

CHRONICLE OF 2016 EU LAW DEVELOPMENTS WITH CRIMINAL LAW AND PROCEDURE IMPLICATIONS

By *F. Ruggieri and E. Militello**

1 Introduction

2016 was not a year in which Europeanist feelings were stimulated. The UK's referendum, terrorist attacks, ongoing wars in not-so-remote locations, and populist waves hitting alternatively on Eurocrats and on migrants. Nevertheless, the day-to-day work of the European institutions, especially in the field of criminal law and procedure, has not stopped, and it could perhaps be said that it made significant progress towards the harmonization of legislation on criminal proceedings.

The present work is a chronicle of the most significant developments occurred in the field of European Union criminal law and criminal procedure in the course of 2016, divided into four parts.

A first part shall be dedicated to legislative interventions, focusing on the most relevant EU directives in the field, newly approved by the European Parliament and by the Council.

It will be noted that the Road Map on criminal proceedings drafted in 2009, an important step in the path towards the harmonization of criminal procedure of EU Member States, has at last been brought to life, with the final approval of three directives: on the presumption of innocence; on legal aid; and on the rights of children who are suspects or accused persons in criminal proceedings.

A significant feature of 2016 has undoubtedly been the approval of the data protection package, including two directives addressing data in criminal proceedings in general and, more specifically, in proceedings for terrorist crimes, which included a much awaited regulation of the Passenger Name Record ("PNR"). These are of particular importance in the wider context of the ongoing fight against terrorism.

A brief update shall follow on the new regulations linked to the 2015 Frontex regulation, as the regulation of the flows of migrants could be of interest both for the crimes relating thereto and for the issues of identification and tracking of the identities of individuals coming to Europe through hard, unregulated paths.

A second part shall then recall some relevant judgments rendered by the Court of Justice of the European Union ("CJEU") in 2016.

First, there will be a focus on several proceedings *ex art. 267 TFEU* concerning European Arrest Warrants ("EAW") which concluded in 2016, allowing for more precise insights into the interpretation of some debated provisions in this matter.

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Secondly, a summary of recent judgments on the topic of repatriation shall follow, taking into account the relevance of the issue within the debate flaring throughout the European Union.

Thirdly, note shall be taken of a significant judgment on the heated topic of horizontal, transnational *ne bis in idem*, which interpreted the provisions of art. 50 of the Nice Charter and art. 54 CAAS so as to allow the opening, in a second Member State, of new proceedings in cases where the proceedings in the first proceeding Member State had been closed in the phase of preliminary investigations by a prosecutor, if proven that such investigations were not fully carried out.

Finally, recent judgments on the topical issue of data retention will be discussed.

A section shall then highlight issues emerged in the course of national application by the Member States of EU Law provisions. In 2016, there has been a thorough debate, in Italy, on the actual possibility to activate the so-called counter limits of the basic, non-renounceable principles of the Italian Constitution, and specifically the legality of criminal provisions. They were caused by the notorious judgment by the CJEU in the *Taricco* case on the overcoming of the statute of limitations in cases where the financial interests of the Union could be harmed. At the same time, in two different Member States, Germany and Greece, national courts have resisted execution of EAWs (in both cases issued by Italian authorities).

A final section on potentially interesting further developments shall follow. Among others, the setting of a formal antiterrorism centre (ECTC) within the already existing structures of Europol, the most recent proposals of the Council on the Office of the Public Prosecutor and on the Protection of the Union's Financial Interests, the entry into force of the Second Market Abuse Directive, and the activation of a "pre-article 7" procedure against Poland for threats to the rule of law shall be acknowledged.

2 Normative updates

2.1 Final steps of the implementation of the 2009 Roadmap

In the field of European criminal procedure, 2016 was a decisive year, in that it brought to a conclusion the process of setting the legislative framework for a comprehensive harmonization of procedural safeguards throughout EU Member States.

In 2009, within the wider context of the Stockholm Programme,¹ the European Council approved the renown EU Roadmap on procedural rights for suspects and accused people in criminal matters (hereinafter, the "Roadmap").²

¹ Communication of the European Council, "The Stockholm Programme - An open and secure Europe serving and protecting the citizen", 2 December 2009, 17024/09.

² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01.

The measures indicated by the Annex to the Roadmap covered the following areas: Translation and Interpretation (Measure A), Information on Rights and Information about the Charges (Measure B), Legal Advice and Legal Aid (Measure C), Communication with Relatives, Employers and Consular Authorities (Measure D), Special Safeguards for Suspected or Accused Persons who are Vulnerable (Measure E), and Pre-Trial Detention (Measure F). The Roadmap then specified that the rights listed in the Annex “could be complemented by other rights” (para. 2), and the Stockholm Programme explicitly referred to the presumption of innocence as one of the other issues that may need to be addressed by the European Commission (para. 2.4.)³

The establishment of said path was stated in the Stockholm Programme itself (par. 2.4), acknowledging the incapacity of Member States and of EU institutions to reach an agreement on a unitary legislative tool that would have dealt with all the aforementioned safeguards.

Setting aside the issue of pre-trial detention which, according to what had been foreseen in the Roadmap, was only the object of a Commission’s Green Paper,⁴ the first measure to be transposed into a Directive was the right on interpretation and translation (Measure A), adopted on 20 October 2010.⁵ The EU institutions then managed to find agreements on the rights to information (Measure B) and to access to a lawyer (Measure D and partially Measure C, “Legal advice” but not “Legal aid”), with those two Directives being approved respectively in 2012⁶ and 2013.⁷

Perhaps aiming to take advantage of the momentum, in November 2013 the Commission presented a three-fold package for the implementation of the remaining measures of the Roadmap: right to legal aid; procedural safeguards for children; and strengthening certain aspects of the presumption of innocence and the right to be present at trial.

However, discussions and consultations on these three measures were not swift, proceeded separately for almost three years, and it was only in the course of 2016 that the legislative procedures for those last three Directives finally concluded.

³ S. CRAS, A. ERBEŽNIK, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial”, *eu crim*, 2016, issue 1, pp. 25-36, at p. 25.

⁴ European Commission, “Green Paper: Strengthening mutual trust in the European judicial area: A Green Paper on the application of EU criminal justice legislation in the field of detention”, 14 June 2011, COM (2011) 327 final.

⁵ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, pp. 1–7.

⁶ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1–10.

