the principle of confidentiality of electronic communications is exhaustive. This means that access must correspond, genuinely and strictly, to one of these objectives.

- As regards the objective of preventing, investigating, detecting, and prosecuting criminal offences, the wording

of the directive does not limit that objective to the fight against serious crime alone, but refers to “criminal offences” in general;

- Within the framework of proportionality, the CJEU, in its judgment in *Tele2 Sverige/Watson*, defined that the objective of fighting serious crime may justify public authorities' access to personal data retained by electronic service providers if, taken as a whole, the data allow precise conclusions to be drawn about the private lives of the persons. This means that if the interference is serious, it can be justified in that field only by the objective of fighting “serious” crime;

- By contrast, when the interference is not serious, such access is capable of being justified by the objective of preventing, investigating, detecting, and prosecuting “criminal offences” generally;

- In the present case, access to the data concerned cannot be defined as “serious interference,” because these data – being cross-referenced with data pertaining to communication with SIM cards and location data – do not make it possible to ascertain the date, time, duration, and recipients of the communications undertaken with the SIM cards. They also do not make it possible to ascertain the locations where these communications took place or the frequency of these communications with specific people during a given period. These data do not therefore allow precise conclusions to be drawn concerning the private lives of the persons whose data is concerned;

- Hence, access to data – as in the case at issue – is legal (under the Directive on privacy and electronic communications), even though it concerns a minor offence (here: robbery of mobile phone).

#### ► *On Focus*

The judgment in the present case (*Ministerio Fiscal*) is an important clarification in the field of data retention. The CJEU drew the line more precisely between admissible and inadmissible law enforcement access to data retained initially for commercial purposes by private providers of electronic communica-

tions services. It set a counterpoint to its landmark decision on national data retention regimes in *Tele2Sverige/Watson*.

The CJEU clarified that there is a correlation between the level of seriousness of interference and the seriousness of crimes to be fought against. This is deducted from the principle of proportionality. In other words: if police seek sound revelations of the persons' communications, the criminal offence involved must be a serious one.

In this way, the CJEU avoided deciding on the Spanish appeal court's initial question, i.e. how the judges in Luxembourg would concretely define the "seriousness" of a criminal offence. The AG added statements in this regard at the end of his opinion. Nonetheless, the matter may be subject to subsequent references for a preliminary ruling. (TW)

### EP Takes Position on Interoperability Legal Framework

On 24 October 2018, the [plenary of the European Parliament backed the position](#) of the LIBE Committee regarding legislative proposals on the interoperability between EU information systems in the area of justice and home affairs. EP negotiators have now green light to enter into informal talks with the Council and the Commission.

The general approach of the Council was endorsed by the Permanent Representatives Committee (Coreper) in June 2018 (see [eucrim 2/2018](#), p. 101). The Council adopted a [revised mandate in September 2018](#) after the Commission had published amendments to its original 2017 proposal (see [eucrim 4/2017](#), p. 174) on 13 June 2018 ([COM\(2018\) 478](#) and [COM\(2018\) 480](#)). The amended proposals of the Commission take into account recently adopted or agreed legal instruments (ETIAS, SIS, and eULISA). The legislation on interoperability consists of two proposals for two regulations: the first would establish an interoperability framework between EU information systems on borders and

visas; the second between EU information systems on police and judicial cooperation, asylum, and migration. For a summary of interoperability between EU border and security information systems, see also the [briefing paper of the EP Think Tank EPRS of October 2018](#).

The LIBE Committee nominated two main rapporteurs to deal with the two dossiers on the interoperability legal framework. Although the rapporteurs (*Jeroen Lenaers*, EPP, NL, responsible for the borders and visa proposal, and *Nuno Melo*, EPP, PT, responsible for the police and judicial cooperation proposal) [generally welcomed the proposed measures](#), a bulk of amendments were tabled. The file on borders and visa contains over 1000 amendments; the file on police and judicial cooperation over 920.

MEPs agree on the practical and technical necessity of interoperability. However, they also raised concerns about compatibility with fundamental rights and data protection principles, in particular the principle of proportionality. It remains to be seen whether the legislative proposal can be adopted before the end of the parliamentary term in May 2019. (TW)

### Victim Protection

#### EP Committee Vote on Whistleblower Directive

On 20 November 2018, MEPs from the Legal Affairs Committee (JURI) [adopted their position](#) on the Commission proposal for a directive on the protection of whistleblowers (COM(2018) 218 final, see [eucrim 1/2018](#), p. 27).

Parliamentarians broadly backed the legislation guaranteeing that whistleblowers in the EU can report breaches of EU law in the areas of tax evasion, corruption, environmental protection, and public health and safety without fear of retaliation or intimidation. Legal Affairs MEPs agreed that the same protection measures must also apply to facilitators, i.e. persons who assist the reporting per-

son, e.g. journalists. Other main issues of the MEPs' amendments concerned the following:

- Introduction of timeframes, i.e. reporting avenues should ensure that the reporting person is notified of receipt of his/her within a week of submission; follow-up on the report should be received no later than two months after receipt of the report;
- No strict tiered approach: it should be up to the reporting person to choose the most appropriate channel to report, whether internal or external, depending on the circumstances;
- Member States should provide information and advice free of charge as well as legal, financial, and psychological support.

The draft legislation was put forward to the plenary on 27 November 2018. Once the plenary has endorsed the EP position, negotiating talks with the Council can start.

EUROCADRES, the trade union organisation representing professionals and managers, [warmly welcomed the MEPs' position](#). In particular, they agreed with the aim of including reporting on the violation of workers' rights and protecting persons supporting whistleblowers, such as those working in NGOs. (TW)

#### ECA Issues Statement on Planned Whistleblower Directive

The European Court of Editors (ECA) examined the Commission proposal for a directive on the protection of whistleblowers (COM(2018) 218 final, see [eucrim 1/2018](#), p. 27). In [Opinion 4/2018](#), the ECA generally welcomes the legislative initiative, but believes that the Directive could become too complex and possibly ineffective in some points.

First, the ECA identifies several advantages of the proposed EU Directive on whistleblowing:

- Improved management of EU policies from the "bottom up" through the actions by employees and citizens;
- Support for the "top-down approach"

when infringement procedures are initiated by the Commission against Member States;

- Increased awareness on the part of citizens, especially regarding their crucial role in applying EU law;
- Help when detecting systematic problems in Member States;
- Savings to the EU budget when reports of whistleblowers concern the EU's financial interests;
- Support for the EU legislator to close loopholes/gaps in the financial management of EU funds;
- Feed audit works, such as those of the ECA.

The ECA opinion mainly criticises the material scope of the proposal. Although the proposed article (Art. 1) takes into account the division of powers between the Union and its Member States, the limitation of applicability of the whistleblower Directive puts a reporting person in a difficult situation. He/she needs to make a complex assessment as to whether his/her planned report is covered by EU rules or rules of national law. In this context, the opening clause giving Member States the possibility to extend the scope of the Directive to “other areas” is rather weak.

The opinion notes, however, that the complex scope is partly mitigated by various provisions that give whistleblowers information, advice, and assistance and by measures against retaliation.

The ECA further analyses the following elements of the Commission proposal in detail:

- Personal scope;
- Obligation to establish internal channels and procedures for reporting and follow-up of reports;
- Procedures for internal reporting and follow-up reports;
- Conditions for the protection of reporting persons;
- Measures against retaliation;
- Reporting, evaluation, and review.

The Opinion concludes that the protection of whistleblowers can only be successful if a trustful corporate culture

is established of which whistleblowing is an accepted part. Furthermore, public interest in the information revealed should guide the legal action. Member States should not be allowed to withhold protection based on the reporting person's subjective intentions or specific motivations.

The ECA opinion is not binding for the EU's legislative authorities (Council and European Parliament), but it enhances the legislative work. (TW)

### EESC Opinion on Whistleblower Directive

On 18 October 2018, the Economic and Social Committee ([EESC](#)) [adopted an opinion](#) on the Commission's plans to strengthen the protection of whistleblowers at the EU level.

The EESC mainly concludes that whistleblower protection is an important tool to help companies address unlawful and unethical acts. It calls on the Commission to review the legal basis for the planned directive (see COM(2018) 218 final and eucrim 1/2018, p. 27) so as to include workers' rights under Art. 153 TFEU.

The EESC made, *inter alia*, the following additional recommendations:

- Former employees, trade union representatives, and legal persons should be included and benefit from the same protection;
- The directive must also protect whistleblowers who initially reported anonymously but whose identity was subsequently revealed.
- In the interest of fairness and legal certainty, a two-stage reporting procedure should be put in place that initially gives the whistleblower a free choice to access internal channels or the competent authorities; and subsequently, if necessary, to access civil society/the media;
- At any stage in the reporting process, whistleblowers should have access to trade union representatives who should be empowered to represent them and to provide advice and support;

- The current proposal that the whistleblower must provide *prima facie* evidence that the retaliation is a consequence of the report should be eliminated since the burden of proof should fully be shifted to the employer;

- The directive must provide full compensation for damages, without any ceiling, and should not refer the matter of compensatory measures to the national law;

- An explicit non-regression clause should be included to clarify that implementation of the directive does not diminish more favourable rights granted to whistleblowers prior to this directive in the Member States.

To change the public perception of whistleblowers, the EESC ultimately calls on the Commission to introduce provisions for awareness-raising campaigns at the European and national levels, including campaigns aimed at young people. (TW)

### Trade Union Organisation Calls for Robust Whistleblower Directive

On 19 November 2018, EUROCADRES – the trade union organisation representing professionals and managers – [termed the Commission initiative](#) on the protection of whistleblowers (COM(2018) 218 final, see eucrim 1/2018, p. 27) a “surprisingly good start.” The president of EUROCADRES, *Martin Jefflén*, called on the EU legislators to draft “a fair and robust Europe-wide whistleblower directive, which actively encourages the reporting of corruption, criminal acts and breaches of public trust.”

*Jefflén* further said that parliamentarians should “strengthen, rather than weaken this important and groundbreaking piece of legislation.” In his opinion, the new directive should meet the following needs:

- Safeguards, so that the directive cannot be used to diminish existing protection in the few EU Member States that offer decent protection to whistleblowers;
- Rethinking of the approach that whistleblowers must first report to their

“heads;” lowering of barriers for reporting to authorities, be they law enforcement agencies or regulatory authorities;

- Provisions on the protection of persons who report anonymously;
- The right of whistleblowers to consult with and be represented by a trade union;
- Coverage of the reporting of working conditions and workers rights;
- Removal of the “malicious reporting” clause, because it discourages potential whistleblowers from coming forward;
- No alteration of the clause requiring a whistleblower to have “reasonable grounds to believe that the information they are reporting is true” into a clause that refers to “good faith.”

The statement by EUROCADRES was issued on the eve of the debate in the European Parliament Legal Affairs Committee (JURI), which adopted its position on the Commission proposal on 20 November 2018. (TW)

### German Bar Association Makes Critical Statement on Whistleblower Draft Directive

In November 2018, the German Bar Association (Deutscher Anwaltverein – DAV) tabled a position paper on the Commission proposal for a directive on the protection of whistleblowers (COM(2018) 218 final, see eucrim 1/2018, p. 27). The position paper is available [in German and English](#).

The DAV welcomed the introduction of EU-wide minimum rules for persons reporting breaches of Union law, but also sees room for improvement. More specifically, the DAV suggests the following:

- *Material scope*: The directive should include protection of employees against health impairments;
- *Personal scope*: Professional secrecy obligations, such as those for the legal profession, have not been sufficiently considered and therefore an exception should be expressly included in the directive for persons whose professions involve professional secrecy obligations;

- *Extension*: Protection should be extended to parties/facilitators supporting the “reporting person;”

- *Obligations*: The scope of “legal entities” in the private sector, who will be obliged to establish internal reporting channels, should be reconsidered. The definition of “legal entities” is too narrow. The proposed broad thresholds should be refined, particularly in view of the burdens for small businesses. Furthermore, the peculiarities of group companies should be reflected. Companies below the thresholds should not, however, be fully exempt from the obligation to create internal reporting possibilities;

- *Feedback system*: Further clarifications are required;

- *Conditions of whistleblower protection*: Strict adherence to the three-tiered approach, i.e. resolve grievances internally first. External whistleblowing must remain the ultima ratio. In addition, the draft directive must fully clarify the relation between external reports by a whistleblower and the potentially justified interest of the company concerned in ensuring the confidentiality of the measures taken internally;

- *Prerequisites for protection*: Revision should include the introduction of a condition that the report was made in the public interest;

- *Practical implementation*: The approach favouring a comprehensive protection of whistleblowers is problematic. In particular, EU legislation needs to better rebalance the legitimate goal of the employer to defend himself against unjustified allegations with protection of the whistleblower acting in good faith;

- *Reporting system*: The three-tiered reporting system should apply comprehensively to all businesses. Exemptions from use of internal reporting channels are too far-reaching and should either be deleted or at least specified.

- *Limitation*: Public disclosure should only be protected as an ultima ratio.

- *Penalties*: The proposed penalties against natural or legal persons, who hinder reporting and take retaliatory

measures or bring vexatious proceedings against reporting persons, are too vague and require clarification. They also do not sufficiently take into account the situation of maliciously or abusively made reports or disclosures.

The DAV concluded that the protection of reporting persons is generally favourable, but does not require safeguarding through criminal sanctions. The behaviour of reporting persons should first and foremost be regulated in labour law if they are employed persons. Furthermore, the DAV opposes tendencies to further dilute the three-tiered reporting system. (TW)

## Cooperation

### European Arrest Warrant

#### Fair Trial Violation: Amsterdam Court Refuses Surrender to Poland

On 5 October 2018, the Internet news channel “DutchNews.nl” reported that the Amsterdam District Court [stopped surrender of a Polish national to Poland](#) (for the time being) because of “major doubts about the independence of the Polish judiciary.” For the full text of the decision in Dutch, see [ECLI:NL:RBAMS:2018:7032](#).

In consideration of the recent reforms of the Polish judiciary, the judges in the Amsterdam court (centrally responsible for executing European Arrest Warrants) found that the suspect’s constitutional right to a fair trial was endangered.

The judges reportedly posed a number of questions to the Polish authorities and indicated that they will refuse surrender if the answers are unsatisfactory.

The decision comes after the European Court of Justice ruled in the “LM” case in July 2018. It concluded that the judicial reforms in Poland may allow the executing authority to refrain from giving effect to EAWs. However, this legal consequence was posed on very narrow conditions (see eucrim 2/2018, pp. 104–105).

## Report

**The 2018 Conference on International Extradition and the European Arrest Warrant***Lake Iseo, Italy, 25–26 June 2018*

Academic and practising lawyers from around the world gathered in Sarnico, Italy in the last week of June 2018 to brainstorm on current developments in extradition law in several countries, including the UK, Scotland, USA, Italy, Albania, Australia, Germany, and Switzerland. A poll of participants indicated that virtually all considered the two-day conference a “complete success,” said *Robert Fleming*, a JD student at the University of the Pacific McGeorge School of Law

The third edition of the global conference on International Extradition and the European Arrest Warrant was held at Hotel Cocca, on the shores of beautiful Lake Iseo (Italy) and attracted over 30 experts from the United States, Australia, the United Kingdom, Scotland and Continental Europe. High on the agenda was an examination of the comparative practice of extradition in several jurisdictions, the current state of the European Arrest Warrant (EAW) mechanism and the plan for future publications on extradition.

Over the course of two days, the seminar sessions covered the theory and practice of a number of domestic extradition laws, noting that few universities, law societies and bar associations around the world focus on extradition as an independent area of legal practice.

No university in the world offers ad hoc programmes in international extradition. “Despite the sharp increase of high-profile extradition cases in recent years, international extradition is still not taught as an independent subject in undergraduate and graduate courses in law across the world,” said *Stefano Maffei* of Italy, one of the principal organizers of the conference. “As a result, with the exception of the UK, no established class of extradition lawyers exists in most countries.”

The seminar began with a comparison of the EU’s enhanced extradition model with the more mature American interstate extradition system. Most participants disagreed with the argument that the U.S. model could serve as a blueprint for the European arrest warrant, which was advanced by *Auke Willems* in a 2016 publication in the *Criminal Law Forum* journal.

Discussion then moved on current developments in International Extradition to/from Australia (with Australian academic and lawyer *Ned Aughterson*), Albania (with lawyer and former officer of the Ministry of Justice *Arben Brace*) and Switzerland (with lawyers *Gregoire Mangeat* and *Alice Parmentier*)

An entire session was devoted to the German theory and practice of extradition. *Anna Oehmichen* (a lawyer and University lecturer) and *Ole Boeger* (Judge at the Higher Regional Court of Bremen) reported on the basics of German extradition law, including the steps of basic extradition procedure and the importance of the German ordre public clause as a refusal ground for surrender. Oehmichen also covered the repercussions in Germany of the European Court of Jus-

tice decision *Aranyosi Caldararu*, concerning poor prison conditions in Romania. “We note an increase in requests for preliminary rulings as the conditions under which extradition can be denied on basis of poor prison conditions is unclear,” said Oehmichen. In a recent decision, the CJEU ruled on a preliminary ruling from Germany and held that the fact that the concerned person has certain legal remedies against the prison conditions at domestic level does not per se rule out a real risk of inhuman treatment.

*Thomas Wahl* (an extradition expert from the Max Planck Institute for Foreign and International Criminal Law) then offered a comprehensive analysis of the controversial Puidgemont case, with specific reference to the decision held by the Higher Regional Court of Schleswig-Holstein according to which the surrender for the Spanish crime of “rebellion” was *ab initio* inadmissible. A few days after the seminar, Spain’s supreme court withdrew its EAW against the former Catalan president.

UK barrister *Mark Summers* QC of Matrix Chambers – who appears on a regular basis in extradition cases, including *Asange v. Sweden* in 2012 – and *Mungo Bovey* QC from the Faculty of Advocates of Scotland, outlined the similarities and differences in the extradition system of England/Wales and Scotland. “Although there are differences between every jurisdiction, this seminar emphasised the common ground we can find, often surprisingly”, said Bovey. On the issue of prison conditions, Summers noted that the UK has developed over the years a ‘serious system for the monitoring of assurances given by foreign countries.

*Nicola Canestrini*, a criminal lawyer from Italy, reported on the procedure to secure the removal of an Interpol red notice (for example once the extradition procedure is finally denied) and noted that a serious infringement of freedom of movement occurs especially when non-democratic countries target individuals through the red notice mechanism.

Other participants included Italian academic lawyer *Gianrico Ranaldi*, *Alessandro Lazzaroni*, *Maria Beatrice Cavarretta* and *Giulia Talignani* (all lawyers from Italy), *Frances Olsena* (a law Professor from UCLA), *Gerry Leonard* (a law Professor from Boston University) and *Sibel Top*, a PhD student at the Institute of European Studies (IES) and *Rebekah Wrobleske*, *Brianna Nielsen* and *Heidi Weinrich* (from the University of the Pacific Mc George School of Law, USA).

