

European criminal justice on the move

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A major change to the area of freedom, security and justice has been seen recently, especially since the end of 2014.

From the perspective of EU Justice policy, the end of 2014 marked a turning point, with the conclusion of the European Council's five-year Stockholm Programme and the publication of the 'EU Justice Agenda for 2020',¹ together with the new 'Strategic Guidelines for Legislative and Operational Planning for the coming years within the EU's Area of Freedom, Security and Justice',² encouraging further action on issues such as the strengthening of the rights of accused and suspected persons in criminal proceedings; the protection of victims; enhancing mutual recognition of decisions in criminal matters; reinforcing the exchange of information between the authorities of the Member States; and advancing negotiations regarding the European Public Prosecutor's Office (EPPO).

From an institutional perspective, the end of 2014 heralded the start of the period in which the Lisbon Treaty began to take full effect. As described in the Article of Dr. Els De Busser in this volume of the ERA Forum, the transitional period for the Lisbon Treaty ended on 1 December 2014, making space for new voting rules, new competences of the European Commission and the CJEU, and a new position for the UK in the area of police and judicial cooperation in criminal matters in the EU. National

¹EU Justice Agenda for 2020—Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, Strasbourg, 11.3.2014.

²Strategic Guidelines for Legislative and Operational Planning for the coming years within the EU's Area of Freedom, Security and Justice, OJ C 240/13, 24.7.2014.

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courts from all EU Member States may now look to the CJEU for the interpretation of EU law. Furthermore, the European Commission can now execute infringement procedures in the case of legal acts of police and judicial cooperation in criminal matters, which provides an exciting possibility, considering the many legal instruments that Member States failed to implement. Especially exciting in this regard will be the developments in the area of mutual recognition of judgements and probation decisions regarding the supervision of probation measures and alternative sanctions; alternatives to provisional detention; and judgements imposing custodial sentences or measures involving the deprivation of liberty. (Member States were supposed to take the necessary measures to comply with the three respective Framework Decisions³ by the end of 2011 but the implementation of such measures is still pending in many Member States). The European Investigation Order is a novelty in the field of mutual recognition instruments. After years of discussion and the failed establishment of the European Evidence Order (EIO), Directive 2014/41/EU⁴ could be adopted in April 2014, allowing a judicial authority in one Member State to request that specific criminal investigative measures be carried out by an authority in another Member State in order to obtain evidence. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State. Antonio Roma Valdés' article in this volume of the ERA Forum outlines the problems that the principle of mutual recognition in criminal matters—once titled the 'cornerstone' of judicial cooperation in criminal matters in the EU—has revealed over the years.

Looking at the current state of European criminal justice, another big question is posed regarding the future role of the UK in the area of freedom, security and justice. As outlined in the article of David Dickson, on 31 May 2014 the UK exercised its opt out of all EU police and criminal justice measures, and on 1 December 2014 opted back into 35 measures.

Furthermore, considerable changes are also being seen currently with regard to the relevant EU Agencies in the field of police and judicial cooperation in criminal matters, namely Europol, Eurojust, and OLAF.

Regarding Europol, a possible reform of its legal basis currently being discussed suggests transforming the Europol Decision into a Regulation.⁵ Under the draft Regulation, the obligations on Member States to share law enforcement information with Europol and to initiate a criminal investigation when requested by Europol would be

³Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009.

Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16.12.2008.

Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5.12.2008.

⁴Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1.5.2014.

⁵Proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM(2013) 173 final, Brussels, 27.3.2013.

strengthened. The draft Regulation also addresses issues of governance, the parliamentary scrutiny of Europol and data protection. The idea of merging the functions of Europol and the European Police College (CEPOL) into a single European Agency for Law Enforcement Cooperation and Training, as envisaged by the Commission's original proposal in 2013, has however already been abandoned due to the opposition of the Council and European Parliament. Hence, CEPOL remains an independent EU agency, with its seat however moved from Bramshill in the UK to Budapest in Hungary.

A similar discussion began with regard to Eurojust in July 2013 when the Commission published a proposal for a draft Regulation,⁶ replacing the current Eurojust Decision. The draft Regulation aims to improve the operational functions and powers of Eurojust's National Members by, for instance, allowing them to issue and execute requests and to order investigative measures in urgent cases. Furthermore, it also addresses Eurojust's structure and governance, its data protection regime, and its cooperation with EU partners, third States and international organisations and bodies.

A ground-breaking new development, however, is currently taking place through the discussions on the establishment of a European Public Prosecutor's Office (EPPO). The EPPO would have a major impact on Eurojust as well as on OLAF, the European Anti-Fraud Office. The Commission's proposal for a Regulation⁷ on the establishment of the EPPO was published on 17 July 2013, together with the draft Eurojust Regulation. Under the current draft of March 2015,⁸ the EPPO would have a collegial structure, and the EPPO and national prosecution services would have concurrent competence to investigate offences against the financial interests of the Union. Corruption cases and the problems with asset recovery in Germany are also dealt with in Dr. Markus Rübenthal's article in this volume of the ERA Forum.

In addition to all these institutional changes, European criminal law also faces new challenges with modern crime such as cybercrime and the jurisdictional problems which arise. In his article in this volume of the ERA Forum, Dr. Cristos Velasco analyses the European instruments that address the issue of cybercrime jurisdiction. A different perspective on policing online child sexual abuse is given by criminal psychologist Jonathan Taylor M.Sc., explaining the common characteristics of paedophiles. Another crime which is being comprehensively discussed at the moment is the trafficking in human beings (THB). The trends and challenges facing policy-makers regarding labour exploitation and trafficking for labour exploitation are discussed by Mariyana Radeva Berket in this volume. Furthermore, Dr. Gerrit Huybrechts describes the challenges regarding the border policy of the EU and the evolution of the Schengen zone upon its 25th anniversary.

⁶Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM(2013) 535 final, Brussels, 17.7.2013.

⁷Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, Brussels, 17.7.2013.

⁸Proposal for a Regulation on the establishment of the European Public Prosecutor's Office—Orientation debate/State of Play, 6318/1/15 REV 1, 2 March 2015.

Finally, the added value of establishing criminal offences for at least serious forms of market abuse is discussed by Sarah Wilson in this volume. Finally, after a long period of disregard, the EU has also drawn its attention to the need for procedural rights. In 2009, the Swedish Presidency published a Roadmap⁹ for strengthening procedural rights of suspected or accused persons in criminal proceedings, envisaging six measures to be taken to improve the rights of these persons in criminal proceedings, namely regarding: the right to translation and interpretation; the right to information on rights and information about the charges; legal advice and legal aid; communication with relatives, employers and consular authorities; special safeguards for suspected or accused persons who are vulnerable; and a Green Paper on pre-trial detention. Until now, the development of procedural rights has progressed steadily, with three Directives having been adopted.¹⁰ Proposals to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings;¹¹ minimum standards for legal aid in criminal proceedings,¹² and the provision of protection for children and other vulnerable groups¹³ have all been tabled and are currently in the legislative process. It will be exciting to see what the final Directives will look like and how they will be implemented and applied in practice.

⁹Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1, 4.12.2009.

¹⁰Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280/1, 26.10.2010;

Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142/1, 1.6.2012;

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

¹¹Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 final, Brussels, 27.11.2013.

¹²Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 final, Brussels, 27.11.2013.

¹³Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, Brussels, 27.11.2013.