⁷ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294/1, 6.11.2013, pp. 1–12.

2.1.1 Directive on the presumption of innocence (2016/343/EU)

The Directive on the presumption of innocence approved on 9 March 2016⁸, after rather swift negotiations,⁹ is the most eccentric of the legislative tools arising out of the 2009 Roadmap. As seen above, indeed, its subject-matter was not explicitly listed in the Roadmap, but was included as an “example” of further issues in the Stockholm Programme, upon Italy’s insistence.

As a further complication, since its very first draft proposal, the Commission included in the text also the parallel topics of the right to be present at trial and the right to a new trial in case of guiltless *in absentia* trials,¹⁰ already partially dealt with in the Framework Decision 2009/299/JHA.¹¹

The deadline for the implementation in national legislation has been set for 1 April 2018. Ireland, Denmark, and the United Kingdom (as long as its status remains that of a Member State) opted not to participate in adopting this Directive.

The purpose of the Directive, stated in Recital 9, is to “enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial,” where the principle of presumption of innocence, as well as a more general right to a fair trial, is a principle

⁸ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, pp. 1–11. T. WAHL, “Directive on the Right to the Presumption of Innocence Published”, *eu crim*, 2016, issue 1, p. 13.; D. FANCIULLO, “The Principle of Presumption of Innocence in the European Union Law: an “Incomplete” Transposition of the Case Law of the European Court of Human Rights?”, *Cahiers de droit européen*, 2016, vol. 52, issue 1, pp. 385-398; N. CANESTRINI, “La direttiva sul rafforzamento di alcuni aspetti della presunzione di innocenza e del diritto di presenziare al processo nei procedimenti penali. Un’introduzione”, *Cassazione Penale*, 2016, issue 5, pp. 2224-2239; L. CAMALDO, “Presunzione di innocenza e diritto di partecipare al giudizio: due garanzie fondamentali del giusto processo in un’unica direttiva dell’Unione Europea”, *Diritto penale contemporaneo*, 23 March 2016, available online at <http://www.penalecontemporaneo.it/d/4584-presunzione-di-innocenza-e-diritto-di-partecipare-al-giudizio-due-garanzie-fondamentali-del-giusto>.

⁹ Although at the beginning of inter-institutional negotiations the divisions between Member States and the EU institutions seemed difficult to overcome, and the actual discussions only began in the second half of 2014, under the Italian Council’s Presidency, a compromise text proposed by the European Parliament in September 2015 was accepted by the Council and, eventually, by the Commission, leading to a swift and informal overall approval in November 2015 (after only five rounds of “trilogue”). The European Parliament’s package substantially accepted the text proposed by the Council, provided that their line on the deletion on the provision of the reversal of the burden of proof be agreed upon. S. CRAS, A. ERBEŽNIK, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial”, *eu crim*, 2016, issue 1, pp. 25-36, at pp. 26-27.

¹⁰ S. RUGGERI, “*Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU”, *eu crim*, 2016, issue 1, pp. 42-51, at p. 42.

¹¹ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, pp. 24–36.

derived from artt. 47 and 48 of the Charter of Fundamental Rights of the EU (the “EU Charter”)¹² and art. 6 of the European Convention on Human Rights (“ECHR”).¹³

Its scope is clearly delimited in art. 2: it applies to suspects and those accused in criminal proceedings, but only if they are natural persons (it does not safeguard legal persons.)¹⁴ As to the timeframe, its applicability begins at the moment when a person becomes a suspect for an alleged criminal offence, independently from whether individuals have been made aware of their status by investigating authorities. The timeframe ends when the decision on the commission of an offence has become definitive, thus excluding the phase of the execution and possible appeals to the European Court of Human Rights (“ECtHR”).

As concerns the safeguard of the presumption of innocence, Chapter 2 includes measures to avoid that the suspect or accused is referred to or presented, in court or in public, as guilty (artt. 4-5); to place the burden of proof of guilt on the prosecution (art. 6); to ensure the right to remain silent and not to incriminate oneself of suspects and accused persons, in general (art. 7).

The framework to enhance the right to be present at trial is set in Article 8. This right is not seen as an absolute right: suspects and accused persons can issue a waiver of said right and, under specific conditions (art. 8 (2-3)), the trials can also be held *in absentia*, provided that the accused person has been made aware of the ongoing investigation and trial or is properly represented by a lawyer. In any case, should the conditions laid down in art. 8 for *in absentia* trials be disregarded, the individual shall be granted a new trial, as per art. 9.¹⁵

2.1.2 Children Directive (2016/800/EU)

In May 2016, a new Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings¹⁶ was approved. With regard to the Roadmap (see above), it is a tool of implementation of Measure E, “Special Safeguards for Suspected or Accused Persons who are Vulnerable”, although it only deals with one specific category of “vulnerable persons”, “children” (defined as persons below the age of 18, art. 3); it is thus frequently referred to as “Measure E-” or “E minus.”¹⁷

This limitation to children seemed to ensure that the text proposed by the Commission in November 2013 - together with the presumption of innocence and the legal aid proposals –

¹² Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

¹³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

¹⁴ S. LAMBERIGTS, “The Directive on the Presumption of Innocence. A Missed Opportunity for Legal Persons?”, *ibidem*, pp. 36-42.

¹⁵ S. RUGGERI, “*Inaudito reo Proceedings*”, *op. cit.*, at p. 45-46.

¹⁶ Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132 of 2016-05-21, pp. 1-20 (entered into force on June 11th).

¹⁷ S. CRAS, “The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings”, *eu crim*, 2016, issue 2, pp. 109-120, at 110.

would not be seen as controversial, and prompted negotiations already in the first half of 2014, under the Greek Council's Presidency. However, negotiations went on for nine "trilogues" and many technical meetings, until the agreement in December 2015. The Commission opted for a mere non-binding Recommendation on the treatment of adult vulnerable persons.¹⁸

Some Member States voiced the opinion that the approved text was composed of watered-down provisions.¹⁹ The deadline for transposition of this Directive is 11 June 2019.²⁰

The instrument is drafted in many respects so as to reflect already existing safeguards in criminal proceedings, only to a higher extent, being *lex specialis* derogating *in melius* to the general provisions.²¹

The Directive is inspired by the principle of the "child's best interests," enshrined in art. 24(2) of the EU Charter, as their interests shall be taken into account in the application of all provisions.²² Among the main provisions the most controversial in the negotiations stage had been the one on the right to legal assistance by a lawyer as early in the process as possible (art. 6), granting legal aid even before the approval of the Legal Aid Directive (see below), with some exceptions, and thus potentially impacting the EU budget. Further fundamental principles are the prevention from reoffending and the fostering of the child's social integration (recital 1), as well as the concept of deprivation of children's liberty as *extrema ratio*, thus to be avoided whenever possible (art. 10).