The fourth International Extradition Conference will be held in Northern Italy at the end of June 2019. All those interested should email the team of organisers at [stefano.maffei@gmail.com](mailto:stefano.maffei@gmail.com)

Prof. *Stefano Maffei*, University of Parma

The judicial reforms in Poland are also subject to the “Article 7-procedure” of the European Union according to which Poland is to be forced to maintain the European values of the rule of law (see eucrim 2/2018, p. 80). (TW)

### **Eurojust Updates Overview of CJEU's Case Law on EAW**

In November 2018, Eurojust issued an update of its [overview of the case law of the CJEU with regard to the application of Framework Decision 2002/584/JHA](#) of 13 June 2002 on the European arrest warrant and surrender procedures between Member States (FD EAW). Where relevant, it also refers to the Charter of Fundamental Rights of the European Union (“Charter”), the European Convention on Human Rights (ECHR), and the European Court of Human Rights (ECtHR).

The document contains an index of keywords, with references to relevant judgments, a chronological list of judgments, and summaries of CJEU judgments organised according to certain keywords (such as human rights scrutiny, refusal grounds, guarantees, time limits). The document has been designed as a supporting tool for practitioners. (TW)

## **Customs Cooperation**

### **ECA Criticizes Delays in Building Up Modernized Customs IT Systems**

In its [Special Report 26/2018](#), the European Court of Auditors (ECA) looked into the EU’s progress in establishing the necessary customs IT systems within the current Customs 2020 Programme.

The Customs 2020 Programme was designed to finance the Union components of a modern, improved customs IT system after reform of the EU’s customs legislation. Member States are required to develop the corresponding national (non-EU) components and pay the associated costs.

According to the report, the imple-

mentation of the new IT systems for the Customs Union suffered a series of delays. As a result, some of the key systems will not be available by the envisaged 2020 deadline. The auditors caution that the rescheduled deadline is also at risk of not being met.

Several reasons have been identified as the cause for the delays, for instance:

- Changing project scope, which increased complexity;
- Insufficient resources allocated by the EU and Member States;
- Lengthy decision-making process due to the multi-layered governance structure.

Furthermore, the auditors found that the monitoring mechanism in the Customs 2020 Programme was insufficient.

The audit was also carried out in view of improving the upcoming Customs Programme, slated to start by 2021, with a possible budget of €950 million. The auditors call on the Commission to learn from the lessons of the previous programme and recommend the following:

- Gear the next Customs Programme expressly towards IT implementation, with precise and measurable objectives;
- Improve time, resource, and scope estimates for each IT project;
- Facilitate cooperative IT development with and between Member States;
- Streamline governance by ensuring more efficient and swifter communication;
- Inform stakeholders about implementation and spending in a timely and transparent manner.

The ECA’s recommendations in the reports are put into practice regularly, although they are not binding for the EU authorities. (TW)

## **Law Enforcement Cooperation**

### **Improved Cooperation Tool Benefits Fight Against VAT Fraud**

New EU legislation was put in place to strengthen administrative cooperation in the field of VAT fraud. The un-

derlying [Regulation \(EU\) 2018/1541 was published in the Official Journal on 16 October 2018](#) (O.J. L 259, 1). It amends Regulations (EU) 904/2010 and (EU) 2017/2454. The new legislation will meet needs in order to combat cross-border VAT fraud more effectively and in a more timely manner.

Since the reform of the current VAT system (basically going back to 1993) is at an impasse, the Regulation is designed as a short-term measure that improves and simplifies administrative cooperation instruments, in particular Eurofisc. Eurofisc is a network of national EU Member State analysts working in different areas of fraud risk. It was set up in 2010 to improve the capacity of Member States to combat organised VAT fraud, especially carousel fraud. Eurofisc allows Member States to exchange early warnings on businesses suspected of being involved in carousel fraud.

The main objectives of the Regulation are as follows:

- Simplified procedures and conditions for administrative enquiries when the taxable person is not established in the Member State where the tax is due (requiring Member State). The enquiry is conducted in the Member State of establishment, under close cooperation with the requiring Member State;
- Simple and effective procedures for forwarding information without a prior request to the competent authorities of other Member States;
- Access for customs authorities to information in the registry of VAT identification numbers and the recapitulative statements (to avoid diversion of goods into the black market);
- Access for Eurofisc liaison officials to vehicle registration data via EUCARIS in order to tackle fraud arising from the dual VAT regime applicable to cars;
- Possibility to carry out joint administrative enquiries;
- Clarification and strengthening of the governance, tasks, and functioning of Eurofisc. Eurofisc liaison officials will be able to access, exchange, process,

and analyse all necessary information swiftly and to coordinate any follow-up actions. Regulation of the request for information from Europol and OLAF by Eurofisc and the exchange of information between the network and the bodies;

- Possibility for Member States to communicate relevant information to OLAF when appropriate. This tool would enable OLAF to fulfil its mandate to carry out administrative investigations into fraud, corruption, and other illegal activities affecting the financial interests of the Union. It would also assist the Member States in coordinating their actions to protect the financial interests of the Union against fraud.

The Regulation entered into force 20 days after publication in the Official Journal, with most of the provisions being applicable as of 1 January 2020. (TW)

### EDPB Criticises E-Evidence Proposals

On 26 September 2018, the European Data Protection Board (EDPB) adopted a [critical opinion](#) regarding the Commission proposals on European Production and Preservation Orders for electronic evidence in criminal matters. For the proposals, see eucrim 1/2018, pp. 35–36; see also eucrim 2/2018, pp. 107–108.

The EDPB addressed 18 recommendations to the co-legislators (i.e. Council and EP), including some fundamental objections to the initiative. For example, the EDPB believes that Art. 82 TFEU cannot serve as the sole legal basis, since the proposal places its focus mainly on private entities.

Furthermore, the EDPB calls on the Commission to better demonstrate the necessity of this new instrument, which comes on top of the European Investigation Order (EIO) and the existing mutual legal assistance (MLA) schemes. In this context, the EDPB is of the opinion that the proposal waters down several safeguards provided for by the EIO and MLA treaties.

Another finding is that the double criminality requirement is a fundamental principle of international cooperation,

which involves additional limitations and safeguards. The e-evidence proposal, however, completely rules out this requirement. The EDPB is against this and highlights the importance of double criminality, which allows States to refuse assistance if the same approaches are not shared with the requesting State. The EDPB further points out that abandoning the double criminality principle is of even more concern given the disappearance of other major traditional safeguards in the field of criminal law.

The EDPB cautions against the major shift in the new system, i.e. addressing private companies directly. It fears that private companies will not safeguard individual rights to the same extent as judicial authorities. Hence, the EDPB recommends the inclusion of additional grounds in the Regulation, certifying that service providers will protect individual fundamental rights; competent data protection authorities must ensure sufficient control.

Likewise, the disappearance of location criteria (i.e. competent authorities can issue orders regardless of where data are actually stored) has several legal consequences. It seems that the Commission has not fully thought them through. For instance, the EDPB is unsure which safeguards from the Directive 2016/680 protecting personal data processed by the police or judicial authorities when investigating/prosecuting crimes must also apply to private companies. Of concern in this context is, above all, possible access by authorities to data outside the European Union. The opinion of the EDPB also calls for improvements to bring the new instrument in line with the General Data Protection Regulation.

The EDPB is also critical of the new categories of data to be introduced by the e-evidence proposal. It finds that the Commission's impact assessment and proposal did not properly substantiate the rationale for the creation of these new subcategories of personal data. It also expresses concern over the different

level of guarantees related to substantive and procedural conditions for access to the categories of personal data. Practical difficulties will occur on how to categorize requested data in some cases.

The last set of recommendations deal with procedures for European Preservation and Production Orders, such as thresholds for issuing orders, time-limits, confidentiality, and user information.

*Background:* The [European Data Protection Board \(EDPB\)](#) is composed of representatives of the national data protection authorities and the European Data Protection Supervisor (EDPS). It replaced the “Article 29 Data Protection Working Party.” The EDPB contributes to the consistent application of data protection rules throughout the European Union and promotes cooperation between the EU's data protection authorities. It also advises the European Commission on issues of data protection as regards new legislation. Its opinions are, however, not binding. (TW)

### CCBE Makes Critical Statement on E-Evidence Proposal

On 19 October 2018, the Council of Bars and Law Societies in Europe (CCBE) delivered a [critical viewpoint on the Commission's proposal](#) of April 2018 for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (see eucrim 1/2018, pp. 35–36).

The CCBE mainly puts forward that the instrument cannot be based on Art. 82 TFEU (as proposed by the Commission) because it does not regulate mutual recognition, but instead orders to private entities. Further questions concern necessity and proportionality. According to the CCBE, the choice of a Regulation instead of a Directive as a legal instrument is not only a paradigm shift in the criminal law area, but also risks lowering the higher national standards by means of EU legislation. The added value of the proposal compared to existing MLA treaties and the European Investigation Order (EIO) is also doubtful.



The CCBE disagrees with the approach of delegating – partly or fully – the protection of fundamental rights to private entities, as it undermines the essential duties of national judicial authorities to ensure that the rights of citizens are not compromised. In this context, the CCBE is also concerned that the proposal abolishes legality checks for requests of judicial cooperation.

Hence, the CCBE suggests restricting the scope of the proposal to preservation orders only and to follow the MLA or EIO procedure when electronic evidence is to be produced. The latter instruments might be improved.

In the event that the European institutions proceed with the proposal, the CCBE further observed and recommends the following:

- Strengthening of possibilities for judicial review in the executing State;
- Clear definition of “evidence”;
- Clarification that the orders may only be issued for the purpose of obtaining evidence in the course of specific criminal proceedings;
- Redrafting of the judicial validation process, including the extension of judicial validation to subscriber and access data and including a procedure in which objections by persons affected can be heard (e.g. on the lawyer-client confidentiality);
- Introduction of the condition that orders can only be issued for serious crimes;
- Further specification of grounds to refuse the execution of an order, including the possibility to refuse if data are covered by professional secrecy/legal professional privilege;
- Possibility for suspected or accused persons or their lawyers to request the issuing of European Production or Preservation Orders – in view of the equality of arms;
- Increased effectivity of legal remedies, also including a person’s right to address remedies in the court of the Member State in which the data are sought.

In the present paper, the CCBE further develops its critical position it issued in [previous comments](#). (TW)

### Commission’s E-Evidence Plans Under Fire

In addition to the EDPB and the CCBE, other organisations and academics voiced critical opinions on the Commission proposals of April 2014 on e-evidence (see [eucrim 1/2018](#), pp. 35–36): two studies for the EP’s LIBE committee – one [by Elodie Sellier and Anne Weyembergh](#), which deals with issues of European cooperation in a more general way (see also [eucrim 2/2018](#), p. 100) and another by [Martin Böse](#) that especially focuses on the e-evidence proposal – looked into the Commission plans and raised numerous critical issues:

- Legal basis of the e-evidence proposal;
- Added value of the proposal;
- Role of service providers in safeguarding fundamental rights;
- Limited legal remedies for the suspect;
- Legal certainty;
- Disputable distinction between access data and transactional data in light of the CJEU’s case law.

Legal expert [Vanessa Franssen](#) delivered an initial [analysis on <european-](#)

[lawblog>](#). She raised similar issues concerning, *inter alia*, the legal basis of the proposal; the choice of legal instrument (i.e. the challenges of the chosen option for a Regulation); the impact of the fragmented, incomplete approach; and the scope of application. [Franssen](#) also points out that, in the meantime, civil society organisations (such as EDRI and CDT) and industry representatives (e.g. from DigitalEurope, EuroISPA and Microsoft) have issued opinions and are attempting to steer the institutional discussion. For the critical viewpoint of the German Bar Association, see [eucrim 2/2018](#), p. 107 et seq. (TW)

### Council Conclusions to Support Law enforcement

At its [meeting of 18 October 2018](#), the European Council called for measures to provide Member States’ law enforcement authorities, Europol, and Eurojust with adequate resources to face new challenges posed by technological developments and the emerging security threat landscape. The resources include the pooling of equipment, enhanced partnerships with the private sector, interagency cooperation, and improved access to data. (CR)

#### Common abbreviations

AG	Advocate General
AML	Anti-Money Laundering
CCBE	Council of Bars and Law Societies of Europe
CEPEJ	European Commission on the Efficiency of Justice
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CVM	Cooperation and Verification Mechanism
EBA	European Banking Authority
ECA	European Court of Auditors
ECB	European Central Bank
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EPRS	European Parliamentary Research Service
ETIAS	European Travel Information and Authorisation System
(M)EP	(Members of the) European Parliament
MLA	Mutual Legal Assistance
MoU	Memorandum of Understanding
OJ	Official Journal
SIS	Schengen Information System
TFEU	Treaty on the Functioning of the European Union



## Council of Europe\*

Reported by Dr. András Csúri

### Foundations

#### European Court of Human Rights

##### Court Re-Elects President Raimondi

On 17 September 2018, *Guido Raimondi* was re-elected as President of the ECtHR. His term ends on 4 May 2019, the same time as his mandate as a judge.

Before his career at the ECtHR *Raimondi* worked in the Legal Department of the Italian Ministry of Foreign Affairs, and was Co-Agent of the Italian government before the ECtHR (1989 to 1997). Afterwards, he served at the Court of Cassation first in the Advocate General's office and then as judge. Before his appointment as judge in Strasbourg, *Raimondi* worked at the International Labour Organization (2003–2010). President Raimondi has been a judge at the Court since 2010 and became its President on 1 November 2015.

### Procedural Criminal Law

##### CEPEJ 2018 Report on Efficiency of Justice

On 5 October 2018, CEPEJ published its [2018 report](#) on the main trends observed for the efficiency of justice in 45 European countries. This 7th evaluation report is based on the 2016 data and serves as a practical tool to better understand the operation of justice in Europe, including major trends, statistics, and common issues. All data is also publicly available as an interactive database:

[CEPEJ-STAT](#). A [summary](#) of the 2018 CEPEJ study is also provided.

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

- The availability and allocation of resources;
- The situation of prosecutors and judges and their relations to one another;
- The organization of courts;
- The performance of the judicial systems.

Throughout the report, CEPEJ highlights numerous methodological problems encountered and the choices made to overcome them.

As regards the budget available to the individual justice systems, each country's investment has been assessed in proportion to its level of wealth. The report reveals an overall, if slight, increase in this area, with particularly sizeable budgets in Luxembourg and Norway. After a series of budget cuts due to the 2008 economic and financial crisis, budgets are returning to pre-crisis levels. As regards the allocation of resources, the budgets of courts account for the largest share (66% on average), especially in states that only have professional judges. In East European countries, more of the judicial budget goes towards public prosecution, while countries in northern Europe invest predominantly in legal aid. In general, there is a higher contribution by the users of the judicial systems to its financing via taxes and court fees. Two extremes in this regard are as follows:

- France, Luxembourg, and Spain provide for access to courts without fees;
- In Austria, revenues from registers exceed the operating costs of the entire judicial system.

As regards judges and prosecutors, there is a trend towards compulsory additional trainings in order to qualify for specialist posts or functions. Great importance is attached to the experience of candidates in the selection process for judges' posts.

Although Europe is still split as to the use of juries, there is a growing professionalization of judges. Based on various indicators, such as staffing level or the number of cases, the busiest prosecution services are in France, Austria, and Italy. In addition, the salary levels of judges and prosecutors are becoming increasingly similar.

Concerning parity within the judicial system, the proportion of women is increasing among judges and prosecutors, but other legal professions remain overwhelmingly male. That said, only Germany appears to have developed a global policy in favor of parity. Only a few specific measures for promoting parity exist in other Member States.

As regards their organization, the courts are becoming fewer in number, larger in size, and more specialized. This goes hand in hand with the developing use of Internet-based information and communication methods. Personal contact remains crucial for court users in order to facilitate a better understanding of decisions and foster trust in justice.

The performance of judicial systems is improving overall in civil and criminal cases, with asylum applications having had a significant impact on the number of incoming cases in nine countries. The productivity of criminal courts is improving, although the duration of procedures appears to be lengthening in Supreme Courts.

\* If not stated otherwise, the news reported in the following sections cover the period 16 September – 15 November 2018.

## Fil Rouge

This issue focuses on whistleblowers and their protection under Union and national law as well as on witness protection for “pentiti” or “collaborating witnesses.” The overriding, key concerns are the same for both Union institutions and Member States: the lack of adequate protection measures and grave consequences from disclosures for the reporting persons’ security, professional career, and even life. Besides providing an effective protection to whistleblowers or pentiti, the authorities must also adequately respond to disclosures.

Under pressure from the European Parliament, investigating the “Panama Leaks” affair, the European Commission eventually decided to step up protection measures for whistleblowers by using a sectoral rather than horizontal approach. *Georgia Georgiadou* from the European Commission examines the policy and legal rationale behind the Commission’s 2018 legislative proposal for strengthening the protection of whistleblowers and the minimum standards that should be put in place throughout the Union.

*Simone White* gives a detailed analysis of the genesis of whistleblower protection measures in several Member States (Ireland, UK, France) and at the Union level, recalling the growing body of evidence that these measures need to be harmonised across legal systems and provide equivalent protection. According to *White*, such harmonisation is possible through either a horizontal or a sectoral approach, each of which has its advantages and disadvantages. She demonstrates that the Commission’s sectoral approach is complex but contains several innovative elements, including the wide range of protected persons. She then analyses the potential impact of protection measures in the area of fraud against the Union’s budget, stressing the need to

clarify which Union body (OLAF, EPPO, or a special unit at the European Ombudsman) should receive whistleblower disclosures and grant the necessary protection measures. She concludes that whistleblower protection should not only protect the internal (financial) market but also – and primarily – persons, especially vulnerable persons.

*David Chiappini* takes stock of the efforts recently undertaken by the French government to ensure effective protection of “repenti,” i.e., collaborating witnesses or suspects who agree to reveal important information about organised crime or terrorism in exchange for reduced penalties or other compensation. He follows up on the evolving recommendations of international bodies, such as the Council of Europe and the United Nations. His in-depth analysis offers insight into the policy and organisational issues inherent to the now fully operational French system and highlights the importance of adequate financing and legal clarity. *Chiappini* stresses that national protection schemes for “repenti” should gradually become a part of mutual recognition and harmonisation in the European Union in order to strengthen the legal arsenal against organised crime and terrorism.

This issue is rounded off with an article by *Tony Marguery*, who summarises the main findings of a legal and empirical comparative study on the limits on mutual trust in the context of the transfer of sentenced persons following the CJEU’s *Aranyosi and Căldăraru* judgment. The project was conducted by the RENFORCE research group at the University of Utrecht and covered five EU Member States.

*Peter Csonka*, European Commission, Head of Unit, DG Justice and Consumers and member of the eucrim Editorial Board

# The European Commission's Proposal for Strengthening Whistleblower Protection

Georgia Georgiadou\*

Recent scandals, such as Dieselgate, Luxleaks, the Panama Papers, and Cambridge Analytica, came to light thanks to whistleblowers who “raised the alarm” over unlawful activities in the organisation for which they worked. From their position as “insiders,” whistleblowers can provide enforcement authorities with key information that can lead to the effective detection, investigation, and prosecution of breaches of law – and they can be crucial sources for investigative journalists – thus contributing to protecting the public from harm.

Yet, whistleblowers very often face many different forms of retaliation for their reporting: they may lose their job and their source of income, and they may suffer damage to their reputation and their health. Fear of such consequences discourages people from coming forward with their concerns. Unfortunately, the protection offered in the EU is fragmented and insufficient. Most EU Member States do not have comprehensive legislation in place that provides whistleblowers with the protection they need. Similarly, at the EU level, whistleblower protection is only provided for in specific sectors, e.g., financial services, transport safety, and environmental protection, and only to varying degrees.

This article explains how the proposal for a Directive on whistleblower protection adopted by the European Commission on 23 April 2018 aims to radically change this situation. It presents the proposed legal framework to ensure that all Member States adopt high, common standards of protection for whistleblowers who unveil illegal activities relating to a wide range of EU policy areas. It analyses the various protection measures to be put in place in order to guarantee effective protection (internal and external reporting channels, protection of the confidentiality/identity of whistleblowers, broad definition of prohibition of retaliation, remedial actions for whistleblowers who suffer retaliation). Lastly, the article gauges the impact that the proposal is expected to have on workplace culture, in both the private and public sectors, and on good governance and accountability across the EU.

## I. Introduction: Added Value of Whistleblower Protection

Unlawful activities may occur in any organisation, whether private or public, large or small. People who work for an organisation are often the first to know about such occurrences and are, therefore, in a privileged position to inform those who can address the problem. Recent scandals, such as Dieselgate, Luxleaks, the Panama Papers, Cambridge Analytica, or Danske Bank, came to light thanks to whistleblowers who “raised the alarm” about unlawful activities harming the environment, public health, data protection, and national or EU public finances. In fact, alongside complaints and audits, whistleblower reports are an important means of providing national and EU enforcement systems with information leading to effective detection, investigation, and prosecution of breaches of EU rules.

Yet, whistleblowers often risk their careers and livelihoods and, in some cases, suffer severe and long-lasting financial, health, reputational, and personal repercussions. Fear of retaliation dissuades people from coming forward with their concerns. For example, according to the 2017 Special Eurobarometer on Corruption<sup>1</sup> around one in three of all Europeans (29%) think that people may not report corruption because there is

no protection for those reporting it. The effective protection of whistleblowers against retaliation is therefore essential in order to safeguard the public interest, to protect freedom of expression and media freedom (as whistleblowers are vital sources for investigative journalism), and to promote transparency, accountability and democratic governance in general.

## II. Need for Action at the EU Level

Currently, the protection afforded to whistleblowers across the EU is fragmented and insufficient. Some Member States have comprehensive legislation in place, but most offer only sectoral protection, e.g. in the fight against corruption, or only for public servants, whilst some provide no protection at all. At the EU level, whistleblower protection is provided for only in specific sectors, such as financial services, transport safety, and environmental protection, and only to varying degrees. This lack of effective protection across the EU can undermine the level-playing field needed for the internal market to function properly and for business to operate in a healthy competitive environment. It can result in unsafe products being placed on the internal market, in pollution of the environment, or in other risks to public health and transport safety, which go be-

yond national borders. It can make it more difficult to detect, prevent, and deter fraud, corruption, and other illegal activities affecting the financial interests of the EU.

### III. Common Minimum Standards of Protection Proposed by the European Commission

On 23 April 2018, the European Commission published a proposal for a Directive on whistleblower protection,<sup>2</sup> precisely to strengthen the enforcement of EU rules in areas where violations can seriously harm the public interest. It draws upon the European Court of Human Rights case law on the right to freedom of expression and the Council of Europe 2014 Recommendation on Protection of Whistleblowers.<sup>3</sup>

#### 1. Personal and material scope

The proposed Directive aims at ensuring that all Member States have common high standards of protection for whistleblowers who unveil illegal activities relating to a wide range of EU policy areas, namely:

- Public procurement;
- Financial services, anti-money laundering, and counter-terrorist financing;
- Product safety;
- Transport safety;
- Environmental protection;
- Nuclear safety;
- Public health;
- Food and feed safety, animal health and welfare;
- Consumer protection;
- Protection of privacy and personal data, and security of network and information systems.

The proposal also applies to the reporting of breaches relating to Union competition rules, to breaches harming the EU's financial interests, and – in view of their negative impact on the proper functioning of the internal market – to breaches or abuses of corporate tax rules.

The proposed Directive protects from retaliation whistleblowers who acted in good faith, i.e., those who had reasonable grounds to believe the information reported was true at the time of reporting and that this information fell within the scope of the Directive. It provides protection to the broadest possible range of persons, who, by virtue of work-related activities (irrespective of the nature of these activities and whether they are paid or not), have privileged access to information about violations of EU rules that can cause serious harm to the public interest and who may suffer retaliation if they report them. The

proposal thus protects not only employees, but also self-employed service providers, contractors, suppliers, shareholders, volunteers, unpaid trainees, and job applicants.

#### 2. Reporting channels and information

Potential whistleblowers should have clear, user-friendly reporting channels available to them to report both internally (within an organisation) and externally (to an outside authority). Member States should thus ensure that legal entities in both the private and the public sectors establish appropriate internal reporting channels and procedures for receiving and following up on reports. As a rule, all private companies with more than 50 employees or with an annual turnover of more than €10 million and all State and regional administrations, as well as local municipalities of over 10,000 inhabitants, are obliged to set up internal reporting channels ensuring confidentiality of the identity of the whistleblower.

In addition, Member States must identify the authorities that will be tasked with receiving and following up on reports. These authorities should put in place specific channels to allow for reporting and, follow-up on the reports received. Both in the context of internal and external channels it is necessary that the whistleblower receives, within a reasonable time-frame, feedback about the follow up to the report. This is crucial to build trust in the effectiveness of the overall system of whistleblower protection and reduces the likelihood of further unnecessary reports or public disclosures. Accordingly, it is provided that such feedback should be given to the whistleblower within three months (for competent authorities, this can be extended up to six months in complex cases).

One of the main factors that has a dissuasive effect on potential whistleblowers is the lack of knowledge of how and where to report and what protection is available. For this reason, the proposal aims to ensure that potential whistleblowers can easily access all the information they need with a view to making an informed decision about reporting.

- Firstly, all the private and public entities obliged to have in place internal reporting channels are also obliged to provide clear and easily accessible information on the procedures for reporting, but also on how and under what conditions reports can be made externally to competent authorities.
- Secondly, all competent authorities have to publish on their websites information, amongst others, on: the contact details for the reporting channels and the applicable procedures and confidentiality regime; the nature of the follow up to be given to reports; the conditions for protection; the remedies available in case of retaliation and the possibilities to receive confidential advice. All information regard-

ing reports should be transparent, easily understandable and reliable, in order to promote and not deter reporting.

- Thirdly, Member States should ensure that the general public has access to comprehensive and independent information and advice – free of charge – on available procedures and remedies. For example, such advice should be available on whether the information is covered by the applicable rules on whistleblower protection, which reporting channel may best be used, and which alternative procedures are available in case the information is not covered by the applicable rules. Access to such advice is crucial to ensuring that reports are made through the appropriate channels in a responsible manner and to ensuring that breaches and wrongdoings are detected in a timely manner or even prevented."

### 3. Reporting conditions

In general, a whistleblower should first report information to his/her employer using internal reporting channels. This is necessary in order to ensure that information on violations of EU rules swiftly reaches those closest to the source of the problem and most capable of addressing it. This also helps prevent unjustified reputational damages. However, a whistleblower can also go directly to the competent state authorities and, where relevant, to EU bodies, if:

- Internal channels do not exist (e.g., in small and micro companies);
- The use of internal channels is not mandatory (e.g., in case of non-employees);
- Internal channels were used but did not function properly or they could not reasonably be expected to function properly;
- The latter may apply, for instance, in cases of fear of retaliation, concerns about confidentiality, the possible implication of upper management in the violation, fear that evidence might be concealed or destroyed or if urgent action is required because of an imminent, substantial danger to the life, health, and safety of persons or to the environment.

In addition, EU law already allows whistleblowers to report directly to national authorities or EU bodies concerning cases of fraud against the EU budget, the prevention and detection of money laundering and terrorist financing, and in the area of financial services.

The proposed Directive also provides protection to those whistleblowers who publicly disclose information (e.g., via social media, to the media, to elected officials, to civil society organisations, etc.) as a means of last resort. This is the case where internal and/or external channels:

- Did not function properly (e.g., the reported violation was not properly investigated or remained unaddressed) or

- Could not reasonably be expected to function properly (e.g., in cases when it is reasonable to suspect a collusion between the perpetrator of the crime and the state authorities responsible for prosecuting them, or in cases of urgent or grave danger for the public interest or risk of irreversible damage, such as harm to physical integrity).

### 4. Protection against retaliation

Where retaliation remains undeterred and unpunished, it has an intimidating effect on potential whistleblowers. This is why the proposal obliges Member States to prohibit any form of retaliation. To further strengthen the dissuasive effect of the prohibition, it requires them to provide for personal liability and effective, proportionate penalties for the perpetrators of retaliation

Effective protection of reporting persons requires a broad definition of retaliation, encompassing any act or omission prompted by the reporting that occurs in a work-related context and causes or may cause unjustified detriment to the reporting person. The proposal sets out a long, indicative list of forms that retaliation may take and that shall be prohibited. These include typical retaliatory measures taken against employees, e.g., dismissal, demotion, reduction in wages, negative performance assessment, intimidation or harassment, discrimination, disadvantage or unfair treatment. They also include forms of retaliation that may be suffered by non-employees, e.g., non-renewal or early termination of a temporary employment contract; damage, including to the person's reputation, or financial loss, including loss of business and loss of income; blacklisting or early termination or cancellation of a contract for goods or services.

In addition, the proposal provides for protection against both direct and indirect retaliation. This may consist in retaliatory measures against the reporting persons taken by their employer or the customer/recipient of services. This also extends to persons working for or acting on behalf of the latter, including co-workers and managers in the same organisation or in other organisations to which the reporting person has contact in the context of his/her work-related activities – where retaliation is recommended or tolerated by the person concerned.

Protection is to be provided in cases of retaliatory measures taken against the reporting person him/herself but also those measures that may be taken against the legal entity he/she represents. Indirect retaliation also includes actions taken against relatives of the reporting person, who are also in a work-related connection with the latter's employer or customer/recipient of services, and workers' representatives who have provided support to the reporting person.

If whistleblowers do suffer retaliation, the proposal provides for a set of measures to protect them. First and foremost, it is also essential that reporting persons who suffer retaliation have access to legal remedies. The type of retaliation suffered determines the appropriate remedy in each case. It may take the form of actions for reinstatement or for restoration of a cancelled contract, compensation for actual/future financial losses or for other economic damage, e.g., legal expenses and cost of medical treatment.

Interim remedies to halt ongoing retaliation, e.g., workplace harassment, or to prevent dismissal are of particular importance for reporting persons, pending the resolution of potentially protracted legal proceedings. Moreover, retaliatory measures are likely to be presented as being justified on grounds other than the reporting. It can be very difficult for whistleblowers to prove the link between the retaliatory measures and the reporting. The perpetrators of retaliation may have greater power and resources to document the action taken and the reasoning behind it. This is why the reversal of the burden of proof in judicial proceedings is an essential protection measure. It means that, once the whistleblower has demonstrated *prima facie* that he/she made a report or public disclosure and suffered a detriment, it is up to the person who has undertaken the detrimental action to prove that it was not an act of retaliation but instead based exclusively on justified grounds.

Whistleblowers also should not incur any liability for having breached a confidentiality clause or non-disclosure agreement. Individuals' legal or contractual obligations, such as loyalty clauses in contracts or confidentiality/non-disclosure agreements, cannot preclude employees from reporting, to deny protection, or to penalize employees for having done so. Other measures relate to protection in judicial proceedings: if legal actions are taken against whistleblowers outside the work-related context (such as proceedings for defamation, breach of copyright, or breach of secrecy), whistleblowers will be able to rely on having reported in accordance with the proposed rules as a defense to seek dismissal of the case.

## 5. Protection of the rights of persons affected by whistleblower reports

The proposal aims at protecting responsible whistleblowing, genuinely intended to safeguard the public interest, while proactively discouraging malicious whistleblowing and preventing unjustified reputational damage. The tiered use of channels – whereby, as a rule, the whistleblower should first report to his/her employer and, only if internal channels do not exist or do not function, to the competent authorities, and then, only as a last resort, to the public – already provides an essential

guarantee against such damages. Moreover, persons affected by the reports fully enjoy the presumption of innocence, the right to an effective remedy and to a fair trial, and the rights of defence. Additionally, the proposal also requires Member States to introduce effective, proportionate, and dissuasive penalties for those who make malicious or abusive reports or disclosures.

## IV. Conclusion

The Commission proposal sets out a sorely needed legal framework to provide robust protection for whistleblowers across the EU. It follows a very balanced approach, in particular in terms of limiting the burden for national authorities and businesses, particularly small companies and microcompanies. Moreover, it strikes a balance between the need to protect whistleblowers and those who are affected by the reports, in order to avoid reporting abuses.

While in line with the principle of subsidiarity at the EU level, the proposed Directive establishes whistleblower protection measures targeting the enforcement of Union law in specific areas. When transposing the Directive, the Commission encourages the Member States to consider extending the application of its rules to other areas and, more generally, to ensure a comprehensive and coherent framework at the national level.

A consistently high level of protection of whistleblowers throughout the EU will encourage people to report wrongdoing that may harm the public interest. It will also enhance openness and accountability in government and corporate workplaces as well as contribute to enabling journalists to perform their fundamental role in European democracies.

### Georgia Georgiadou

European Commission, DG JUSTICE, Deputy Head of the Unit on Fundamental Rights Policies

\* This article presents the personal views of the author and does not necessarily reflect the official position of the European Commission.

1 [https://data.europa.eu/euodp/data/dataset/S2176\\_88\\_2\\_470\\_ENG](https://data.europa.eu/euodp/data/dataset/S2176_88_2_470_ENG).

2 Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM(2018) 218. See also T Wahl, "Commission Proposes EU-Wide Rules on Whistleblowers' Protection", (2018) *eucri*m, 27–29.

3 [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c5ea5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5).

# A Matter of Life and Death

## Whistleblowing Legislation in the EU

Dr. Simone White\*

Some EU Member States have already adopted broad-ranging whistleblowing legislation because of financial or public health scandals. In this context, the European Parliament suggested a draft directive to protect whistleblowers by offering a “horizontal” approach covering all public and private sectors. In 2018, the European Commission, by contrast, proposed widening the existing EU sectoral approach and including the protection of the financial interests of the European Union in a directive “on the protection of persons reporting on breaches of Union law.” The author argues that this broader sectoral approach – while making a step forward – still raises a number of issues.

### I. Introduction

“Un attachement passionné au droit” – this is the way *François Ost* described the relationship of a whistleblower with the law, adding

risquant son emploi et s’exposant à toutes sortes de poursuites judiciaires, parce qu’il dénonce la corruption de ses supérieurs hiérarchiques, la fraude fiscale de sa banque, la fraude environnementale ou sanitaire de l’entreprise qui l’occupe.<sup>1</sup>

In this context, it becomes clear that lives, the environment, money, and reputations are at stake. However, this *attachement passionné au droit* is often viewed with suspicion and alarm, rather than as the positive contribution to the rule of law that it is.

At the international level, the jurisprudence of the European Court of Human Rights has been constant in affirming the rights of whistleblowers to freedom of expression and to protection against retaliation,<sup>2</sup> as well as the duties of employers in this respect.<sup>3</sup> International organisations have promoted the improvement of whistleblowing regulation for a number of years.<sup>4</sup> Despite this chorus at the international level, some EU Member States continue to show a distinct lack of enthusiasm in adopting legislation.<sup>5</sup>

In other Member States, legislation exists but proves inadequate in the face of some of the challenges and so continues to evolve. The UK Public Interest Disclosure Act (PIDA) of 1998, one of the earliest pieces of dedicated legislation in the EU, shows that even this legislation has had to be “tweaked” on several occasions, based on jurisprudence and practice. Even so, it is not clear that the necessary change in culture has taken place across all sectors. In the public health sector, for instance, whistleblowers in the recent Gosport hospital tragedy were “fired, gagged and blacklisted” for drawing attention to the fact that 456 elderly people had died in the hospital after

having been given excessive doses of opioid drugs through pumps by medical staff.<sup>6</sup> It is tragic that the whistleblowers were not listened to.

At present, there is a tendency to try to move away from concepts connected with the intention of the whistleblowers, such as “good faith,” and to move towards tests that focus on the nature of the information itself.<sup>7</sup> The notion of “public interest”<sup>8</sup> can be equally slippery and is undergoing some careful recalibration in some Member States.

Arguably, an independent service is needed to implement the protection of whistleblowers. The efficacy and independence of such a system can only be gauged and improved through practice over a certain period of time, as recent changes in the law of the Netherlands (*Wet Huis voor klokkenluiders 2016*) or the present review of the 2014 Irish Protected Disclosure Act have shown.<sup>9</sup>

In France, the “*Sapin II*” law adopted in December 2016<sup>10</sup> requires a number of organisational measures to be put in place in order to protect whistleblowers. They include the setting up of internal reporting mechanisms for firms with more than 500 employees and with a turnover of over €100 million. This requirement also applies to municipalities with more than 10,000 inhabitants. The French Anti-Corruption Agency has acquired a new role in ensuring the respect for procedures.

However, new legislation alone is no “magic bullet” and, with recently enacted legislation, time needs to pass before whistleblowers begin to understand and trust systems that have been put in place. Hence, there may not be a noticeable increase in the number of whistleblowers reporting immediately after the adoption of legislation. A change in culture in the work place must also take place for whistleblowers to begin to trust reporting procedures.



Whistleblowing does not lend itself well to statistical analysis, as the number of disclosures or the number of recognised or presumed whistleblowers are a crude measuring tool and do not give any idea of the interests at stake. A presumed whistleblower in the nuclear safety sector or in the public health sector giving information on dangerous behaviour or products counts as one data entry in statistical terms. In prevention terms, the human misery and financial costs potentially prevented may be much higher indeed. Thus, in the future, it will be necessary to develop more sophisticated statistical models in relation to whistleblowing, which are based on the grounds for preventing harm – in this way, the small number of whistleblowers could no longer be used as a reason for not putting an adequate legal framework in place. This should be taken into account when developing benchmarks and indicators for whistleblowing policies, as advocated by the European Parliament.<sup>11</sup> It is a challenging task for criminologists, who are undoubtedly needed in this area.