2.1.3 Directive on legal aid 2016/1919/EU

In October 2016, the sixth (and last) piece of legislation required to implement the 2009 Roadmap was approved: the Directive on legal aid in criminal proceedings.²³

¹⁸ Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24.12.2013, p. 8–10.

¹⁹ Italy made a special declaration expressing concern for the low level of protection granted by the Directive. On the other hand, Romania and Poland only agreed subject to reservations, and again, Ireland, Denmark, and the UK decided not to participate in the adoption. S. CRAS, "The Directive on procedural safeguards for children", *op. cit.*, footnote 68.

²⁰ T. WAHL, "Directive on Protection of Children in Criminal Proceedings", *eu crim*, 2016, issue 2, pp. 76-77.

²¹ S. CRAS, "The Directive on procedural safeguards for children", *op. cit.*, at 111.

²² S. CIVELLO CONIGLIARO, "All'origine del giusto processo minorile europeo. Una prima lettura della Direttiva 2016/800/UE sulle garanzie procedurali dei minori indagati o imputati nei procedimenti penali", *Diritto penale contemporaneo*, 13 June 2016, available online at http://www.penalcontemporaneo.it/upload/1465747996CIVELLOCONIGLIARO_2016a.pdf.

²³ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, pp. 1–8. T. WAHL, "Directive on Legal Aid Published", *eu crim*, 2016, issue 4, pp. 162-163; L. CAMALDO, "La direttiva 2016/1919/UE sul gratuito patrocinio completa il quadro europeo delle garanzie difensive nei procedimenti penali", *Diritto penale contemporaneo*, 13 December 2016, available online at <http://www.penalcontemporaneo.it/d/5105-la-direttiva-20161919ue-sul-gratuito-patrocinio-completa-il-quadro-europeo-delle-garanzie-difensive>; M. BARGIS, "Il diritto alla "dual defence" nel procedimento di

The purpose of the Directive is to harmonize the conditions and requirements for legal aid across the European Union and ensure the effectiveness of the right to legal aid (recital 1), already acknowledged by art. 47 (3) of the EU Charter (recital 3) and thus covering the remainder of Measure C of the Roadmap. Legal aid is thereby defined as “funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer” (art. 3).

Negotiations on this third tool were longer than the other two comprised in the package presented by the Commission in November 2013, as it involves greater expenditures. Heated debates on who should bear the relevant costs occurred. As a jointly agreed solution, the beneficiaries of the system of legal aid are to be identified through a so-called “means and/or merit test” (art. 4(2)). Only at a later stage, in June 2016, was the scope of the Directive broadened from “provisional legal aid” to “ordinary legal aid” (art. 2).²⁴

To enhance efficiency of the fundamental right safeguarded, a provision concerns the duty on Member States to ensure adequate quality of both the legal aid system and of the legal aid services provided (art. 7).

Additionally, a new specification of the right to legal aid was recognized, the right to receive legal aid in connection with procedures of European Arrest Warrants, both in the executing and in the issuing Member State (Art. 5).

This third Directive too shall not be applicable to Ireland, Denmark and the United Kingdom. The deadline for its transposition is 25 May 2019 (art. 20).

2.2 Data protection package

On 27 April 2016, a comprehensive and much awaited package of legislative acts in the field of data protection was approved. The safeguard at the EU level of personal data as a fundamental right has represented a much debated topic in the last few years: it is sufficient to recall the reactions to the ground-breaking 2014 CJEU *Digital Rights Ireland* judgment on data retention,²⁵ annulling the Data Retention Directive;²⁶ or to the negotiations on the recent

esecuzione del mandato di arresto europeo: dalla direttiva 2013/48/UE alla direttiva (UE) 2016/1919”, *Diritto penale contemporaneo*, 2016, issue 3, pp. 40-50; J. OUWERKERK, “All ‘bout the Money? On the Division of Costs in the Context of EU Criminal Justice Cooperation and the Potential Impact on the Safeguarding of EU Defence Rights”, *European Journal of Crime, Criminal Law and Criminal Justice*, 2017, Volume 25, Issue 1, pages 1 – 10.

²⁴ T. WAHL, “Political Agreement on Legal Aid Directive”, *eucri*, 2016, issue 2, p. 77.

²⁵ Judgment of the Court (Grand Chamber) of 8 April 2014, *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung (C-594/12) and Others*, Joined cases C-293/12 and C-594/12.

²⁶ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, pp. 54–63.

EU-US Umbrella Agreement on Privacy,²⁷ approved by the European Parliament on 12 July 2016 and by the Council on 2 December 2016, in the aftermath of the 2015 CJEU *Schrems* judgment,²⁸ which had at turn annulled the previous “safe harbour” agreement with the United States on transfer of personal data. The countless disrupting technology and communication developments in the last twenty years, in a growingly globalised world, rendered the General Data Protection legislation of the EU²⁹ obsolete. The newly approved package comprises a new General Data Protection Regulation³⁰ and a Directive on the processing of personal data in connection to criminal offences,³¹ both applicable only to natural persons. In the same context, a Directive on Passenger Name Record (“PNR”) data was also approved on that same day.³²

The General Data Protection Regulation 2016/679, which will be applicable starting 25 May 2018, includes specific rules on the control of individuals’ personal data, with a dual effort to reduce bureaucracy for businesses and enhancing consumer protection.³³

In the field of judicial cooperation in criminal matters, a significant role is played by Directive 2016/680/EU, whose transposition deadline is set for 6 May 2018 (art. 63). It covers the processing of personal data by national authorities for purposes of the prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties (art. 1(1)).

The rules for the processing of personal data, including those by automated means, shall comply with principles of legality, adequacy, proportionality, accuracy and security (art. 4). Specific rights of access (artt. 12-18) and of effective remedies in case of breach (artt. 52-57)

²⁷ T. WAHL, “EP and Council Back EU-US Umbrella agreement”, *eu crim*, 2016, issue 4, pp. 164-165; ID., “EU and US sign ‘Umbrella Agreement’”, *eu crim*, 2016, issue 2, p. 79.