We are conscious here that investigative journalists and their sources are also exposed through the nature of their work. This is beyond the scope of this article however, as is whistleblowing regulation within the EU institutions. Both these topics – journalists and their sources and regulation of whistleblowing within the EU institutions – deserve further analysis.

The European parliament has put forward solutions at the EU level in the form of a proposal for a horizontal approach covering all sectors, both public and private. This horizontal approach is consistent with that adopted in a number of Member States.<sup>12</sup>

In 2018, the European Commission, mindful of securing strong legal bases in relation to the EU internal market, proposed a directive extending the sectoral approach. As we shall see, this proposed directive does potentially widen the ambit of whistleblowing rules, but also raises a number of issues. In the following, both approaches are briefly presented and juxtaposed.

## II. Horizontal Approach Favoured by the European Parliament

Recent, highly publicised whistleblowing incidents in the financial and public health sectors have suggested that harmonisation at the EU level could ensure that minimum standards on the protection of whistleblowers are respected. The harmonisation level should at least require that national legislation be in compliance with the existing ECtHR case law. Such harmonisation would also make it possible for all Member States to draw on the experience already acquired in some Member States, and it would promote the equal treatment of workers

throughout the EU. Harmonised rules would cover both the public and private sectors and apply horizontally to all sectors of the economy, with as few exceptions as possible (typically and controversially: national security). All workers would be covered, whatever their status.

Member States have also discussed the need for horizontal legislation. For example, when considering their legislative option in 2018, the Irish Government Reform Unit considered the following option: “Do nothing and continue with sectoral legislation.” However, they found that:<sup>13</sup>

The sectoral approach resulted in a number of separate protected disclosure provisions across a number of statutes. While there are similarities between these provisions, there are also significant differences. This uncoordinated approach led to an unsatisfactory patchwork of sector specific provisions which are potentially confusing in nature and which fail to provide clarity in the law relating to protected disclosures. The continuation of such a policy, even on a coordinated basis, would take some considerable time to ensure a sufficiently broad sectoral coverage. Such an approach would not be in accordance with best international practice and would also militate against the generally recommended concept of a robust and comprehensive pan-sectoral approach. [...] Not recommended.

The International Bar Association echoed this sentiment in 2018:<sup>14</sup>

Whistleblower legal frameworks should not be sector-specific (subject to some qualifications) and should apply to public, private and not-for-profit sectors.

The Greens/European Free Alliance (EFA) group in the European Parliament had such a horizontal approach in mind when it put forward its draft directive in 2016, with Arts. 151 and 153(2)(b) TFEU as legal bases.<sup>15</sup> These legal bases concern working conditions and the health and security of workers, respectively. In October 2017, the European Parliament also adopted a resolution calling for a proposal from the European Commission for a horizontal (trans-sectoral) directive providing for whistleblower protection.<sup>16</sup> However, as will be discussed in the next section, the European Commission subsequently opted for the continuation of pre-existing sectoral approaches at the EU level.

## III. Sectoral Approaches Favoured by the European Commission

The EU approach to whistleblowing, as applicable in the Member States, has hitherto been one tailored to specific sectors and issues in order to include investment products,<sup>17</sup> insurance distribution,<sup>18</sup> securities,<sup>19</sup> statutory audits,<sup>20</sup> market abuse,<sup>21</sup> money laundering,<sup>22</sup> credit institutions,<sup>23</sup> and trade secrets<sup>24</sup>. Provisions on whistleblowing vary in accordance with the sector: they are comprehensive in market abuse legislation, whilst whistleblowing is mentioned only briefly in the directive on trade secrets, as an exception to the general rule

on secrecy.<sup>25</sup> The limited protection that whistleblowers enjoy at present in EU law therefore depends on the Single Market sectors in which the whistleblower seeks to act.

## 1. The Commission initiative of April 2018 – Scope, aims, legal bases

With its proposed directive of April 2018,<sup>26</sup> the Commission continues a sectoral approach covering various aspects of the Single Market and, for the first time, the protection of the financial interests of the EU (“PIF”). The legal bases put forward are Arts. 16, 33, 43, 50, 53(1), 62, 91, 100, 103, 109, 114, 168, 192, 207 TFEU<sup>27</sup> for the Single Market and Art. 325(4) TFEU for “PIF”. The Single Market areas covered are: (i) public procurement; (ii) financial services, prevention of money laundering and terrorist financing; (iii) product safety; (iv) transport safety; (v) protection of the environment; (vi) nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; and (x) protection of privacy and personal data and security of network and information systems. The following are also covered: breaches relating to the Internal Market, as referred to in Art. 26(2) TFEU, as regards acts breaching the rules of corporate tax or arrangements whose purpose is to obtain a tax advantage that defeats the object/purpose of the applicable corporate tax law. We will return to the material scope of this proposed directive and the issues it raises later.

It is important to be familiar with the following aims of the Commission proposal:

- Strengthen the protection of whistleblowers and avoid retaliation against them;
- Provide legal clarity and certainty;
- Support awareness-raising and the fight against socio-cultural factors leading to under-reporting.

The impact assessment on the proposed directive<sup>28</sup> shows how the decision to continue sectoral approaches was reached. It recalls that, in 2016, the Commission announced that it would assess the scope for horizontal or further sectoral EU action with a view to strengthening the protection of whistleblowers. This commitment was affirmed by President *Juncker* in the Letter of Intent complementing his 2016 State of the Union speech and in the 2017 Commission Work Programme.<sup>29</sup> The impact assessment found that the EU Treaty did not provide for a specific legal basis for the EU to regulate the legal position of whistleblowers in general; that is to say, it did not provide a basis for a horizontal approach: in particular, freedom of expression, as enshrined in the Charter of Fundamental Rights of the European Union, cannot serve as a standalone legal basis.<sup>30</sup>

As a result, a legislative initiative under Art. 153(1)(a) and (b) TFEU was not attempted. Such an initiative would have regulated aspects of whistleblower protection relating, respectively, to improvement of the working environment to protect workers’ health and safety and to working conditions, and it would have provided protection to workers reporting on violations of both national and EU law. It was argued that the personal scope of such an initiative would be too limited, in the sense that it would not allow for protection of all the categories of persons referred to in the Council of Europe Recommendation.<sup>31</sup> Thus, such a horizontal approach would only have limited effectiveness in terms of improving the enforcement of EU law.

## 2. The innovative aspects of the Commission proposal

Notwithstanding the limitations in the applicability of the proposed EU directive, the Commission’s proposal is innovative especially in five aspects. This innovation results from the fact that these aspects are not always present in the most advanced EU and/or national legislations.

Firstly, the Commission proposes a wide definition of a “reporting person.” A reporting person may be a natural or a legal person and persons working in the private or public sectors. According to the given definition “reporting persons” may include the following:

- Persons having the status of worker within the meaning of Art. 45 TFEU;
- Persons having the status of being self-employed within the meaning of Art. 49 TFEU;
- Shareholders and persons belonging to the management body of an undertaking, including non-executive members, volunteers, and unpaid trainees;
- Any persons working under the supervision and direction of contractors, as well as sub-contractors and suppliers.

Reporting persons whose work-based relationship is yet to begin are also included. It may be useful to compare this with the situation that exists in the Irish Protected Disclosure Act of 2014.<sup>32</sup> The Act’s definition of the term “worker” includes employees and former employees, trainees, people working under a contract for services, independent contractors, agency workers, people on work experience, and the Gardaí (Police force). The Irish legislation does not, however, mention volunteers, that is to say persons without contract of employment.

Secondly, the proposed directive has adopted the “tiered” approach to reporting that is already evident, for example, in Ireland, France, the UK, the Netherlands, Belgium, or Romania. This tiered approach involves a separation between “report-

ing” (internally or externally) and disclosing (making the disclosure public) in the draft directive.

A tiered approach usually means that, in order to be protected against retaliation, a whistleblower must follow prescribed routes and must first of all report internally, if at all practicable. The draft directive (Art. 13(2)) states that a person reporting externally shall qualify for protection, *inter alia*, according to the following comprehensive criteria:

- No appropriate action was taken after internal reporting;
- Internal reporting channels are not available;
- The use of internal channels was not mandatory;
- The reporting person could not be expected to make use of internal reporting channels in light of the subject matter of the report;
- The reporting person has reasonable grounds to believe that the use of internal reporting channels could jeopardise the effectiveness of investigative actions by the competent authorities;
- The reporting person was entitled to report to a competent authority directly through the external reporting channels by virtue of Union law.

In addition, the draft directive provides that public/media disclosure may also justify protection under certain circumstances: According to Art. 13(4)(b) a person making a public disclosure qualifies for protection if he or she could not reasonably be expected to use internal and/or external reporting channels, due to imminent danger in terms of the public interest, or to the particular circumstances of the case, or where there is a risk of irreversible damage. This provision allowing public disclosure is meant to avert environmental or public health disasters and extends the boundaries of legally acceptable action by whistleblowers.

Another aspect of the tiered approach in the Commission proposal is that the obligation to set up internal reporting channels is subject to certain thresholds (cf. Art. 4). In the *private sector*, the directive is to apply to the following:

- Legal entities with 50 or more employees;
- Legal entities with a turnover of €10 million or more;
- Legal entities of any size operating in the area of financial services or those that are vulnerable to money laundering or terrorist financing;
- Vulnerable small private entities, following a risk assessment to be conducted by the Member State.

Public sector entities obliged to set up internal reporting channels are state or regional administrations or departments, municipalities of more than 10,000 inhabitants, and other entities governed by public law. The thresholds are considered necessary so as not to unnecessarily burden small entities, and this

approach has already been adopted by a number of Member States. A harmonisation of thresholds seems desirable, particularly in cross-border cases.

Thirdly, protection against retaliation is construed widely and deems access to remedial measures against retaliation as appropriate, including interim relief, pending the resolution of legal proceedings, in accordance with the national legal framework (cf. Art. 15(6)). The prohibited measures of retaliation are listed in Art. 14, i.e., the draft directive takes an enumerative approach in this regard. There is, of course, always a danger associated with this method, in that a particular measure could be omitted. However, Art. 14(k) seems wide enough, when it stipulates:

Member States shall take the necessary measures to prohibit any form of retaliation, including damage, including to the person's reputation, or financial loss, including loss of business and loss of income.

Fourthly, Art. 16 contains measures for the protection of the identity of concerned persons, i.e., natural or legal persons who are referred to in the report or disclosure as persons to whom the breach is attributed or with which they are associated. Where the identity of the concerned persons is not known to the public, competent authorities must ensure that the identity is protected for as long as the investigation is ongoing. This echoes the need to protect the identity of the whistleblower specified in Arts. 5 and 7. According to Art. 5(1), internal channels for receiving the reports must be designed, set up, and operated in a manner that ensures the confidentiality of the identity of the reporting person and prevents access to non-authorised staff members. According to Art. 7(c), external reporting channels must be designed, set up, and operated in a manner that ensures the completeness, integrity, and confidentiality of the information and prevents access to non-authorised staff members of the competent authority. Art. 7(4) goes into detail by requiring Member States to establish procedures to ensure that, where a report being initially addressed to a person who has not been designated as responsible handler for reports that person is refrained from disclosing any information that might identify the reporting or the concerned person.<sup>33</sup>

Fifthly, Art. 17 lays down penalties applicable to natural or legal persons who hinder or attempt to hinder reporting, take retaliatory measures against reporting persons, bring vexatious proceedings against reporting persons, or breach the duty of maintaining the confidentiality of the identity of reporting persons. According to Art. 17(2), Member States must also provide for effective, proportionate, and dissuasive penalties applicable to persons making malicious or abusive reports or disclosures, including measures for compensating persons who have suffered damage from malicious or abusive reports or disclosures.

### 3. Points of discussion

These five points show that the legislation intends to address situations in the public and private sectors, whilst paying attention to the rights and obligations of the various parties. It is worth remembering, however, that this will only apply to aspects of the Single Market and to “PIF.” The defined material scope of the proposed directive may exclude practices in hospitals, residential homes, schools, etc. *unless* there is a recognisable, single-market issue at stake, which is covered by one of the above-mentioned Single Market legal bases. It may be difficult for employees and members of the public to know whether a particular “report” or “disclosure” would justify protection against retaliation. In this context, the draft directive does not mention a whistleblower’s access to legal advice in this admittedly complex regulatory framework.

An EU internal market perspective makes sense from the European Commission’s point of view. However, from a human rights perspective, it is not clear why the internal market should be privileged in terms of whistleblower protection. As the EU is not yet a party to ECHR, perhaps this level of coherence is not yet required; in any case it would seem desirable.

Art. 1 of the draft directive refers to an annexe with a nine pages of legal instruments the directive would apply to. One wonders therefore it would be immediately clear to a prospective whistleblower whether his information would fall within the ambit of any of these instruments.

Would it protect whistleblowers in hospitals and institutions dealing with vulnerable people, for example? The answer seems to be: it depends! Protection would be guaranteed only if the public health issue concerned the quality and safety of organs and substances of human origin or the quality and safety of EU medicinal products and devices. There is therefore scope for the protection of a whistleblower with information on faulty or dangerous products. The directive would not, however, cover a whistleblower such as *Heinisch*, with information on ill-treatment in an institution. In such cases of ill-treatment in institutions, national law on whistleblowing (when it exists) would have to apply. As a consequence, one whistleblower reporting on both aspects (faulty products and ill-treatment) might only be protected for part of his or her disclosure by the implementing rules of the directive. It is not clear yet how this can work in practice.

Another point worthy of discussion is the issue of “follow up.” The draft directive also regulates reporting in some detail<sup>34</sup> and the follow-up of reports (but curiously not the follow-up of disclosures). It does not require competent authorities to investigate but rather to “follow up”. Art. 3 defines the latter notion as

any action taken by the recipient of the report, made internally or externally, to assess the accuracy of the allegations made in the report and, where relevant, to address the breach reported, including actions such as internal enquiry, investigation, prosecution, action for recovery of funds and closure.

In the same way, the reporting person must receive “feedback” about the “follow-up of the report” – feedback is not defined here. The precise nature of follow-up and feedback will therefore be left to Member States’ competent authorities.

In its draft opinion of July 2018,<sup>35</sup> the EP Committee on Budgetary Control made a number of suggestions for the amendment of the draft directive. It suggests, *inter alia*, the following:

- Creation of a European referral body associated with the Office of European Ombudsman to receive and handle reports at the Union level;
- Protection under the directive for both reporting persons and persons facilitating the reporting;
- Obligation to provide advice and legal support for reporting persons and those facilitating the reporting.

Let us also look at the procedure for internal reporting in Art. 4 of the proposed directive. It requires “a diligent follow up to the report by the designated person or department.” This does not have quite the same bite as a “duty to investigate and take the necessary remedial measures.” The term “follow up” (at least in English) tends to suggest that one is waiting for someone else to act. But who would be acting in this case? And would this be any clearer in national legislation?

### IV. The Potential Impact for “PIF” Whistleblowers

As mentioned in the introductory remarks, the proposed whistleblower directive includes the protection of the EU’s financial interests (PIF). The financial interests of the EU have been usefully defined in Art. 2(1) of Regulation 883/2013 to include revenues, expenditures, and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices, and agencies and the budgets managed and monitored by them. In the context of PIF, three points are worth mentioning.

The first point is that “PIF” whistleblowers may not know whether EU funds are involved, but the directive might not bring the required elucidation. Both EUROCADRES and the European Court of Auditors have voiced several misgivings about the material scope of the directive. In their opinion, the auditors are concerned about the complexity surrounding the scope of the proposed directive. Its scope is based on a list of EU directives and regulations in an annex to the directive. The Commission encourages Member States to consider ex-

tending the directive to ensure a comprehensive and coherent framework at the national level. If there is no such voluntary extension, warn the auditors, potential whistleblowers would need to know whether the breach they were planning to report is covered or not, *ergo* whether or not they could benefit from protection. This could deter them.<sup>36</sup>

The second point relates to institutional dynamics that do not appear altogether propitious. The European Parliament called on the Commission, and on the European Public Prosecutor's Office, as far as it is within its mandate, to create efficient channels of communication between the parties concerned, to likewise set up procedures for protecting whistleblowers who provide information on irregularities relating to the financial interests of the Union, and to establish a single working protocol for whistleblowers.<sup>37</sup> It also calls for the creation of a special unit with a reporting line as well as dedicated facilities within Parliament for receiving information from whistleblowers relating to the financial interests of the Union.<sup>38</sup> This mechanism would be in addition to the establishment of a European referral body associated with the Office of the European Ombudsman to receive and handle reports at the Union level.

It seems that the optimum trajectory for PIF whistleblowers' information still needs to be clearly defined, as does the role of the EPPO in this area. Perhaps from the potential PIF whistleblower's point of view, it should be crystal clear who receives the information, who is responsible for acting on it – and who may grant protection. OLAF's role and cooperation with EPPO in relation to whistleblowers should also be clarified. Too circuitous a route for "PIF" disclosures could lead to information not reaching the person habilitated to take action in time and to whistleblowers not obtaining timely protection from those with authority to grant it.

The third point has to do with a specific conundrum related to EU expenditure. EU budget funding is often mixed with national, regional, or private funding. This can lead to a confusing legal situation. Member States may decide to apply one whistleblower regime to the national part of funding in accordance with existing national legislation (if any exists), whilst the EU whistleblowing regime would apply to only the EU part of the funding. Yet other Member States may consider the whistleblowing directive to apply to the entire funding (which, by the way, would not correspond to the present definition of the financial interests of the European Union).

The same remark would apply *mutatis mutandis* on the income side of the EU budget (customs duties, VAT), as national tax is often evaded at the same time as EU tax. In the area of indirect taxation, however, experience shows that information often comes from informants, rather than from whistleblowers. The

draft directive does not, however, provide any framework for the protection of informants – indeed it was not intended to do so, the legal framework for the protection of informants being the sole competence of the Member States. This means however that only a small proportion of "PIF" information providers would be protected on the income side of the EU budget.

## V. Conclusion

Whistleblowing legislation will remain a matter of striking a delicate balance between the rights and obligations of the whistleblower, the employer, and all persons concerned. Contrary to popular belief, such legislation does more than just ensure whistleblower protection, but also ensures that an adequate response is given in reaction to disclosures and that the above-mentioned delicate balance is scrupulously respected. As such, it is complex legislation, obviously touching on many areas of law: criminal, civil, labour, and sector-specific laws.

Whistleblowing is often discussed as an antidote to financial malpractice. There certainly is plenty to deal with, and the proposed directive represents a real advancement, with Single Market-related and finance-related sectors being well covered – including, *inter alia*: procurement, insurance, money laundering, protection of the EU's financial interest of the EU. At the same time, there is a wider range of problems in relation to which the potential of whistleblowing has yet to be fully explored or supported by EU legislation, as pointed out by the European Parliament. At their extreme, these problems concern life-and-death situations, affecting the greater population (when exposed to chemical or biological hazards) and vulnerable groups in society (for example, the sick and/or aged, as illustrated by the UK's Gosport tragedies). The present patchwork of legislative responses are only steps on the road to progress in this legal area.

Should the directive be adopted, the issues raised in this article could no doubt be resolved in time. It is in the nature of whistleblowing legislation that it evolves in practice, so we look forward to following the proposed directive's journey – and not just in relation to "PIF".

---

\* The information and views in this article are those of the author and do not reflect the official opinion of the European Commission.

1 F. Ost, «Le droit, objet de passions? I crave the law», *Académie Royale de Belgique*, see <[https://fr.wikipedia.org/wiki/Fran%C3%A7ois\\_Ost](https://fr.wikipedia.org/wiki/Fran%C3%A7ois_Ost)> accessed 20 November 2018.

2 The right to freedom of expression is enshrined in Art. 10 ECHR and also in Art. 11 CFR.

3 ECtHR, 21 July 2011, *Heinisch v Germany*, Appl. no. 28274/08; 12 February 2008, *Guja v. Moldova*, Appl. no. 14277/04; 18 December 2008,

**Dr. Simone White**

Legal Officer in the Legal Advice Unit of the European  
Anti-Fraud Office (OLAF)

*Zakharov v. Russia*, Appl. no. 14881/03; 26 February 2009, *Kudeshkina v. Russia* Appl. no. 29492/05; 19 January 2016, *Aurelian Oprea v. Romania*, Appl. no. 12138/08.

4 See (in no particular order) OECD, “Committing to Effective Whistle-blower Protection”, 2016, <<http://www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf>>; Transparency International, “International principles for whistleblower legislation, best practices for laws to protect whistleblowers and support whistleblowing in the public interest”, 2013, <[https://www.transparency.org/whatwedo/publication/international\\_principles\\_for\\_whistleblower\\_legislation](https://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation)> accessed 20 November 2018; Council of Europe “Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers”, <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c5ea5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5)>; ETUC, *Whistleblower-protection.eu* <<https://www.etuc.org/en/pressrelease/whistleblowerprotectioneu>> accessed 20 November 2018; Eurocadres – Council of European Professional and Managerial Staff, “Directive on whistleblower protection” <<https://www.eurocadres.eu/news/directive-on-whistleblower-protection/>>; European Court of Auditors (ECA), “Opinion No 4/2018 concerning the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law” <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=47282>>; G20 Anti-Corruption Action Plan – Protection of Whistleblowers (2011) “Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding principles for Legislation” <<https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>>, all links accessed 20 November 2018.

5 Blueprint for Free Speech, “Analysis of whistleblower protection laws, <<https://blueprintforreespeech.net/en/library-overviews/>>”, accessed 20 November 2018.

6 Express, “After scandal of Gosport ... time to act to protect whistleblowers” <<https://www.express.co.uk/news/uk/978707/gosport-hospital-scandal-jane-barton-nhs-should-protect-whistleblowers>> accessed 20 November 2018.

7 See, for example, International Bar Association – Legal Policy & Research Unit and Legal Practice Division “Whistleblower Protections: A Guide”, April 2018, available at: <<https://www.ibanet.org/Conferences/whistleblowing.aspx>>, accessed 20 November 2018, pp. 22–23: “An inquiry into the whistleblower’s motives in lodging the complaint is almost always irrelevant and detracts from the misconduct reported”.

8 See UK jurisprudence: *Parkins v Sodexho* [2002] IRLR 109; *Chesterton Global Limited and Another v Murmohamed* [UK EAT/U335/14]; *Underwood v Wincanton Plc* [UK EAT/0163/15].

9 Cf. 33 258 Voorstel van wet van de leden Van Raak, Heijnen, Schouw, Voortman, Segers en Ouwehand, houdende de oprichting van een Huis voor klokkenluiders (Wet Huis voor klokkenluiders), <<https://zoek.officielebekendmakingen.nl/kst-33258-6.html>>; Irish Department of Public Expenditure and Reform, *Statutory Review of the Protected Disclosures Act 2014*, 2018.

10 Loi n°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

11 European Parliament resolution of 14 February 2017 on the role of whistleblowers in the protection of EU’s financial interests, P8\_TA(2017)0022.

12 These include: France, Hungary, Ireland, Malta, The Netherlands, Portugal, Sweden, Slovakia and the UK. Other Member States are in the process of adopting horizontal legislation.

13 Ireland: Government Reform Unit – Department of Public Expenditure and Reform, “Protected Disclosures Bill 2013 – Regularly Impact Analysis”, July 2013, available at: <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiguL0oPLeAhW1AxAlHcl-DolQFjAAegQIABAC&url=https%3A%2F%2Fper.gov.ie%2Fwp-content%2Fuploads%2FProtected-Disclosures-Bill-2013-Regulatory-Impact-Assessment.pdf&usq=AOvVaw3G4S8R2M\\_z0ts-0X37mL\\_X](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiguL0oPLeAhW1AxAlHcl-DolQFjAAegQIABAC&url=https%3A%2F%2Fper.gov.ie%2Fwp-content%2Fuploads%2FProtected-Disclosures-Bill-2013-Regulatory-Impact-Assessment.pdf&usq=AOvVaw3G4S8R2M_z0ts-0X37mL_X)>, p. 10.

14 International Bar Association, *op. cit.* (n. 7), p. 18.

15 Cf. V. Abazi and A. Alemanno, “Whistleblower protection in the public and private sector in the European Union – A draft directive”, available at: <[https://www.greens-efa.eu/legacy/fileadmin/dam/Images/Transparency\\_campaign/WB\\_directive\\_draft\\_for\\_consultation\\_launch\\_May\\_2016.pdf](https://www.greens-efa.eu/legacy/fileadmin/dam/Images/Transparency_campaign/WB_directive_draft_for_consultation_launch_May_2016.pdf)> accessed 20 November 2018; see also T. Wahl, “Green Initiative Whistle-Blowers Directive”, (2016) *eucri*, 80.

16 European Parliament resolution of 24 October 2017 on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies, P8\_TA(2017)0402; see also T. Wahl, “EP Urges Commission to Draft EU Law on Protection of Whistle-Blowers”, (2017) *eucri*, 176.

17 Art. 28 of Regulation 1286/2014 on key information for packaged retail and insurance-based investment products (PRIIPs), *O.J. (2014) L 352/1*.

18 Art. 35 of Directive 2016/97 on insurance distribution, *O.J. (2016) L 26/19*.

19 Arts. 26 and 65 of Regulation 909/2014 on improving securities settlement in the EU and on central security depositories, *O.J. (2014) L 257/1*.

20 Art. 30 of Directive 2014/56 amending Directive 2006/43 on statutory audits of annual accounts and consolidated accounts, *O.J. (2014) L 158/196*.

21 Commission Implementing Directive 2015/2392 on Regulation 596/2014 as regards reporting to competent authorities of actual or potential infringements of that Regulation, *O.J. (2015) L 332/126*.

22 Arts. 37 and 38 of Directive 2015/849 on the prevention of use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation 648/2012 and repealing Directive 2005/60 and Commission Directive 2006/70, *O.J. (2015) L 141/73*.

23 Art. 71 of Directive 2013/36 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, *O.J. (2013) L 176/338*.

24 Art. 5 of Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, *O.J. (2016) L 157/1*.

25 See Art. 5 of Directive (EU) 2016/943, *ibid.*

26 European Commission, “Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law”, COM(2018) 218 final = 2018/0106(COD). See also T. Wahl, “Commission Proposes EU-Wide Rules on Whistleblowers’ Protection”, (2018) *eucri*, pp. 27–29.

27 Areas covered include: data protection, customs cooperation, the Common Agricultural Policy, the right of establishment, mutual recognition of qualifications, transport and transport safety, competition, state aid, health, safety, environmental protection and consumer protection, public health, the environment, and the common commercial policy of the EU.

28 Commission Staff Working Document, Impact Assessment, SWD(2018) 117 final.

29 *Ibid.*, p. 1 of the *Impact Assessment*.

30 *Ibid.*, pp. 30–31 of the *Impact Assessment*.

31 *Ibid.*, *Impact assessment*.

32 The Act is presently under review; see: Department of Public Expenditure and Reform, “Statutory Review of the Protected Disclosures Act 2014”, July 2018, <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwigutXlPvLeAhXvslsKHxwATMQfjAAegQIARAC&url=https%3A%2F%2Fwww.per.gov.ie%2Fwp->

[content%2Fuploads%2FStatutory-Review-of-the-Protected-Disclosures-Act-2014.pdf&usg=AOvVaw2V\\_Blu11sfkeGKlb-BU76n>](#) accessed 20 November 2018.

33 The draft directive does not, however, contain rules about the communication of reporting persons' identities to judicial authorities or courts; national provisions would therefore apply.

34 Art. 11 of the draft directive (Record-keeping of reports received), *op. cit.* (n. 26).

35 European Parliament, Committee on Budgetary Control, "Draft Opinion on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of law" rapporteur: *Dennis de Jong, 2018/0106 (COD) PE623.726v623.761*

36 ECA, Opinion No 4/2018, *op. cit.* (n. 4).

37 European Parliament resolution of 14 February 2017, *op. cit.* (n. 11), point 24.

38 *Ibid.*, point 19.

# État des lieux des programmes de protection des témoins et des collaborateurs de justice dans le domaine du crime organisé et du terrorisme

## Regard croisé du système pénal français à la lumière des instruments internationaux

David Chiappini

**Collaborators with justice and witnesses are the most important impact factors when combatting organized crime and terrorism, since they provide information on the goals of criminal groups, on criminal networks, and on planned or committed crimes. Protective measures can be applied to guarantee the personal safety of collaborators with justice as well as witnesses and their relatives both requiring protection. The efforts of European institutions aim to establish common criteria in this field (protection programmes, protection measures for witnesses and collaborators of justice, etc.). For a few years now, the necessity of European legislative instruments has been under discussion. The Council of Europe, whose active role on matter has been proven through their recent suggestions on the modernization of their work on witnesses' and collaborators' protection, has carefully studied this question. The French system has been influenced by different European instruments, whose resources were later used in France for its own protection programmes. The implementation of the law on such protection should be considered in the context of the numerous retaliation murders since 2012. After the Paris attack in November 2015, however, a new act to increase protection measures against terrorism was introduced, thus increasing the protection for witnesses. This article explores the legal framework on witness protection and protection for collaborators with justice in France.**

Grâce à leur coopération, les collaborateurs de justice et les témoins menacés jouent un rôle déterminant dans le démantèlement d'organisations criminelles. Afin d'encourager leur témoignage, certains Etats comme la France ont adopté des mesures procédurales et non procédurales spécifiques de protection à leur profit. Le développement de dispositif ad hoc de protection est devenu un enjeu prioritaire de politique pénale dans de nombreux pays. L'accroissement du crime organisé transnational aujourd'hui soulève la question de l'adaptation et de la pertinence de ces mécanismes dans une dimension internationale.

Le terme de collaborateur de justice, plus communément dénommé « repenti » en référence à la pratique italienne des pentiti,<sup>1</sup> désigne la personne qui, collaborant avec les autori-

tés administratives ou judiciaires, permet d'éviter une activité criminelle, d'en réduire les conséquences ou d'en identifier les auteurs et/ou les complices. En 2005, le Conseil de l'Europe a défini le collaborateur de justice comme

toute personne qui est poursuivie ou a été condamnée pour avoir participé à une association de malfaiteurs ou à toute autre organisation criminelle ou à des infractions relevant de la criminalité organisée, mais qui accepte de coopérer avec la justice pénale, en particulier en témoignant contre une association ou une organisation criminelle ou toute infraction en relation avec la criminalité organisée ou avec d'autres infractions graves.<sup>2</sup>

Le témoin est défini en droit pénal français comme la personne à l'encontre de laquelle il n'existe aucune raison plausible de soupçonner qu'elle a commis ou tenté de commettre une infraction. En cas de crimes ou délits punis d'au moins trois ans d'emprisonnement, la loi lui offre la possibilité de pouvoir

témoigner sans que son identité apparaisse dans le dossier de procédure, lorsque son audition est susceptible de mettre gravement en danger sa vie ou son intégrité physique, celles des membres de sa famille ou de ses proches. Le Conseil de l'Europe a une approche plus pragmatique de la notion de témoin en définissant ce dernier comme la

personne détenant des informations pertinentes pour une procédure pénale et/ou en mesure de les communiquer dans le cadre de celle-ci (quel que soit son statut et quelle que soit la forme du témoignage – directe ou indirecte, orale ou écrite – selon le droit national), qui n'est pas incluse dans la définition de « collaborateur de justice ».<sup>3</sup>

Les évolutions récentes de la criminalité ont conduit le législateur français à développer des moyens procéduraux adaptés en recourant notamment au dispositif des collaborateurs de justice dans certaines catégories d'infractions graves spécialement déterminées telles que l'association de malfaiteurs, le proxénétisme, la traite des êtres humains, le trafic de stupéfiants ou encore le terrorisme. De manière générale, le processus de collaboration se fonde essentiellement sur une « négociation » du quantum de la sanction encourue à travers l'octroi de réduction ou d'exemption de peines dans les cas prévues par la loi. En ces domaines, il est néanmoins apparu primordial, autant pour l'agent infracteur que pour le témoin qui collaborent activement avec les autorités administratives et judiciaires de pouvoir bénéficier de la mise en œuvre de programmes spécifiques de protection compte tenu des risques importants de représailles. Pendant longtemps, l'absence de mécanismes institutionnels de « protection renforcée » en droit français suscitait les réticences d'éventuels prétendants à s'engager dans la voie de la collaboration procédurale.

À la différence d'autres modèles étrangers, plus familiers de ces pratiques à l'instar des Etats-Unis ou de l'Italie, le système français a toujours été considéré en net recul en matière de législation spéciale sur la protection des collaborateurs de justice et des témoins menacés. Pour ces derniers, seules quelques mesures procédurales<sup>4</sup> étaient prévues par le législateur pour assurer leur protection dans les affaires criminelles les plus sensibles. La loi n°2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité<sup>5</sup> dite « Perben II » instaure officiellement la possibilité de recourir à un programme spécial de protection afin d'assurer la sécurité et la réinsertion des « repentis » juridiquement reconnus par la loi.<sup>6</sup> Cependant, il incombait au pouvoir exécutif le soin de fixer les conditions d'application pour rendre opérationnel le présent dispositif. En l'absence de parution du décret d'application et de sources de financement, le système de protection restait en pratique lettre morte. Le problème de la mise en place effective d'un dispositif de protection ad hoc ressurgit en France dans un contexte de recrudescence des réglemens de compte sur son territoire<sup>7</sup> entre 2011 et 2013.

Après dix ans de silence depuis la reconnaissance officielle « des repentis à la française », le gouvernement Ayrault signe le 17 mars 2014 le décret d'application<sup>8</sup> du volet protection qui jusque-là n'existait pas en droit français. Toutefois, les témoins restaient exclus du champ d'application de ces mesures spéciales de protection renforcées. Les attentats meurtriers perpétrés à Paris et Saint-Denis le 13 novembre 2015 ont mis en lumière certaines limites du système de protection applicables aux témoins. Le législateur français en tire les conséquences et procède à un alignement du régime sur celui des témoins gravement menacés en adoptant l'article 22 de la loi n°2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et son financement. Les modalités de mise en œuvre du régime de protection des témoins menacés sont aujourd'hui prévues et unifiées par décret modificatif n°2016-1674 paru le 6 décembre 2016.

S'il incombe, tout d'abord, aux systèmes nationaux de résoudre la plupart des questions relevant de la protection des témoins et des « repentis », l'analyse de la situation et notamment française démontre l'existence d'une dimension européenne et internationale non négligeable sur laquelle il convient de se pencher plus en détail. En effet, de nombreux travaux<sup>9</sup> ont été préalablement engagés par les différentes institutions chargées de proposer « des solutions dotées d'une valeur ajoutée »<sup>10</sup> avant de déboucher sur l'adoption de textes normatifs non contraignants (I). Sensibilisé, le législateur français s'est résolu à exploiter le présent dispositif de la collaboration-protection dans son arsenal juridique (II).

## **I. Le rôle moteur des institutions européennes et internationales dans la construction d'une législation harmonisée en matière de protection des témoins et des collaborateurs de justice**

Les différentes institutions européennes et internationales se sont, chacune à leur niveau, emparées de la question des systèmes de protection élaborés pour les témoins et les collaborateurs de justice dans le cadre de la lutte contre le crime organisé et le terrorisme.

Dès les années 90, le Conseil de l'Union européenne a convié les Etats membres à réfléchir à l'instauration de dispositifs spéciaux de protection dans leurs propres législations internes. Ces objectifs prioritaires se sont matérialisés, tout d'abord, par l'adoption le 7 décembre 1995 d'une résolution relative à la protection des témoins, entendue au sens large, dans le cadre de la lutte contre la criminalité organisée internationale. Une autre résolution relative aux collaborateurs à l'action de la justice dans le cadre la lutte contre la criminalité organisée sera adoptée le 20 décembre 1996. Enfin, le Conseil a préco-



nisé dans son programme d'action stratégique en matière de prévention et lutte contre la criminalité organisée adopté le 3 mai 2000<sup>11</sup> la nécessité d'élaborer un instrument qui contienne des mesures de protection des témoins et des collaborateurs de justice ainsi que la possibilité d'accorder à ces derniers des remises de peine. À l'échelle internationale, il convient de noter que la Convention des Nations Unies contre la criminalité transnationale organisée (UNTOC) du 15 décembre 2000 comporte des dispositions spécifiques relatives à la protection des témoins et des victimes,<sup>12</sup> ainsi que des mesures propres à renforcer la coopération des suspects et des co-prévenus avec les autorités judiciaires.<sup>13</sup>

Force de propositions, le Conseil de l'Europe<sup>14</sup> s'est également employé à promouvoir la protection des témoins et des collaborateurs de justice au sein de ses Etats membres. Ce thème d'actualité est de nouveau débattu depuis 2014.

## 1. Les apports du Conseil de l'Europe

Actif depuis de nombreuses années dans le domaine de la protection des témoins et des collaborateurs de justice, le Conseil de l'Europe s'est saisi avec une attention particulière de cette problématique, considérée comme l'un des cinq domaines prioritaires de son champ d'action. En effet, ce dernier a joué un rôle pivot à travers ses travaux dont le Livre blanc sur le crime organisé transnational, approuvé par le Comité européen des problèmes criminels (CDPC), retrace de façon détaillée la mise en œuvre des programmes de protection des témoins, de la collaboration des co-accusés et des mesures d'incitation à la coopération.