²⁸ Judgment of the Court (Grand Chamber) of 6 October 2015 - Maximilian Schrems v Data Protection Commissioner - Case C-362/14.

²⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31-50.

³⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88.

³¹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, pp. 89–131. P. DE HERT, V. PAPAKONSTANTINOY, “The New Police and Criminal Justice Data Protection Directive. A First Analysis”, *New Journal of European Criminal Law*, 2016, issue 1, pp. 7-19; C. C. COCQ, “EU data protection rules applying to law enforcement activities: towards an harmonized legal framework?”, *New Journal of European Criminal Law*, 2016, issue 3, pp. 263-276.

³² Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L 119, 4.5.2016, p. 132–149.

³³ T. WAHL, “New Data Protection Rules”, *eu crim*, 2016, issue 2, p. 78.

shall be granted to the data subject. Independent supervision by national public authorities shall be ensured. At the same time, the efficiency of data collection and transnational information exchange for criminal justice purposes is to be improved (recitals 25 and 65). Peculiar rules are foreseen for cases of transfers of data from the competent authorities to third countries (or international organizations), to clearly ensure that the transfer be made with an adequate level of data protection (artt. 35-40).

Finally, as concerns the PNR Directive, it must be underlined that the approval represents the final landing of tireless negotiations begun in 2007. Indeed, two unsuccessful attempts to prompt discussions on a proposal were made by the Commission in 2007 and 2011.³⁴

The final text overcame the fears regarding the standard of protection of personal data. Those had led to the demise of the 2011 proposal, which was seen as disproportionately setting apart fundamental rights in name of the - legitimate - security aim. In fact, national security experts advocated the necessity of such legislation on the basis of an analysis of the patterns of terrorist attacks in the last twenty years.³⁵

The EU, however, had already agreed on a harmonization of the collection of the less controversial data on passengers of air carriers, the so-called Advanced Passenger Information (“API”), namely those contained in the travellers’ passports.³⁶ All other information provided by travellers to air carriers prior to the flights, extending even to seat and meal preferences (listed in Annex I to the Directive) were debated. This wide range explains the alleged threat of surreptitious advancement of a surveillance society.³⁷

The Directive, to address these concerns, includes many data protection safeguards.³⁸ Among them, the duty on Member States to designate Passenger Information Units (PIUs) responsible for collecting and processing PNR data (art.4); the exclusion of sensitive data (art. 13 (4)); a time limit for retention of 5 years, with the provision that after the first 6 months, data shall be stored in depersonalised form (art. 12).

In any case, the scope of the directive includes mandatorily data collected in bulk by air carriers prior to each flight on flights outside the EU, solely for the prevention or prosecution of terrorism or serious crimes (those listed in Annex II to the Directive). It additionally allows Member States to implement it also on intra-EU flights on a voluntary basis, upon issuance of a specific notification to the Commission (art. 2). The Directive only applies to the relations

³⁴ D. LOWE, “The European Union’s Passenger Name Record Data Directive 2016/681: is It Fit for Purpose?”, *International Criminal Law Review*, 2016, vol. 16, issue 5, page 856-884, at 856-857, 863-864; N. VAVOULA, “‘I Travel, therefore I Am a Suspect’: an overview of the EU PNR Directive”, *EU Immigration and Asylum Law and Policy*, available online at: <http://eumigrationlawblog.eu/i-travel-therefore-i-am-a-suspect-an-overview-of-the-eu-pnr-directive/>.

³⁵ *Ibidem*, at 858-860.

³⁶ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 6.8.2004, pp. 24–27.

³⁷ D. LOWE, “The European Union’s Passenger Name Record Data Directive”, at 865.

³⁸ T. WAHL, “EU PNR Directive Published”, *eu crim*, 2016, issue 2, p. 78.

between Member States; the sharing of PNR data with third countries is regulated by distinct PNR agreements, whose validity shall be assessed by the CJEU upon evaluation of the safeguard of fundamental rights.³⁹ The PNR Directive is to be implemented in national legislation no later than 25 May 2018.

2.3 External borders regulation: the European Border and Coast Guard

In a continued effort to improve the EU legislative tools to react to the unprecedented migratory flows, the EU approved in September a Regulation instituting the European Border and Coast Guard.⁴⁰

The new Agency will build on the foundation of Frontex, the former EU agency on external border management, which is seen as a fundamental component of an area of freedom, security and justice.⁴¹ It will extend its tasks and cover a wider range of aims, being responsible for the operational and technical strategy on border management, in cooperation with the European Fisheries Control Agency, and the European Maritime Safety Agency.⁴²

The strategy for the regulation on the new European Border and Coast Guard Agency is explained in art. 4: to ensure the implementation of integrated border management at the EU level, oversee an effective functioning of border control at the external borders, provide increased operational and technical assistance to EU Member States, support search and rescue operations and play an enhanced role in returns and, regarding the matter of the present contribution, analyse the risks for internal security.

In fact, one of the findings highlighted in the recitals is the impact of the unrelenting migrations in the current geopolitical context on cross-border crimes, such as migrant smuggling, trafficking in human beings, and terrorism (recital 19). One of the Regulation's aims is to "contribut[e] to addressing serious crime with a cross-border

³⁹ D. LOWE, "The European Union's Passenger Name Record Directive", at 860-863. The most recent PNR Agreement was that with Canada: on 8 September 2016, the Advocate General Mengozzi gave an opinion that the agreement between EU and Canada to share Passenger Name Records (PNR) data is not fully in compliance with European law. Court of Justice of the European Union, Opinion of Advocate General Mengozzi delivered on 8 September 2016 Opinion 1/15 (Request for an opinion submitted by the European Parliament).

⁴⁰ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC OJ L 251, 16.9.2016, pp. 1–76.

⁴¹ European Commission - Press release, "European Border and Coast Guard agreed", 22 June 2016, IP/16/2292.