Plusieurs actes normatifs ont été adoptés au premier rang desquels figurent la recommandation Rec(1997)13 du 10 septembre 1997 sur l'intimidation des témoins et les droits de la défense qui aborde les différentes situations dans lesquelles les témoins peuvent prétendre à une protection. Plus tard, la Recommandation Rec(2001)11 du 19 septembre 2001 concernant des principes directeurs pour la lutte contre le crime organisé préconise que la protection des témoins se fasse à tous les niveaux de la procédure pénale (avant, pendant et après le procès). Cependant, de nombreuses insuffisances restaient encore à déplorer et le cadre initial loin d'être satisfaisant. Le 20 avril 2005, de nouvelles études davantage ciblées ont abouti à l'élaboration de la recommandation Rec 2005(9) relative à la protection des témoins et des collaborateurs de justice, instrument juridique dont le contenu est plus cohérent et mieux structuré. Elle vise expressément à ce que des témoins ou collaborateurs de justice exposés au même genre d'intimidation puissent bénéficier d'une protection similaire. Sur le fond, cette importante recommandation pose immanquable-

ment les jalons d'une véritable législation européenne dans le domaine de la protection des témoins et des collaborateurs de justice. Celle-ci s'inscrit dans la continuité des réflexions déjà amorcées courant 2003 en matière de terrorisme par le Comité d'experts sur le fonctionnement des conventions européennes dans le domaine pénal (PC-OC) dans le cadre de l'article 23<sup>15</sup> du second protocole additionnel à la Convention européenne d'entraide judiciaire en matière pénale.

Ces travaux d'ampleurs parachèveront ces efforts de construction, entamés quelques années plus tôt, dans l'instauration de mesures concrètes dédiées à la protection des témoins et des personnes qui participent ou ont participé à des organisations criminelles. En effet, l'objectif assigné de la recommandation Rec(2005)9 est de garantir que les témoins et les collaborateurs de justice puissent témoigner librement sans faire l'objet d'actes de représailles ou d'intimidation. Malgré l'importance de cet instrument dans le cadre de la lutte contre les formes modernes de criminalité et de terrorisme, un premier constat en demi-teinte est dressé sur l'effectivité de la recommandation. Les témoins restent menacés et le plus souvent réticents à coopérer, ce qui illustre les difficultés rencontrées dans la pratique en contrariété avec les axes directeurs de la recommandation.

## 2. Vers une révision de la recommandation Rec 2005(9)

Dans l'optique de remédier les différents points d'achoppement, le Conseil de l'Europe se penche actuellement sur les nécessités d'une éventuelle actualisation de la recommandation Rec 2005 (9) du Conseil des ministres adoptée le 20 avril 2005. Ce choix de révision<sup>16</sup> démontre un regain d'intérêt de la thématique à l'échelle européenne, laquelle s'inscrit plus globalement dans le cadre du Plan d'Action sur le Crime Organisé Transnational pour la période 2016–2020. Le projet de révision actuellement en cours de discussion<sup>17</sup> a pour objectif de combler les lacunes relevées dans le domaine de la protection des témoins et des collaborateurs de justice. L'objectif recherché est de répondre aux imperfections qui ont pu être mises en exergue à ce sujet, notamment de comprendre pourquoi les instruments existants à l'heure actuelle ne sont pas correctement mis en œuvre.

En définitive, la démarche du Conseil de l'Europe s'oriente vers le perfectionnement du cadre juridique pour la coopération internationale en matière de protection des témoins et des collaborateurs de justice, tout en élargissant le champ d'application de la Recommandation sur la base des nouvelles expériences et informations acquises depuis son adoption en 2005<sup>18</sup>. En effet, il convient nécessairement de prendre en compte les

évolutions législatives récentes<sup>19</sup> intervenues dans chaque Etat membre à l'instar du modèle français qui connaît un important bouleversement de sa législation ayant trait à la protection des témoins et des collaborateurs de justice.

## II. L'émergence d'une pratique française de protection des témoins et des collaborateurs de justice

Le système français s'est doté tardivement d'un modèle ad hoc de protection au bénéfice de personnes qui collaborent avec les autorités. Longuement attendus, les décrets d'application apportent désormais des précisions sur la composition, le fonctionnement et la saisine de la Commission nationale de protection et réinsertion (ci-après CNPR) dont le rôle est de définir les mesures de protection et de réinsertion destinées aux repentis et aux témoins menacés.<sup>20</sup>

En France, la CNPR, clef de voûte du dispositif, est chargée de garantir l'application homogène et cohérente de la protection des collaborateurs de justice et des témoins. Placée sous la tutelle du ministère de l'intérieur, cette commission administrative, présidée par un magistrat hors hiérarchie, comprend des personnalités issues d'horizons divers du monde de la sécurité et de la justice.<sup>21</sup> Parmi ses attributions, la Commission peut décider de toutes mesures proportionnées qu'elle définit au regard de la nature du dossier, de la portée des déclarations des personnes bénéficiaires et de la gravité des risques encourus par celles-ci (notamment de protection physique et de domiciliation). Elle peut également définir des mesures de réinsertion eu égard à la situation matérielle et sociale de la personne, de sa famille et de ses proches (mise en place d'un soutien psychologique, formation, etc.). L'opportunité des mesures est examinée à la lumière de nombreux paramètres laissés à la discrétion de la Commission.

Par ailleurs, elle dispose de la possibilité de recourir à la procédure relative à l'identité d'emprunt.<sup>22</sup> Si cela s'avère indispensable, le président de la Commission devra saisir à cette fin, le président du tribunal de grande instance de Paris, exclusivement compétent en la matière pour autoriser par ordonnance motivée une telle mesure, lequel aura préalablement sollicité les réquisitions du procureur de la République. En effet, le magistrat du parquet, gardien de l'état civil au regard de l'article 53 du code civil français, est le seul à être en mesure de communiquer l'ensemble des éléments permettant d'apprécier le caractère impérieux de l'autorisation sollicitée.<sup>23</sup> Enfin, le retrait de l'autorisation peut être prononcé lorsque cette mesure n'apparaît plus nécessaire ou si la personne qui en bénéficie adopte un comportement incompatible avec la mise en œuvre ou le bon déroulement de cette mesure.

Le Bureau de la protection des repentis du service interministériel d'assistance technique (ci-après SIAT), rattaché à la Direction centrale de la police judiciaire, joue un rôle primordial dans la mise en œuvre des programmes de protection. Interlocuteur direct de la CNPR et de son président, le secrétariat permanent de ce service spécialisé est chargé de présenter les dossiers des différentes personnes pouvant bénéficier de la procédure spéciale de protection et se voit confier l'instruction des demandes d'identité d'emprunt.

La confidentialité des différentes mesures de protection-réinsertion et d'identité d'emprunt élaborées sous le contrôle effectif de la CNPR et dont la mise en œuvre matérielle incombe au SIAT doit être intégralement assurée à tous les stades de la procédure. Il s'agit ici d'une exigence fondamentale du dispositif et la garantie de son bon fonctionnement dont le non-respect est pénalement sanctionné. En effet, la divulgation de l'identité réelle d'un collaborateur de justice, d'un témoin protégé ou de leurs conjoints, enfants ou ascendants directs peuvent leur être gravement préjudiciables (dommage, infirmité) ou avoir des conséquences irréversibles (la mort). C'est pourquoi, le législateur a érigé en infraction pénale la révélation d'identité en réprimant quiconque se rendrait coupable de ce délit à des peines de cinq à dix ans d'emprisonnement et de 75 000 à 150 000 euros d'amende selon les cas d'aggravations. Plus récemment, la loi n°2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme a étendu le périmètre de protection des collaborateurs de justice. Cette nouvelle loi vient incriminer, non plus seulement la révélation de l'identité d'emprunt de ces personnes, mais également tout élément permettant son identification ou sa localisation. Enfin, autre évolution notable, il est également prévu de garantir la sécurité de ces personnes lorsqu'elles comparaissent devant une juridiction de jugement en permettant soit d'ordonner le huis clos lorsque cette comparution est de nature à mettre gravement en danger leur vie ou leur intégrité physique ou celle de leurs proches, soit de recourir à l'utilisation d'un dispositif technique permettant leur audition à distance ou de rendre leur voix non identifiable.

## III. Conclusion

La gestion processuelle des programmes de protection en France reste encore à l'état embryonnaire sans que l'on puisse tirer à ce jour de réel bilan sur l'efficacité de ces mesures dans le paysage juridique français. Les moyens de financement restent encore timides et très insuffisants,<sup>24</sup> à l'inverse d'autres pays qui investissent des crédits conséquents dans les programmes dédiés à la protection des témoins et des collaborateurs de justice. Partant d'une bonne intention, le système

français tel qu'il est conçu n'est pour autant pas à la hauteur de ses ambitions. En effet, celui-ci reste marginalisé sur le plan de la volonté politique et demeure très difficile à mettre en œuvre d'un point de vue procédurale. Sans compter que structurellement, le mécanisme actuel demeure lacunaire à plusieurs titres s'agissant notamment de la rédaction parfois confuses des textes ou encore de la restriction du champ d'application législatif du dispositif où certaines infractions particulièrement graves sont exclues. À ces critiques de fond, il faut également souligner l'absence d'encrage culturel d'une criminalité mafieuse en France qui vient relativiser la portée du recours au dispositif des repentis, à l'exception de la Corse,<sup>25</sup> véritable laboratoire test qui justifie pour partie l'expérimentation du statut. En tout état de cause, seules les prochaines années per-

mettront plus précisément de connaître les tenants et les aboutissants des problèmes soulevés en la matière dont la pratique commence seulement à se développer.<sup>26</sup>

Au-delà, les pistes de travail doivent être renforcées au plan européen autant que les difficultés posées de l'adoption d'un instrument législatif contraignant doivent être dépassées. Il est impératif aujourd'hui pour les Etats membres de poursuivre les efforts entrepris d'une mutualisation des mécanismes de récompenses et des mesures de protection ainsi que de renforcer le volet de la coopération transfrontalière. Il s'agit là de l'assurance d'un meilleur développement de cet outil novateur dont l'objectif commun est la lutte contre la criminalité organisée et le terrorisme.

1 C. Ducouloux-Favard, « Réflexion sur les repentis et les collaborateurs de justice au regard du droit italien », *Gaz. Pal.*, n°183, 2003, p. 1. ; G-C. Caselli, « Les repentis de la mafia », *LPA*, 26 février 1999, p. 33.

2 REC(2005)9 du Conseil des ministres adoptée le 20 avril 2005.

3 *Op. cit.* (n. 2).

4 Jusqu'en 2016, le code de procédure pénale français connaissait seulement un dispositif de protection des témoins à deux niveaux à savoir la domiciliation du témoin dans une brigade de gendarmerie ou un commissariat de police (art. 706-57) et le témoignage anonyme (art. 706-58). Aujourd'hui, un troisième niveau de protection est prévu (art 706-62-2).

5 B. De Lamy, « La loi du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité (crime organisé – efficacité et diversification de la réponse pénale) », *D.* 2004, p.1910.

6 Art.132-78 du Code pénal français et Art. 706-63-1 du Code de procédure pénale français.

7 « Le statut de repenti sera bientôt effectif », *Journal Le Monde*, 14 septembre 2013.

8 Décret n°2014-346 du 17 mars 2014 relatif à la protection des personnes mentionnées à l'article 706-63-1 du code de procédure pénale bénéficiant d'exemptions ou de réductions de peines.

9 G. Vermeulen « EU standards in witness protection and collaboration with justice », *IRCP*, 2005

10 Document de travail de la Commission « sur la faisabilité d'un instrument législatif européen dans le domaine de la protection des témoins et des collaborateurs de justice », 13 novembre 2007, COM(2007) 693.

11 Recommandation n°25 du Document intitulé « Prévention et contrôle de la criminalité organisée : une stratégie de l'Union européenne pour le prochain millénaire », *JOCE C 124* du 3 mai 2000, p.1.

12 Art. 24 et 25 de la convention UNTOC.

13 Art. 26 de la convention UNTOC.

14 Selon Marie-Aude BEERNAERT, le Conseil de l'Europe « n'a, certes, jamais expressément recommandé de recourir aux collaborateurs de justice mais il a, par contre insisté à plusieurs reprises sur la nécessité d'organiser à leur profit des mesures de protection effectives et appropriées », in M.-A. BEERNAERT, *Repentis et collaborateurs de justice dans le système pénal : analyse comparée et critique*, Bruxelles, Bruylant, 2002, p. 5.

15 « Lorsqu'une Partie fait une demande d'entraide en vertu de la Convention ou de l'un de ses Protocoles concernant un témoin qui risque d'être exposé à une intimidation ou qui a besoin de protection, les autorités compétentes de la Partie requérante et celles de la Partie requise font de leur mieux pour convenir des mesures visant la protection de la personne concernée, en conformité avec leur droit national ».

16 L'annonce de ce projet de révision de la recommandation par un collègue d'experts a été remise à l'ordre du jour à l'occasion de la 72ème

### David Chiappini

Doctorant à l'Université Paris Nanterre, Centre de droit pénal et de criminologie.



session plénière des 29–31 mars 2017. Les premiers résultats ont donné lieu à la publication le 8 novembre 2017 d'un rapport d'évaluation provisoire, <https://rm.coe.int/assessment-of-the-answers-to-the-questionnaire-review-of-the-recommend/1680764f16>.

17 Le Comité européen pour les problèmes criminels (CDPC) a tenu à Strasbourg sa réunion plénière du 28 Novembre au 1er Décembre 2017, qui a conduit ultérieurement à la production d'un rapport sommaire en mai 2018 lors de la première réunion du groupe de travail et de rédaction chargé de la révision de la recommandation.

18 CDPC (2016)18 – Révision de la recommandation REC(2015) 9 – document préparé par Lorena Bachmaier Winter, <https://rm.coe.int/168070d2cd>.

19 Sur la base d'un questionnaire détaillé adressé aux différents États membres afin d'obtenir des informations sur les cadres de protection des témoins et des repentis.

20 C. Sorita-Minard, « Le nouveau dispositif français de protection des repentis », *Revue GRASCO*, Sept. 2014, p.39.

21 Composition de la Commission modifiée depuis le décret n°2016-1674 du 5 décembre 2016

22 Articles 18 à 25 du décret, *op. cit.* (n. 7).

23 Circulaire CRIM 2004-13 GI / 02-09-2004 présentant les dispositions relatives à la criminalité organisée de la loi n°2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité, *BOMJ*, n°95 (1er juillet – 30 septembre 2004).

24 Un financement à hauteur de 450 000 euros annuel financé par l'Agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC).

25 « Patrick Giovannoni, premier repenti, devant les assises », *Journal Le Monde*, 20 février 2018, p. 10. ; « Le repenti Giovannoni jugé à huis clos », *Journal Le Monde*, 21 février 2018, p. 12.

26 On dénombre un peu moins de dix repentis éligibles en France aux programmes de protection depuis l'instauration de la CNPR en mars 2014.

# La confiance mutuelle sous pression dans le cadre du transfert de personnes condamnées au sein de l'Union Européenne

Dr. Tony Marguery\*

This article discusses the limits on mutual trust in the context of transfer of sentenced persons following the CJEU's *Aranyosi and Căldăraru* judgment. It summarizes the main findings of a recent legal and empirical analysis of mutual recognition cases conducted in five EU Member States: Italy, the Netherlands, Sweden, Romania, and Poland. The research conducted contends that the presumption of mutual trust existing between the EU Member States is a legal fiction. In the context of transfer of a custodial sentence from one country to another based on mutual recognition and mutual trust, failure of the latter can have very negative effects on judicial cooperation and, consequently, on the fight against crime. Non-compliance with individuals' fundamental rights can undermine the very essence of judicial cooperation and, with it, the European project. Such failure can only be prevented if the EU endeavours to establish and maintain a truly integrated penal policy – with concern for individuals at its very core – and if the Member States accept and abide by the common European values.

## I. Introduction

Au sein de l'Union Européenne (UE) et, en particulier, dans les domaines de compétence de l'Espace de Liberté, de Sécurité et de Justice (ELSJ),<sup>1</sup> les relations entre États membres sont basées sur l'existence d'une confiance mutuelle. Cette confiance existe car tous les États membres sont censés partager un ensemble de valeurs énumérées à l'article 2 du Traité sur l'Union Européenne (TUE) de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, y compris des droits des personnes appartenant à des minorités.<sup>2</sup> Le respect pour les droits de l'homme, plus particulièrement, est censé être équivalent dans toute l'Union en raison de la Charte des Droits Fondamentaux de l'Union Européenne (la Charte) qui a force obligatoire pour tous les États membres dès lors qu'ils agissent dans le cadre du droit de l'Union et, dans les autres cas,<sup>3</sup> de la Convention Européenne de sauvegarde des Droits de l'Homme (CEDH) à laquelle tous les États membres sont partis.

Toutefois, l'équivalence dans le respect des droits de l'homme existe peut-être sur le papier, mais il en va tout autre en pratique. D'une manière générale, ainsi que le rappelle le Préambule de la Charte, l'Union place la personne au cœur de son action en instituant la citoyenneté de l'Union et en créant un espace de liberté, de sécurité et de justice. Il est donc de la nature même de l'Union que l'intérêt de l'individu soit concrète-

ment et adéquatement protégé lors de la mise en œuvre, par les États membres des politiques Européennes en matière de lutte contre le crime et de protection des droits fondamentaux. C'est en gardant cet objectif présent à l'esprit qu'a été entreprise la recherche dont les résultats furent publiés en janvier 2018 sous le titre « Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU. Transfer of Judgments of Conviction in the European Union and the Respect for Individual's Fundamental Rights ».<sup>4</sup> Cette recherche, cofinancée par la Commission Européenne, a été conduite sous l'égide de l'Université d'Utrecht dans cinq pays membres de l'UE, à savoir l'Italie, la Pologne, la Roumanie, la Suède et les Pays-Bas.<sup>5</sup> Son objectif était, dans ces cinq pays, d'analyser les conséquences concrètes de la jurisprudence *Aranyosi* et *Căldăraru* et, plus généralement, du respect des droits fondamentaux de l'individu dans le cadre des opérations de transfert de prisonniers en application du principe de reconnaissance mutuelle.

Ce court article a pour but de faire état de certains résultats obtenus au terme de cette recherche. A cette fin, il sera nécessaire, premièrement, de rappeler le champ d'application du principe de confiance mutuelle dans le cadre du transfert de prisonniers au sein de l'Union ; puis, dans un second temps, de résumer les principaux résultats de la recherches entreprises. Finalement, la conclusion s'aventurera sur de possibles pistes de réflexion pour répondre à la crise de confiance que traverse actuellement la coopération pénale, voire la construction européenne dans son ensemble.