⁴² C. RIEHLE, "Frontex. New Regulation adopted", *eu crim*, 2016, issue 3, p. 126; P. DE BRUYCKER, "The European Border and Coast Guard: A New Model Built on an Old Logic", *European Papers*, 2016, Vol. 1, Issue 2, pp. 559-569; D. FERNÁNDEZ ROJO, "Creación de una Guardia Europea de Fronteras y Costas: Breve análisis de la propuesta de Reglamento de la Comisión Europea de 15 de diciembre de 2015", *European Papers*, 22 April 2016, available online at: <http://www.europeanpapers.eu/en/europeanforum/creacion-de-una-guardia-europea-de-fronteras-y-costas>.

dimension, to ensure a high level of internal security within the Union in full respect for fundamental rights, while safeguarding the free movement of persons within it" (art. 1).

The new framework does not deprive Member States of their sovereignty on this issue: although the day-to-day administration will be executed by national border guards, the agency is allowed to intervene in exceptional cases and is thus provided with a pool of resources provided by all Member States.⁴³

This Regulation is not applicable to Denmark, Ireland, and the United Kingdom (which are not part of the Schengen *acquis*) (recitals 65-67).

Finally, it should be noted that the Regulation incidentally amended art. 29 of the new Schengen Borders Code ("SBC"),⁴⁴ allowing in exceptional circumstances for the reintroduction of internal borders for periods up to six months (art. 80). Currently, an Implementing Council Decision, legally based in art. 29 SBC, allows internal borders in five Schengen States (Austria, Germany, Denmark, Sweden and Norway) until 12 February 2017.⁴⁵ A Commission proposal to extend the authorization to "prolong proportionate, temporary border controls for a maximum period of three months" has been tabled on 25 January 2017.⁴⁶

3 Relevant judgments of the CJEU

Shifting the focus to the case law of the CJEU ("the Court"), a review of the 2016 relevant judgments in the field of judicial cooperation in criminal matters shall be conducted, with reference to cases on EAW, data retention, *ne bis in idem* and repatriation.

3.1 EAW judgments

Looking at 2016, it emerges that many judgments involved specifications on the features of EAW, currently regulated by Framework Decision 2002/584/JHA of 13 June 2002 (the "Framework Decision").⁴⁷ The notions involved in these judgments were detention conditions, *in absentia* proceedings and interpretation of notions used in the Framework Decision.

⁴³ C. RIEHLE, "New FRONTEX Regulation and new name", *eu crim*, 2016, issue 2, pp. 70-71.

⁴⁴ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, pp. 1-52.

⁴⁵ Council Implementing Decision (EU) 2016/1989 of 11 November 2016 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 306, 15.11.2016, pp. 13-15. T. WAHL, "Internal Border Controls Prolonged", *eu crim*, 2016, issue 4, p. 156.

⁴⁶ European Commission, "Proposal for a Council Implementing Decision setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk", 25 January 2017, COM(2017) 40 final.

⁴⁷ Council Framework Decision of 13 June 2002 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1-20.

3.1.1 Detention conditions

The most debated aspect was the relevance of an assessment of detention conditions in the State where the execution shall take place. Judgments of the CJEU allowing courts in the executing State to conduct such an assessment have been welcomed as a signal of the Court fighting for fundamental rights. Nevertheless, such decisions of the Court, should they become a steady standpoint, may compel amendments in the legislative tools on EAW.

The judgment of the Grand Chamber triggering discussions on this topic was *Joined Cases Aranyosi and Căldăraru*, issued on 5 April 2016.⁴⁸

The Court stated that if there is evidence of deficiencies in detention conditions amounting to a substantial risk of inhuman or degrading treatment prohibited by art. 19 of the EU Charter in the requesting Member State, the executing judicial authority must first postpone its decision on the surrender until it obtains the supplementary information. Then, if such risk cannot be discounted within a reasonable time, the executing judicial authority should be able to choose whether to bring the surrender procedure to an end.

In September, another case on the anticipated assessment of possible inhuman or degrading treatment was adjudicated by the Court, this time in the field of international cooperation, the *Petruhhin* case.⁴⁹

In the ruling, the Court first stated that a national legislation limiting guarantees from extradition to third States only applicable to its own nationals affected nationals of other EU Member States and their freedom of movement within the EU, although justifiable under some conditions. Then, it specified that Member States receiving extradition requests from

⁴⁸ Judgment of the Court (Grand Chamber) of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, *Joined Cases C-404/15 and C-659/15 PPU*. R. NIBLOCK, "Mutual recognition, mutual trust? Detention conditions and deferring an EAW", *New Journal of European Criminal Law*, 2016, issue 2, pp. 250-251; S. GÁSPÁR-SZILÁGYI, "Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant", *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, vol. 24, issue 2-3, pp.: 197-219 (23); E. SELVAGGI, "Quando le condizioni di detenzione nello Stato che emette il MAE giustificano il rifiuto della sua esecuzione", *Cassazione Penale*, issue 9, pp. 3470-3477; A. MARTUFI, "La Corte di Giustizia al crocevia tra effettività del mandato d'arresto e inviolabilità dei diritti fondamentali", *Diritto penale e processo*, 2016, issue 9, pp. 1243-1251; S. RIONDATO, "Mandato d'arresto europeo. Condizioni di detenzione nello Stato Membro emittente", *Diritto penale e processo*, 2016, issue 8, pp. 1111-1113; F. CANCELLARO, "La Corte di Giustizia si pronuncia sul rapporto tra mandato d'arresto europeo e condizioni di detenzione nello stato emittente - Corte di Giustizia Ue, grande camera, sent. 5 aprile 2016, Aranyosi e Caldăraru, cause C-404/15 e C-659/15 PPU", *Diritto Penale Contemporaneo*, 18 April 2016, available online at <http://www.penalecontemporaneo.it/d/4645-la-corte-di-giustizia-si-pronuncia-sul-rapporto-tra-mandato-d-arresto-europeo-e-condizioni-di-deten>.

⁴⁹ Judgment of the Court (Grand Chamber) of 6 September 2016, *Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra*, Case C-182/15. C. RIZCALLAH, *European and International Criminal Cooperation: A Matter of Trust? CJEU (Grand Chamber), Aranyosi and Căldăraru, 5 April 2016, Joined Cases C 404/15 and C 659/15 PPU - CJEU (Grand Chamber), Petruhhin, 6 September 2016, Case C-182/15*, Case Notes of the College of Europe, volume 1, Brugge, 2017; T. WAHL, "CJEU Ruling "Petruhhin": Extradition of EU Citizens to third Countries", *eurim*, 2016, issue 3, p. 131.

a third country have a duty to concretely assess the risk of prejudice to the rights referred to in art. 19 of the EU Charter.

3.1.2 *In absentia proceedings*

An interesting judgment on *in absentia* proceeding, also in light of the heated debate on the topic linked to the Presumption of Innocence Directive (see above), was the one in the *Dworzecki* case, issued in May.⁵⁰

The Court first established that the regulation of trials *in absentia* for EAW purposes, and specifically the notions of ‘summoned in person’ and ‘actually received official information’ referred to in art. 4 of the Framework Decision, are not to be left to the determination of individual Member States but are an autonomous notion of EU law. As a consequence, it ruled that it is not sufficient for the EAW conditions to be met to hand the summons on a subject belonging to that household of the concerned person. It shall be unequivocally ascertained if and when the information contained in the summons were actually passed on to the addressee of the summons. However, the Court also noted that the fact that a trial was carried out *in absentia* and without proof of actual knowledge by the accused person might not be sufficient to refuse the execution of a EAW, provided that the accused be granted the chance to initiate a new trial.

3.1.3 *Interpretation of the Framework Decision*

In June, in the *Bob-Dogi* case, the Court affirmed that a national arrest warrant underlying the EAW is needed in order to open the EAW procedure. It therefore rejected the opinion, advocated by some Member States, that the EAW may be considered as a replacement of the national arrest warrant.⁵¹

In July, the Court issued a decision⁵² on the interpretation of the term “detention” in the Framework Decision. The Court found that the concept of “detention” is an autonomous concept of EU law, which must be interpreted as an encompassing measure causing a deprivation of liberty comparable to imprisonment, “having regard to the type, duration, effects and manner of implementation of the measures”. The Court excluded from the notion

⁵⁰ Judgment of the Court (Fourth Chamber) of 24 May 2016, *Openbaar Ministerie v Paweł Dworzecki*, Case C-108/16 PPU. T. WAHL, “CJEU Interprets Refusal Ground on trials *in absentia*”, *eu crim*, 2016, issue 2, p. 80; E. SELVAGGI, “Mandato d’arresto europeo: nel processo *in absentia* valgono le disposizioni comunitarie”, *Cassazione Penale*, issue 9, pp. 3484-3485; S. RIONDATO, “Mandato d’arresto europeo. Nozione di ‘citazione in giudizio *ad personam*’ e di ‘notifica ufficiale con altri mezzi’”, *Diritto penale e processo*, 2016, issue 8, pp. 1113-1114.

⁵¹ Judgment of the Court (Second Chamber) of 1 June 2016, *Niculaie Aurel Bob-Dogi*, Case C-241/15. T. WAHL, “AG Gives opinion in Bob-Dogi Case”, *eu crim*, issue 1, p. 18; E. SELVAGGI, “Va rifiutato il MAE che non si fondi su un provvedimento nazionale”, *Cassazione Penale*, issue 9, pp. 3478-3483.

⁵² Judgment of the Court (Fourth Chamber) of 28 July 2016, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, Case C-294/16 PPU. T. WAHL, “CJEU interprets the Concept of “detention” in the FD EAW”, *eu crim*, 2016, issue 3, p. 132; S. RIONDATO, “Mandato d’arresto europeo. Deduzione del periodo di custodia scontato nello Stato Membro di esecuzione”, *Diritto penale e processo*, 2016, issue 10, p. 1385.

of served detention - that could reduce the remainder of the execution of a sentence - “a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents”.

In November, in three separate cases, all referred to the Court by a Dutch tribunal, the Court seized the opportunity to provide clearer definitions of the term “judicial authority”, used widely in the Framework Decision but undefined.⁵³

The Court denies the assumption that said definition may be left to national legislation and provided autonomous EU specifications of the notion on a case-by-case basis: in the *Poltorak* case,⁵⁴ it excluded that an act issued by a police service may be encompassed in the notion, as it would not undergo any judicial approval; in the *Ruslanas Kovalkovas* case,⁵⁵ it ruled out that an organ of the executive, such as a Ministry of Justice, may be a “judicial authority.” Lastly, in the *Özcelik* case,⁵⁶ the Court recognized the qualification of “judicial decision” of an arrest warrant issued by a Hungarian police department and subsequently confirmed by a decision of the public prosecutor’s office, which is an authority responsible for administering criminal justice.

3.2 Repatriation judgments

In the midst of the largest and most chaotic ever migratory wave towards Europe’s shores, a growing issue in national politics is represented by the distinction between applicants for international protection, *i.e.* asylum seekers and refugees, and those who do not have human rights based protection needs, so-called “economic migrants”. In this second case, repatriation may occur.

⁵³ T. WAHL, “CJEU Rules on the interpretation of the term “Judicial authority”, *eu crim*, 2016, issue 4, pp. 165-167.

⁵⁴ Judgment of the Court (Fourth Chamber) of 10 November 2016, *Openbaar Ministerie v Krzysztof Marek Poltorak*, Case C-452/16 PPU.

⁵⁵ Judgment of the Court (Fourth Chamber) of 10 November 2016, *Openbaar Ministerie v Ruslanas Kovalkovas*, Case C-477/16 PPU.

⁵⁶ Judgment of the Court (Fourth Chamber) of 10 November 2016, *Openbaar Ministerie v Halil Ibrahim Özçelik*, Case C-453/16 PPU.

The CJEU intervened again in 2016 to define some aspects of the Directive on illegal returns (“Return Directive”),⁵⁷ after the well-known 2015 *Celaj* judgment⁵⁸ on the admissibility of prison sentences for irregular migrants re-entering illegally into the country.⁵⁹

In the *Affum* judgment,⁶⁰ the Court stated that Member States cannot enact legislation providing for the imprisonment of “nationals of non-EU countries in respect of whom the return procedure established by the Return Directive has not yet been completed (...) merely on account of illegal entry, resulting in an illegal stay”. In fact, the effectiveness of the proceedings set forth in the Return Directive shall be ensured at all times, while an imprisonment operated by a third Member State solely because the individual who is undergoing that procedure attempted to cross an internal border may delay the procedure and the return itself.⁶¹

The CJEU also adjudicated its first cases on qualification and procedures for international protection.

In February, in the *J.N.* case,⁶² the Court affirmed the compatibility between the EU Charter and a clause in the International Protection Directive⁶³ which allowed detention of third-country nationals undergoing such a procedure “for purposes of national security or public order.”⁶⁴ The Court determined that the EU legislator, in drafting said provision, had struck a legitimate and proportionate balance between the right to liberty of applicants for international protection and the principle of security, in allowing detention of those subjects

⁵⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, pp. 98–107.