## II. Conditions de détention et confiance mutuelle

Dans le domaine pénal, la confiance mutuelle est nécessaire afin de faciliter la libre circulation des décisions judiciaires et de compenser l'absence de frontières et la liberté de circulation des personnes dans l'Union. Elle a permis la mise en œuvre du principe de reconnaissance mutuelle qui régit la coopération pénale et la lutte contre le crime.<sup>6</sup> Ce dernier principe oblige les autorités d'un État membre (autorité d'exécution), qui reçoivent une décision judiciaire prise par les autorités d'un autre État membre (autorité d'émission), à reconnaître cette décision et à l'exécuter. En sus de la Charte, un ensemble de garanties procédurales fondamentales ont été imposées aux États membres pour assurer le bon fonctionnement de la reconnaissance mutuelle.<sup>7</sup> Si d'aventure il existait un doute quant à la conformité de cette décision avec les droits fondamentaux de l'individu qu'elle affecte, celui-ci devrait se retourner contre les autorités d'émission de la décision. Les seules exceptions au principe qui permettent un contrôle de la décision étrangère par l'autorité d'exécution sont restrictivement énumérées et doivent être interprétées de manière stricte.<sup>8</sup> Autrement dit, les autorités d'exécution du pays A qui reçoivent une décision prise par le pays B ont une obligation, au sens du droit de l'Union, de considérer cette décision comme un 'produit' de fabrique quasi nationale.

Ainsi, il est interdit aux autorités d'exécution, non seulement de vérifier si l'autre État membre, sauf dans des cas exceptionnels,<sup>9</sup> a effectivement respecté, dans un cas concret, les droits fondamentaux de l'UE, mais encore, lorsqu'un contrôle est autorisé, d'exiger de cet État un niveau de protection national des droits fondamentaux plus élevé que celui de l'UE.<sup>10</sup> Il va sans dire que la confiance mutuelle pèse particulièrement lourd sur les épaules des juges nationaux qui peuvent se sentir relégués à l'état de simple «juge enregistreurs» – contrôleurs de la forme des décisions sans pouvoir de contrôle sur le fond. Le poids est d'autant plus lourd à porter que la reconnaissance mutuelle peut avoir pour conséquence le transfert d'une personne vers un autre État où elle sera détenue dans des conditions contraires à l'interdiction de la torture protégée par l'article 4 de la Charte correspondant à l'article 3 de la CEDH.

Compte tenu du caractère absolu de ce droit et du lien privilégié qu'il entretient avec le droit à la dignité humaine, la Cour de Justice de l'Union Européenne (CJUE) a autorisé un renversement de la présomption de confiance mutuelle lorsqu'il existe un risque réel de violation de l'article 4 de la Charte. En particulier, le 5 avril 2016, dans les affaires jointes Pál Aranyosi et Robert Căldăraru, la CJUE a rendu une décision capitale pour l'avenir de la coopération judiciaire en matière pénale dans l'Union Européenne.<sup>11</sup> Étendant sa jurisprudence en matière d'asile<sup>12</sup> au domaine pénal, et plus particulièrement, à celui

du mandat d'arrêt Européen (MAE), la CJUE a décidé qu'une autorité judiciaire chargée de l'exécution d'un tel mandat ne pouvait pas remettre vers un autre État membre une personne suspectée de la commission d'une infraction pénale, ou déjà condamnée à une peine d'emprisonnement, sans être certaine que cette remise ne conduirait pas à un traitement inhumain ou dégradant de cette personne au sens de l'article 4.<sup>13</sup> La décision prise dans les affaires Aranyosi et Căldăraru permet au juge de l'exécution de retarder le transfert de la personne requise tant qu'il n'a pas de certitude que cette personne sera détenue dans une prison conforme aux exigences minimums de dignité humaine.

Le contrôle se fait en deux étapes : Premièrement, le juge doit être en possession « d'éléments objectifs, fiables, précis et dûment actualisés sur les conditions de détention qui prévalent dans l'État membre d'émission et démontrant la réalité de défaillances soit systémiques ou généralisées, soit touchant certains groupes de personnes, soit encore certains centres de détention ». <sup>14</sup> En second lieu, il doit apprécier « de manière concrète et précise, s'il existe des motifs sérieux et avérés de croire que la personne concernée courra ce risque en raison des conditions de sa détention envisagées dans l'État membre d'émission ». <sup>15</sup> Afin d'écartier tout doute, il lui est demandé de s'informer auprès des autorités d'émission sur le lieu et les conditions précises de détention prévues pour la personne requise. <sup>16</sup> De manière ultime, si ce juge n'obtient pas cette certitude dans un délai raisonnable, il lui est permis de mettre fin à la procédure de remise du MAE. <sup>17</sup>

Cette décision était attendue dans la mesure où contrairement à ce qu'une lecture « sur papier » du principe de confiance mutuelle laisse suggérer, le respect des droits fondamentaux au sein de l'UE n'est, en pratique, certainement pas parfait. Nombreux sont les pays où les prisons souffrent de défaillances systématiques contraires aux droits de l'homme et dénoncées régulièrement par les organes du Conseil de l'Europe<sup>18</sup> ou les jugements pilotes de la Cour Européenne des Droits de l'Homme (la Cour Européenne).<sup>19</sup> Le jugement Aranyosi et Căldăraru a apaisé certains doutes des autorités d'exécution en ce qui concerne le respect futur du droit à ne pas souffrir d'un traitement dégradant.

Mais qu'en est-il, par exemple, des situations où le juge s'inquiète de la validité même de la décision étrangère au regard du droit à un procès équitable ? Doit-il accepter toute décision au nom de la confiance mutuelle même lorsque le procès qui l'a précédé semble entaché de violations graves de ce droit ? Qu'en est-il du droit au respect de la vie privée auquel la décision de transfert peut sérieusement porter atteinte ? Par ailleurs, quelle sont les conséquences pratiques d'un renversement du principe de confiance mutuelle sur l'obligation de

transmettre un jugement de condamnation pénale, voire une personne condamnée, dans le cadre d'autres procédures que le MAE ? Ainsi comment le respect des droits fondamentaux influence-t-il la mise en œuvre de la Décision Cadre 2008/909 concernant l'application du principe de reconnaissance mutuelle aux jugements en matière pénale prononçant des peines ou des mesures privatives de liberté aux fins de leur exécution ou la Décision Cadre 2008/947 concernant l'application du principe de reconnaissance mutuelle aux jugements et aux décisions de probation aux fins de la surveillance des mesures de probation et des peines de substitution ?<sup>20</sup>

### III. De l'impact pratique de la jurisprudence Aranyosi et Căldăraru en Italie, Pologne, Roumanie, Suède et aux Pays-Bas

#### 1. Le cadre de la recherche

C'est dans le but de répondre à ces questions, que la recherche précitée dans l'introduction a été mise en place afin non seulement de faire une analyse légale de la mise en œuvre du MAE, des décisions-cadres 2008/909 et 2008/947 et de la politique de respect des droits de l'homme incarnée par la Charte et les directives procédurales adoptées en matière pénale, mais surtout de procéder à une analyse « sur le terrain » de la mise en œuvre de ces politiques et de l'influence du principe de confiance mutuelle sur l'obligation de reconnaissance mutuelle. En particulier, les conséquences pratiques de la jurisprudence *Aranyosi et Căldăraru* ont été analysées. Ainsi, des entretiens avec des juges, procureurs, avocats, détenus et organisations non gouvernementales ont été menés, analysés et transcrits par des criminologues.

Le cadre théorique établi pour la recherche s'est concentré sur trois droits fondamentaux, à savoir :

- Le respect du droit à un procès équitable tel que protégé par l'article 6 de la CEDH, les articles 47 et 48 de la Charte et les directives 2010/64, 2012/13 et 2013/48 ;
- Le droit au respect à la vie familiale tel que garanti par l'article 8 de la CEDH et 7 de la Charte et,
- Le respect des articles 3 de la CEDH et 4 de la Charte sur l'interdiction de la torture et des traitements inhumains ou dégradants.

L'influence du respect de ces droits fondamentaux a été analysée de manière chronologique aux trois étapes du processus de reconnaissance mutuelle. En premier lieu, la question était posée de savoir si une possible violation dans le passé affectant un jugement de condamnation devant être reconnu avait une influence sur la décision de reconnaître ce jugement (violations passées). En second lieu, les garanties procédurales fon-

damentales encadrant la mise en œuvre de la reconnaissance mutuelle sont-elles suffisantes pour renforcer la confiance mutuelle ou bien la reconnaissance mutuelle souffre-t-elle d'insuffisances procédurales limitant ou empêchant son bon fonctionnement (violations présentes) ? En dernier lieu, la décision adoptée par la CJUE dans les affaires *Aranyosi et Căldăraru* est-elle de nature à apaiser de manière suffisante les craintes des autorités nationales compétentes vis-à-vis du risque de violation future des droits fondamentaux dans un État membre voisin (violations futures) ?

#### 2. Les principaux résultats de la recherche

Les résultats de la recherche ont mis à jour, que d'une manière générale, le principe de confiance mutuelle dans le cadre du transfert de personnes condamnées à la prison ou de jugements de condamnation autres qu'à des peines de prison est accepté dans la législation et/ou jurisprudence nationale. La violation passée du droit à un procès équitable ne semble pas poser de problèmes majeurs. En particulier, l'harmonisation du principe *ne bis in idem* et des droits de la défense dans le cadre de procès par contumace offrent suffisamment de garanties aux praticiens nationaux quant au respect de ces droits.<sup>21</sup> En revanche, certains États membres, tels que les Pays-Bas<sup>22</sup> s'interrogent sur l'application au MAE de la jurisprudence de la Cour Européenne en matière de déni de justice flagrant. Cette jurisprudence interdit à un État de procéder à l'extradition d'une personne lorsque le procès qui a abouti au jugement est vicié par un déni de justice flagrant du droit à un procès équitable ou de la prohibition de la torture.<sup>23</sup> Quant à elles, les violations (présentes) possibles du droit à un procès équitable dans le cours de la procédure de reconnaissance ne semblent pas affecter la décision de reconnaissance. Les autorités compétentes étant confiantes que de telles violations seront réparées dans le pays d'origine de la décision.

Il n'en demeure pas moins que certaines tensions perdurent en pratique en ce qui concerne le risque de violation future des droits fondamentaux de la personne affectée par la reconnaissance mutuelle. C'est essentiellement le respect des articles 3 de la CEDH et 4 de la Charte et le champ d'application de la jurisprudence *Aranyosi et Căldăraru* qui posent problèmes. Deux types de problèmes sont mis en avant : d'un côté, il existe des divergences importantes dans la mise en œuvre de cette jurisprudence entre les États membres et, plus généralement, de celle du principe de confiance mutuelle et, d'un autre côté, le régime de la confiance mutuelle reste flou dans le cadre des décisions-cadres 2008/909 et 2008/947.

En ce qui concerne le premier type de problème, il doit tout d'abord être fait état du manque de clarté concernant la

charge de la preuve des conditions de détention au premier stade du contrôle dans l'application de la jurisprudence Aranyosi et Căldăraru. Dans la plupart des cas, c'est à la défense d'apporter cette preuve, mais en l'absence de critères précis et de réseau officiel transnational entre conseils, il existe des divergences dues aux différences socio-économiques entre les personnes concernées. Les problèmes sont plus marqués en ce qui concerne la deuxième étape du contrôle de la jurisprudence Aranyosi et Căldăraru. L'échange d'informations entre autorités judiciaires se révèle parfois difficile soit en raison de la barrière linguistique, soit en raison de l'important pouvoir discrétionnaire accordé aux autorités d'exécution pour poser des questions aux autorités d'émission. L'étendue et la nature du contrôle ainsi exercé s'illustrent parfois par des questionnaires très longs et détaillés. Par exemple, en Italie, il n'est pas rare que les questions posées portent non seulement sur le lieu de détention, mais encore, pour n'en nommer que quelques-unes, sur les conditions exactes d'hygiène ou la propreté de la cellule.<sup>24</sup>

Par ailleurs, il existe aussi d'importantes divergences entre les pays en ce qui concerne le délai pour l'obtention des informations.<sup>25</sup> Il faut aussi noter que certains pays, comme les Pays-Bas, réclament des « assurances » que la personne requise ne sera pas détenue dans tel ou tel établissement<sup>26</sup> alors que de telles assurances ne sont pas considérées comme élément de preuve suffisant dans d'autres pays, comme la Suède.<sup>27</sup> Enfin, il semble que certains pays font preuve de réticence et n'appliquent simplement pas la jurisprudence Aranyosi et Căldăraru. En particulier, des entretiens avec des juges Roumains montrent que le refus de considérer les conditions de détention à l'étranger résulte du fait que les conditions de détention en Roumanie sont elles-mêmes préoccupantes.<sup>28</sup> Ces juges justifient leurs décisions par une application stricte du principe de confiance mutuelle. Il existe donc une « polarisation » entre pays « sceptiques » et pays « confiants ».

En ce qui concerne le second type de problème, l'étude de la Décision Cadre 2008/909 en particulier, révèle qu'il existe d'importantes différences entre pays sur la prise en compte des conditions de détention dans le contrôle exercé au titre du transfert de prisonniers. Bien sûr le système de reconnaissance mutuelle mis en œuvre par la Décision Cadre 2008/909 est différent de celui du MAE. Les rôles des autorités nationales sont en quelque sorte inversés. Ce sont les autorités d'émission du pays qui a procédé à la condamnation de la personne qui décident de transférer vers l'État d'exécution, le prisonnier, ou le jugement le concernant au cas où cette personne réside dans ce dernier État. L'exécution de la peine d'emprisonnement n'aura donc pas lieu dans le pays d'émission comme c'est le cas dans le MAE, mais dans le pays d'exécution.<sup>29</sup> Bien entendu la confiance mutuelle lie toutes les autorités nationales,

qu'elles soient émettrices ou exécutrices d'une demande de reconnaissance mutuelle. Toutefois, les conditions de détention qui peuvent affecter le transfert d'un prisonnier, contrairement au MAE, ne joue pas au niveau du refus d'exécution de la demande, mais à celui de son émission. Rien n'oblige une autorité à procéder au transfert d'un prisonnier vers un autre État membre, et il est rapporté qu'il est peu probable qu'un pays d'exécution mette en avant les conditions de détention dans ses propres établissements pour refuser la requête. Quand bien même il le ferait, un tel motif de refus n'est pas prévu par la décision-cadre. La raison officielle pour procéder à un transfert est l'objectif pénal de réhabilitation poursuivi par la décision-cadre. Un transfert devrait être commandé par la volonté de permettre une meilleure réhabilitation du détenu.<sup>30</sup> Il résulte toutefois de la recherche que la Décision Cadre n'impose pas de critères minimums pour déterminer s'il existe de bonnes chances de réinsertion dans tel ou tel pays. Par conséquent, chaque pays procède de manière différente. Le même constat est fait en ce qui concerne la Décision Cadre 2008/947. Deux observations peuvent ici être faites.

Premièrement, les contrôles des conditions de détention dans le pays d'exécution ne sont pas clairement pris en compte lorsqu'un transfert est décidé. Bien entendu, la jurisprudence Aranyosi et Căldăraru ne s'adresse pas, a priori, aux autorités en charge du transfert de prisonniers, qui d'ailleurs ne sont pas nécessairement des autorités judiciaires au sens du MAE. Il n'en reste pas moins que sur le fond une autorité décidant du transfert d'un prisonnier devrait clairement s'y opposer s'il existe un risque réel de violation de l'article 4 de la Charte, et ce aux mêmes conditions que celles qui s'appliquent au MAE. Toutefois, la recherche a démontré qu'il existe d'importantes carences en l'espèce. Par exemple, un détenu peut être transféré sans son consentement dans certaines circonstances, et la décision de transfert ne peut pas faire l'objet d'un recours effectif.<sup>31</sup> Dès lors, il peut paraître difficile, pour ne pas dire impossible, d'obliger l'autorité d'émission à procéder à une évaluation au titre de l'article 4 de la Charte.

Deuxièmement, la première observation est confortée, voire aggravée, par le fait que certains pays, tel que l'Italie, affichent clairement l'objectif d'utiliser la Décision Cadre dans le but de se « débarrasser » des prisonniers étrangers et de contribuer à l'amélioration des conditions de détention nationales à la suite de l'arrêt Torreggiani rendu par la Cour Européenne qui a condamnée l'Italie pour ses prisons surpeuplées.<sup>32</sup> Aux Pays-Bas, en revanche, il est clairement décidé que le transfert de prisonnier ne doit pas avoir pour but de réduire la population carcérale d'un pays dont les conditions de détention souffrent de déficiences systématiques.<sup>33</sup> Il est clair que les divergences de conception concernant la réhabilitation des prisonniers et la différence entre MAE et transfert de prisonnier en ce qui

concerne les conditions de détention sont pour le moins problématiques dans une Union Européenne censée respecter les droits fondamentaux des citoyens.

#### IV. Conclusion

Les observations faites lors de la recherche menée appellent non seulement à un respect impératif des valeurs communes sur lesquelles l'Union est fondée mais aussi à une meilleure intégration des politiques pénales en Europe. Des mesures tant au niveau européen qu'au niveau national doivent être prises.<sup>34</sup>

Tout d'abord au niveau européen, l'œuvre de clarification du principe de confiance mutuelle et de ses implications pour l'obligation de reconnaissance mutuelle entreprise par la CJUE doit être poursuivie dans un esprit d'intégration et de respect des droits fondamentaux.<sup>35</sup> La clarification peut aussi être menée à bien grâce à des mesures de droit souple adoptées par la Commission Européenne.<sup>36</sup> Il est aussi temps d'envisager l'adoption de critères minimums concernant les conditions de détention dans les prisons européennes.<sup>37</sup> L'article 82(2)b du TFUE (voire l'article 352) concernant le droit des personnes dans la procédure pénale peut servir de base légale. En effet, de bonnes conditions de détention doivent être exigées tant pour les personnes définitivement jugées que pour celles qui sont en détention préventive en attendant d'être jugées. Enfin, il est urgent de procéder à une analyse plus profonde du respect de l'article 4 de la Charte dans le cadre du transfert de prisonniers opéré à l'aune de la Décision Cadre 2008/909. Le rôle de la défense doit être renforcé, et si nécessaire, la Décision Cadre amendée. Dans une Union où l'individu doit être au centre de la construction européenne et de son ELSJ, les déclarations d'intention devraient être suivies d'effet.

Au niveau national, il est essentiel que tous les États membres respectent les normes communes établies dans l'Union. Ce d'autant plus que certaines de ces normes sont établies pour sauvegarder les valeurs de l'Union. Les gouvernements doivent accepter que la lutte contre le crime, et donc, la protection des citoyens, impliquent nécessairement le respect des droits fondamentaux des personnes sujettes à la justice pénale garantis par le droit de l'Union. Dans un contexte de coopération rapprochée entre autorités judiciaires fondée sur la confiance mutuelle, l'un ne va pas sans l'autre. Si les droits fondamentaux Européens sont bafoués en pratique, une crise de confiance s'installe et il n'y a pas de coopération possible. En fin de compte, personne n'est gagnant car une absence de coopération peut aboutir à une absence de condamnation ou à la remise en liberté d'une personne condamnée. Les mesures nécessaires pour l'amélioration des conditions de détention sont connues et constamment mises en avant par les organes

du Conseil de l'Europe en particulier.<sup>38</sup> Les efforts produits par certains États afin d'améliorer les conditions de détention dans leurs prisons doivent être poursuivis, voire amplifiés. Mais cela serait une erreur de croire que seuls les problèmes pratiques liés à la prohibition de la torture et des traitements dégradants mettent en danger la coopération judiciaire et la lutte contre la criminalité.

Les observations faites dans le cadre de la mise en œuvre de la jurisprudence Aranyosi et Căldăraru sont valables lorsque l'essence même de certains droits fondamentaux, quand bien même il ne s'agirait pas de droits absolus, est mise en péril par la politique d'un État membre. Les événements récents relatifs aux violations de l'État de droit qui ont entraînés le déclenchement de l'article 7 TUE par la Commission Européenne à l'encontre de la Pologne viennent confirmer cette conclusion. Prenant en compte la proposition motivée de la Commission constatant l'existence, dans ce pays, d'un risque clair de violation des valeurs communes visées à l'article 2 TUE,<sup>39</sup> la CJEU a récemment étendu sa jurisprudence Aranyosi et Căldăraru aux garanties d'un procès équitable rendu par un tribunal indépendant.<sup>40</sup> La haute juridiction décide ainsi que la présomption de confiance mutuelle peut être réfutée s'il existe un risque réel de violation du droit fondamental à un procès équitable garanti par l'article 47 (2) de la Charte, en raison de défaillances systémiques ou généralisées en ce qui concerne l'indépendance du pouvoir judiciaire de l'État membre d'émission et que la personne concernée court un tel risque si sa remise a lieu. Les conséquences de cette nouvelle étape dans la polarisation entre États ne se sont pas fait attendre et les premières décisions nationales de refus de remise ont déjà été prises.<sup>41</sup>

Il est loisible aux autorités politiques des pays concernés<sup>42</sup> de prétendre que leurs politiques aux couleurs totalitaires sont justifiées par une identité nationale spécifique et différente.<sup>43</sup> Toutefois, ces différences ne doivent pas aller à l'encontre des valeurs qui soutiennent le projet Européen et qui ont été acceptées par l'ensemble des pays membres comme le seraient les termes d'un contrat. Le non-respect de ces valeurs n'a pas qu'un prix politique. Il a aussi un prix bien plus précieux pour tout le monde, celui de la coopération judiciaire et de la lutte contre le crime.

\* Je souhaite remercier Thomas Wahl, rédacteur en chef de la revue eucrim à l'Institut Max Planck de droit pénal étranger et international et Anna Pinggen, doctorante à l'Institut, pour leurs commentaires concernant une première version de cet article.

1 Article 3(2) du TUE et 67 TFUE.

2 Cour de Justice de l'Union Européenne, Avis 2/13 du 18 décembre 2014, paragraphe 168.



3 Cour de Justice de l'Union Européenne, Affaire C-256/11 du 15 novembre 2011, *Murat Dereci et autres contre Bundesministerium für Inneres*, paragraphe 72.

4 T. Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU* (Wolf Legal Publishers, Oisterwijk, 2018). Voir aussi <https://euprisoners.eu> (dernier accès octobre 2018).

5 Universités de Babes Bolej, de Wrocław, de Lund, de Bologna et d'Utrecht.

6 Articles 67 et 82 TFUE.

7 En particulier, le droit à l'assistance d'un avocat, le droit à l'interprétation et à la traduction dans le cadre des procédures pénales et le droit à l'information dans le cadre des procédures, ont fait l'objet d'une harmonisation minimale. Voir Directive 2010/64/UE du 20 octobre 2010 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales [2010] JO L 280/1 ; Directive 2012/13/UE du 22 mai 2012 sur le droit à l'information dans le cadre des procédures pénales [2012] JO L 142/1 ; et, Directive 2013/48/UE du 22 octobre 2013 relative au droit d'accès à un avocat dans le cadre des procédures pénales et des procédures relatives au mandat d'arrêt européen, au droit d'informer un tiers dès la privation de liberté et au droit des personnes privées de liberté de communiquer avec des tiers et avec les autorités consulaires [2013] JO L 294/1.

8 Voir ainsi Cour de Justice de l'Union Européenne, Affaire C-220/18 PPU du 25 juillet 2018, *ML*, paragraphe 54 et C-216/18 PPU du 25 juillet 2018, *LM*, paragraphe 41.

9 Cour de Justice, Avis 2/13 *op. cit.*, paragraphe 191.

10 Cour de Justice, Affaire C-220/18 PPU *op. cit.*, paragraphe 50.

11 Cour de Justice, Affaires Jointes C-404/15 et C-659/15 PPU du 5 avril 2016, *Pál Aranyosi et Robert Căldăraru*. Pour des annotations de cette décision voir notamment A. Willems, "Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character", *European Journal of Legal Studies*, 2016 Vol 9 No 1 p. 211–249 ; G. Anagnostaras, "Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Căldăraru", *Common Market Law Review*, 2016 Vol 53 No 6 p. 1675–1704 ; T. Marguery, "Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?", *European Papers*, 2016 Vol 1 No 3 p. 943–963.

12 Cour de Justice de l'Union Européenne, Affaires Jointes C-411/10 et C-493/10 du 21 décembre 2011, *N. S. (C-411/10) contre Secretary of State for the Home Department et M. E. et autres (C-493/10) contre Refugee Applications Commissioner et Minister for Justice, Equality and Law Reform*. Voir sur ce sujet C. Costello, M. Mouzourakis, "Reflections on reading Tarakel: Is 'How Bad is Bad Enough' Good Enough?", *Asiel&Migrantenrecht*, 2014 Vol 10 p. 404–411.

13 Cour de Justice, Affaires Jointes C-404/15 et C-659/15 PPU *op. cit.*, paragraphe 88.

14 Cour de Justice, Affaires Jointes C-404/15 et C-659/15 PPU *op. cit.*, paragraphe 89.

15 Cour de Justice, Affaires Jointes C-404/15 et C-659/15 PPU *op. cit.*, paragraphe 92.

16 Cet échange d'information doit se faire dans l'urgence en application de l'article 15(2) de la Décision Cadre 2002/584/JAI du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre États membres [2002] JO L 190/1 ; voir aussi Cour de Justice de l'Union Européenne, Affaire C-367/16 du 23 janvier 2018, *Dawid Piotrowski*, paragraphes 60 et 61.

17 Cour de Justice, Affaires Jointes C-404/15 et C-659/15 PPU, *op. cit.*, paragraphe 104.

18 Voir en particulier les rapports annuels du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants, sur <https://www.coe.int/fr/web/cpt> (dernier accès octobre 2018).

19 Voir les jugements pilotes concernant les conditions de détention dans les prisons des pays membres de l'Union, par exemple Cour Européenne des Droits de l'Homme, Jugement du 8 janvier 2013, *Torreggiani et autres c. Italie*, Requête nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10 ; Jugement du 25 janvier 2015, *Neshkov et autres c. Bulgarie*, Requête nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12

### Dr. Tony Marguery

Assistant Professor, Utrecht University,  
RENFORCE research group  
<https://renforce.rebo.uu.nl>



and 9717/13 ; Jugement du 10 mars 2015, *Varga et autres c. Hongrie*, Requête nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 ; Jugement du 6 septembre 2016, *W.D. c. Belgique*, Requête no. 73548/13 et Jugement du 25 avril 2017, *Rezmiveş et autres c. Roumanie*, Requête nos 61467/12, 39516/13, 48231/13 et 68191/13.

20 Décision Cadre 2008/909/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements en matière pénale prononçant des peines ou des mesures privatives de liberté aux fins de leur exécution [2008] JO L 327/27 et Décision Cadre 2008/947/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements et aux décisions de probation aux fins de la surveillance des mesures de probation et des peines de substitution [2008] JO L 337/102.

21 Il doit être noté que cette harmonisation a eu lieu tant par voie législative que par voie judiciaire. On notera ainsi la présence de motifs de non-exécution des décisions cadres en cas de violation du principe *ne bis in idem* ou des droits de la défense dans le cadre d'un procès par contumace. Concernant ces motifs, l'harmonisation a été complétée par la jurisprudence de la CJUE, voir par exemple concernant *ne bis in idem* Cour de Justice de l'Union Européenne, Affaire C-261/09 du 16 novembre 2010, *Gaetano Mantello* et concernant l'article 4a les décisions suivantes Cour de Justice de l'Union Européenne, Affaire C-270/17 PPU du 10 août 2017, *Tadas Tupikas* ; Cour de Justice de l'Union Européenne, Affaire C-108/16 PPU du 24 mai 2016 *Paweł Dworzecki* ; Cour de Justice de l'Union Européenne, Affaire C-271/17 du 10 août 2017 *Sławomir Andrzej Zdziaszek*.

22 Voir, en particulier, T. Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, *op. cit.*, p. 206–209 and 236.

23 En particulier, Cour Européenne des Droits de l'Homme, Jugement du 7 juillet 1989, *Soering c. Royaume Unis*, Requête no. 14038/88, paragraphe 113 ; Cour Européenne des Droits de l'Homme, Jugement du 17 janvier 2012, *Othman (Abu Qatada) c. Royaume Unis*, Requête no. 8139/09, paragraphes 259 et 263. Concernant la notion de déni flagrant voir aussi Conclusion de l'Avocat Général Sharpston dans l'Affaire C-396/11, *Ciprian Vasile Radu*.

24 T. Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, *op. cit.*, p. 155–156.

25 Par exemple, 30 jours maximum en Italie et aucun délai spécifique aux Pays Bas (toutefois la détention provisoire ne peut excéder 9 mois).

26 Voir T. Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, *op. cit.*, p. 216–218. Voir aussi le récent rapport écrit pour le Comité LIBE "Criminal procedural laws across the Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation" (2018), p. 106–107 disponible sur [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2018\)604977](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604977) (dernier accès octobre 2018).

27 Voir T. Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, *op. cit.*, p. 396–397.

28 Voir T. Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, *op. cit.*, p. 352.

29 Il doit toutefois être précisé que dans le cadre d'un MAE, une personne de la nationalité de l'État d'exécution peut aussi effectuer sa condamnation dans ce pays s'il en a la nationalité ou en est résident et que ce pays s'engage réellement à exécuter la peine, voir les articles 4(6) et 5(3) de la Décision Cadre.

30 Cet objectif est aussi celui recherché par la Décision Cadre 2008/947.

31 Ceci est le cas du prisonnier dont la nationalité est celle de l'État membre d'exécution, ou si cette personne sera déportée ou a fui vers ce pays ou y a retourné en raison d'une procédure pénale à son encontre (article 6(2)).

32 Cour Européenne des Droits de l'Homme, Jugement du 8 janvier 2013, *Torreggiani et autres c. Italie*, *op. cit.*

33 Voir T. Marguery (ed.), *Mutual Trust under Pressure, the Transferring of Sentenced Persons in the EU*, *op. cit.*, p. 237–238.

34 Les mesures mentionnées ici sont loin d'être exhaustives. Voir aussi "Criminal procedural laws across the Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation" (2018), *op. cit.*

35 A cet égard, il est utile de mentionner la récente décision prise par la CJUE dans l'affaire C-220/18 PPU *op. cit.* qui réponds à un certain nombre de questions concernant le champ d'application de la jurisprudence *Aranyosi et Căldăraru*. Ainsi la CJUE décide au paragraphe 87 que le contrôle des conditions par les autorités d'exécution ne doit porter que sur « les établissements pénitentiaires dans lesquels, selon les informations dont elles disposent, il est concrètement envisagé que cette personne soit détenue, y compris à titre temporaire ou transitoire. » Par ailleurs, la liste des questions posées au titre de l'article 15(2) MAE doit être strictement limitée aux questions nécessaires pour évacuer le risque de violation de l'article 4 de la Charte et 3 ECHR au sens de la jurisprudence de la Cour Européenne des Droits de l'Homme, par exemple, dans son Jugement du 20 octobre 2016, *Muršić c. Croatie*, Requête no. 7334/13 paragraphes 102–141.

36 Voir par exemple la Communication de la Commission – Manuel concernant l'émission de l'exécution d'un mandat d'arrêt européen 2017/C 335/01.

37 Il y a lieu de rappeler l'absence regrettable de suivi du Livre Vert sur les conditions de détention publié par la Commission le 14 juin 2011, voir Commission Européenne « Renforcer la confiance mutuelle dans l'espace judiciaire européen – Livre vert sur l'application de la législation de l'UE en matière de justice pénale dans le domaine de la détention » COM (2011) 0327 final.

38 Voir par exemple : Cour Européenne des Droits de l'Homme, Jugement du 10 mars 2015, *Varga et autres c. Hongrie*, *op. cit.*, paragraphe 104 ; Conseil de l'Europe, Comité des Ministres, Recommandation R(99)22 sur

le surpeuplement des prisons et l'inflation carcérale ; Recommandation No R(99) 22 concernant la surpopulation carcérale ; Conseil de l'Europe, le Livre blanc sur le surpeuplement carcéral.

39 Commission Européenne, Proposition de Décision du Conseil relative à la constatation d'un risque clair de violation grave, par la République de Pologne, de l'état de droit, COM (2017) 835.

40 La CJUE a récemment décidé d'étendre sa jurisprudence *Aranyosi et Căldăraru* au droit à un procès équitable mis en danger par les réformes législatives en Pologne qui mettent en danger l'État de droit et l'indépendance de la justice, voir Cour de Justice Affaire C-216/18 PPU *op. cit.*

41 Voir, par exemple, la décision rendue le 4 octobre 2018 par le Tribunal d'Amsterdam qui suspend l'exécution d'un MAE émit par la Cour de Poznań en Pologne et concernant une personne suspectée de trafic de drogue, affaire 13/751441-18 RK 18/3804, Tribunal d'Amsterdam disponible sur <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBA MS:2018:7032> (dernier accès octobre 2018) ou bien la décision rendue par la Cour Régionale de Rzeszów (Pologne) suite aux questions posées par la Cour Centrale d'Investigation 002 de Madrid <http://themis-sedziowie.eu/materials-in-english/common-position-of-judges-of-regional-court-in-rzeszow-with-reference-to-madrid-court-request/> (dernier accès octobre 2018).

42 La Hongrie est, elle aussi, sous le coup d'une procédure d'article 7 TUE, cette fois-ci ouverte par le Parlement Européen, voir Résolution du Parlement européen du 12 septembre 2018 relatif à une proposition invitant le Conseil à constater, conformément à l'article 7, paragraphe 1, du traité sur l'Union européenne, l'existence d'un risque clair de violation grave par la Hongrie des valeurs sur lesquelles l'Union est fondée (2017/2131(INL)) P8\_TA-PROV(2018)0340. Voir sur le sujet H. Labayle, *Winter is coming : la Hongrie, la Pologne, l'Union européenne et les valeurs de l'État de droit*, disponible sur <http://www.gdr-elsj.eu/2018/09/26/informations-generales/winter-is-coming-la-hongrie-la-pologne-lunion-europeenne-et-les-valeurs-de-letat-de-droit-deuxieme-partie/> (dernier accès octobre 2018).

43 Voir le discours du Président Hongrois devant le Parlement Européen le 11 septembre 2018, disponible sur <https://visegradpost.com/fr/2018/09/11/viktor-orban-denonce-le-chantage-de-lue-discours-complet/> (dernier accès octobre 2018).

# Imprint

## Impressum

Published by:

**Max Planck Society for the Advancement of Science  
c/o Max Planck Institute for Foreign and International  
Criminal Law**

represented by Director Prof. Dr. Dr. h.c. mult. Ulrich Sieber  
Guenterstalstrasse 73, 79100 Freiburg i.Br./Germany

Tel: +49 (0)761 7081-0  
Fax: +49 (0)761 7081-294  
E-mail: [u.sieber@mpicc.de](mailto:u.sieber@mpicc.de)

Internet: <http://www.mpicc.de>

Official Registration Number:  
VR 13378 Nz (Amtsgericht  
Berlin Charlottenburg)  
VAT Number: DE 129517720  
ISSN: 1862-6947



MAX-PLANCK-GESELLSCHAFT

**Editor in Chief:** Prof. Dr. Dr. h.c. mult. Ulrich Sieber  
**Managing Editor:** Thomas Wahl, Max Planck Institute for Foreign and International Criminal Law, Freiburg  
**Editors:** Dr. András Csúri, Utrecht University; Cornelia Riehle, ERA, Trier  
**Editorial Board:** Peter Csonka, Head of Unit, DG Justice and Consumers, European Commission Belgium; Francesco De Angelis, Directeur Général Honoraire, Commission Européenne Belgique; Prof. Dr. Katalin Ligeti, Université du Luxembourg; Lorenzo Salazar, Ministero della Giustizia, Italia; Prof. Rosaria Sicurella, Università degli Studi di Catania, Italia  
**Language Consultant:** Indira Tie, Certified Translator, Max Planck Institute for Foreign and International Criminal Law, Freiburg  
**Typeset:** Ines Hofmann, Max Planck Institute for Foreign and International Criminal Law, Freiburg  
**Produced in Cooperation with:** Vereinigung für Europäisches Strafrecht e.V. (represented by Prof. Dr. Dr. h.c. mult. Ulrich Sieber)  
**Layout:** JUSTMEDIA DESIGN, Cologne  
**Printed by:** Stückle Druck und Verlag, Ettenheim/Germany

The publication is co-financed by the  
European Commission, European  
Anti-Fraud Office (OLAF), Brussels



© Max Planck Institute for Foreign and International Criminal Law 2018. All rights reserved: no part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical photocopying, recording, or otherwise without the prior written permission of the publishers. The views expressed in the material contained in eucrim are not necessarily those of the editors, the editorial board, the publisher, the Commission or other contributors. Sole responsibility lies with the author of the contribution. The publisher and the Commission are not responsible for any use that may be made of the information contained therein.

### Subscription:

eucrim is published four times per year and distributed electronically for free.

In order to receive issues of the periodical on a regular basis, please write an e-mail to:

[eucrim-subscribe@mpicc.de](mailto:eucrim-subscribe@mpicc.de).

For cancellations of the subscription, please write an e-mail to:  
[eucrim-unsubscribe@mpicc.de](mailto:eucrim-unsubscribe@mpicc.de).

### For further information, please contact:

Thomas Wahl  
Max Planck Institute for Foreign and International Criminal Law  
Guenterstalstrasse 73,  
79100 Freiburg i.Br./Germany

Tel: +49(0)761-7081-256 or +49(0)761-7081-0 (central unit)  
Fax: +49(0)761-7081-294  
E-mail: [t.wahl@mpicc.de](mailto:t.wahl@mpicc.de)