⁵⁸ Judgment of the Court (Fourth Chamber) of 1 October 2015, Criminal proceedings against Skerdjan Celaj, Case C-290/14. E. URÍA GAVILÁN, “Pena de Prisión e inmigración irregular: comentario a la sentencia del Tribunal de Justicia de la Unión Europea en el asunto C-290/14, Celaj”, *European Papers*, 22 April 2016, available online at: <http://www.europeanpapers.eu/en/europeanforum/pena-de-prision-e-inmigracion-irregular>.

⁵⁹ E. PISTOIA, “Unravelling Celaj”, *European Papers*, 4 May 2016, available online at: <http://www.europeanpapers.eu/en/europeanforum/unravelling-celaj>.

⁶⁰ Judgment of the Court (Grand Chamber) of 7 June 2016, *Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d’appel de Douai*, Case C-47/15.

⁶¹ J. WAASDORP, A. PAHLADISINGH, “Expulsion or Imprisonment? Criminal Law Sanctions for Breaching an Entry Ban in the Light of Cimmigration Law”, *Bergen Journal of Criminal Law and Criminal Justice*, 2016, Vol. 4, Issue 2, pp. 247-266; S. RIONDATO, “Rimpatrio di cittadini di Paesi terzi il cui soggiorno è irregolare. Normativa nazionale che prevede, in caso di ingresso irregolare, la pena della reclusione”, *Diritto penale e processo*, issue 10, pp. 1383 – 1384.

⁶² Judgment of the Court (Grand Chamber) of 15 February 2016, *J. N. v Staatssecretaris voor Veiligheid en Justitie* (Case C-601/15 PPU).

⁶³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, pp. 96–116 (“International Protection Directive”).

⁶⁴ Art. 8 (3)(e), International Protection Directive.

pending their application in cases of a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.”⁶⁵

In the *Alo and Osso* case,⁶⁶ the Court stated that it is legitimate for a Member State to impose an additional condition for social security (e.g. a place-of-residence condition) to beneficiaries of subsidiary protection under the Qualification Directive,⁶⁷ more grievous than those imposed on refugees, if those groups are not in an objectively comparable situation as regards the objective pursued by those rules.⁶⁸

3.3 Ne bis in idem

In a judgment rendered in June⁶⁹, the CJEU reiterated its interpretation of the double jeopardy rule and better defined its limitations. The legal bases for the *ne bis in idem* principle are found in artt. 54-55 of the Convention on the Application of Schengen (“CISA”)⁷⁰ and in art. 50 of the EU Charter, affirming that a person cannot be held liable to be tried or punished again in criminal proceedings for an offence for which he “has already been finally acquitted or convicted” (art. 50 EU Charter) or “whose trial has been finally disposed of” (art. 54 CISA) within the Union in accordance with the law.

In the case at issue, the CJEU was not innovative in stating that, in order to trigger the application of *ne bis in idem*, a decision determining the merits of the case by the prosecuting authority of a Schengen state must have been made.⁷¹

⁶⁵ S. PEERS, “Detention of asylum-seekers: the first CJEU judgment”, *EU Law Analysis*, 9 March 2016, available online at: <http://eulawanalysis.blogspot.it/2016/03/detention-of-asylum-seekers-first-cjeu.html>.

⁶⁶ Judgment of the Court (Grand Chamber) of 1 March 2016, *Kreis Warendorf v Ibrahim Alo and Amira Osso v and Region Hannover*, Joined Cases C-443/14 and C-444/14.

⁶⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, pp. 9–26 (“Qualification Directive”).

⁶⁸ L. HALLESKOV STORGAARD, “Enhancing and diluting the legal status of subsidiary protection beneficiaries under Union law – the CJEU judgment in *Alo and Osso*”, *EU Law Analysis*, 9 March 2016, available online at: <http://eulawanalysis.blogspot.it/2016/03/enhancing-and-diluting-legal-status-of.html>

⁶⁹ Judgment of the Court (Grand Chamber) of 29 June 2016, *Criminal proceedings against Piotr Kossowski*, C-486/14.

⁷⁰ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, pp. 19-62.

⁷¹ T. WAHL, “No Detailed Investigation – Fresh Proceedings Admissible CJEU says”, *eucri*, issue 2, p. 79; S. MONTALDO, “A New Crack in the Wall of Mutual Recognition and Mutual Trust: *Ne Bis in Idem* and the Notion of Final Decision Determining the Merits of the Case”, *European Papers*, 5 January 2017, available online at: <http://www.europeanpapers.eu/en/europeanforum/new-crack-wall-mutual-recognition-and-mutual-trust-ne-bis-in-idem-and-final-decision>; S. RIONDATO, “Principio del *ne bis in idem*. Ammissibilità dell’azione penale nei confronti di un accusato in uno Stato Membro dopo la chiusura del procedimento penale avviato a suo carico in un altro Stato Membro, senza istruttoria approfondita”, *Diritto penale e processo*, issue 10, pp. 1384 – 1385; S. CAPORALE, “*Ne bis in idem* internazionale. Il provvedimento di archiviazione non sempre chiude definitivamente il processo”, *Archivio Penale*, 2016, issue 3, pp. 1-13; P. BERNARDONI, “Nuova

However, the decision is remarkable since it declares for the first time that a decision made by a public prosecutor to close investigations without filing a request for indictment cannot be seen as a final decision on the merits, in cases where it emerges that no thorough or detailed investigation activity has been carried out. Referring to the specifics of the case, the Court further stated that the lack of thoroughness of the investigation can be deduced by the fact that the victim was not heard and no potential witness was summoned to verify the reconstruction of facts made in written by the victim.

It should be recalled that, in the course of 2016, the Italian Supreme Court (*Corte di Cassazione*) in two different instances referred to the CJEU for preliminary rulings *ex art. 267* TFUE on the interpretation of the combination of administrative and criminal penalties in the field of market abuses.⁷²

The EU case law on the principle of *ne bis in idem* shall undoubtedly be somehow affected by the recent ECtHR judgment in the *A&B v. Norway* case,⁷³ seen as a partial *revirement* from the principles established in the famous *Grande Stevens* judgment in 2014.⁷⁴ In November 2016, the ECtHR found that there had been no violation of art. 4 of Protocol no. 7 to the ECHR, deeming it acceptable for a State to maintain dual (administrative and criminal) proceedings for the same offence, provided that there was a “close connection” between the two investigations and that the result was a “combination of penalties”.

3.4 Data protection and retention

An additional field of intervention for the Court in 2016 has been the interpretation of the legislation on data protection and retention, continuing the privacy-friendly trend

pronuncia della corte di giustizia sul ne bis in idem: un chiarimento sulla nozione di “sentenza definitiva” e un’occasione persa per definire lo status delle riserve *ex art. 55 CAAS - Nota a CGUE, Grande Sezione, 29 giugno 2016, Kossowski, C-486/14”, Diritto Penale Contemporaneo, 5 July 2016, available online at <http://www.penalecontemporaneo.it/d/4868-nuova-pronuncia-della-corte-di-justizia-sul-ne-bis-in-idem-un-chiarimento-sulla-nozione-di-sentenz>.*

⁷² F. VIGANÒ, “Ne bis in idem e doppio binario sanzionatorio: nuovo rinvio pregiudiziale della Cassazione in materia di abuso di informazioni di privilegiate - Cass., II sez. civ., ord. 15 novembre 2016, 23232/16, Pres. Petitti, Est. Falabella, Puma c. Consob”, *Diritto Penale Contemporaneo*, 28 November 2016, available online at <http://www.penalecontemporaneo.it/d/5079-ne-bis-in-idem-e-doppio-binario-sanzionatorio-nuovo-rinvio-pregiudiziale-della-cassazione-in-materi>. F. VIGANÒ, “A Never-Ending Story? Alla Corte di Giustizia dell’Unione Europea la questione della compatibilità tra ne bis in idem e doppio binario sanzionatorio in materia, questa volta, di abusi di mercato - Prime osservazioni su Cass., sez. trib. civ., ord. 20 settembre 2016 (dep. 13 ottobre 2016), n. 20675/16, Pres. e Rel. Chindemi”, *Diritto Penale Contemporaneo*, 17 October 2016, available online at: <http://www.penalecontemporaneo.it/d/5001-a-never-ending-story-alla-corte-di-justizia-dellunione-europea-la-questione-della-compatibilita-tr>.

⁷³ Judgment on the merits delivered by the Grand Chamber, *A and B v. Norway*, nos. 24130/11 and 29758/11, ECHR 2016.

⁷⁴ Judgment on the merits delivered by a chamber, *Grande Stevens and others v. Italy*, no. 18640/10 *et al.*, ECHR 2014.

identifiable bearing in mind, *inter alia*, the ground-breaking *Digital Rights Ireland*⁷⁵ and *Schrems*⁷⁶ cases.⁷⁷

In *Breyer*,⁷⁸ the court clarified the interpretation of “personal data” in the definition of the Data Protection Directive,⁷⁹ now repealed by the new General Data Protection Regulation (see above). Dynamic IP addresses are a relatively new tool used to connect to the Internet: they are not linked to a specific device, as the “static” ones, they change upon every access to the Internet, and thus do not allow online media service providers to identify the user without a specific request to the Internet service provider. In the case at issue, it ruled that even dynamic IP addresses constitute personal data, as it is not required that all the information enabling the identification of the data subject must be in the hands of one person. It is sufficient that the online media service provider has the legal means enabling it to obtain from the internet service provider the additional data and identify the data subject (para. 49).⁸⁰ The Court further held that the aim of the online media service provider to ensure the general operability of a website is not a legitimate interest allowing them to store data after the consultation of the website by the user (para. 64). This stance obviously leaves aside possible cases of processing of those same data for purposes of criminal justice, falling outside of the scope of the Directive (para. 51).

In the awaited *Tele2 Sverige* judgment,⁸¹ rendered in December, the Court denied the compatibility between EU law and general or indiscriminate data retention regimes in national legislation, especially the English and Swedish ones. Said regimes would risk creating in the Union’s citizens the perception of a surveillance State in contrast with the fundamental right enshrined in art. 8 of the EU Charter, on the right of respect for personal and family life. The Court stated that Member States are merely allowed, in the context of prevention policies, to enact legislation on “targeted retention of that data solely for the purpose of fighting serious crime.”⁸² Said authorization comes with strings attached: the retention shall respect the principle of proportionality, be limited to what is strictly

⁷⁵ *Supra*, footnote 25.

⁷⁶ *Supra*, footnote 28.

⁷⁷ T. WAHL, “CJEU opposes General Data Retention Regimes (Case Tele2 Sverige)”, *eucri*, 2016, issue 4, p. 164.

⁷⁸ Judgment of the Court (Second Chamber) of 19 October 2016, Patrick Breyer v Bundesrepublik Deutschland - (Case C-582/14).

⁷⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

⁸⁰ T. WAHL, “CJEU Ruling on Legitimate interest in Storing Dynamic IP addresses”, *eucri*, 2016, issue 4, pp. 161-162.

⁸¹ Judgment of the Court (Grand Chamber) of 21 December 2016 - Tele2 Sverige AB v Postoch telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others - Joined Cases C-203/15 and C-698/15.

⁸² Court of Justice of the European Union, Press Release No 145/16, 21 December 2016, available online at: http://curia.europa.eu/jcms/jcms/Jo2_16799/it/?annee=2016.

necessary, be subject to prior review by an independent authority (para. 120), and grant that data do not leave the EU.⁸³

4 National application by national courts:

4.1 Resistance to Italian EAWs by Germany and Greece

The EU legislation on the European Arrest Warrant (“EAW”), generally seen as a pillar of mutual recognition within the European Union, suffered at least two important setbacks in the course of 2016. In two different instances, indeed, national courts rejected European Arrest Warrants issued by Italian authorities on grounds of pre-eminence of national laws.

From an EU law perspective, this deviation from the principle of mutual recognition can be seen as a worrying signal of resurging appeals to national sovereignty, though justified on the basis of alleged differences in standards of protection of fundamental rights in different Member States.⁸⁴

In the German instance, the German Federal Constitutional Court upheld the complaint of a U.S. citizen against whom a legitimate EAW had been issued by Italian authorities, requesting that he be surrendered to Italy.⁸⁵ The applicant had lodged a constitutional complaint stating that - although he had been tried *in absentia* - according to Italian criminal procedure he would not be granted the right to a second trial but only to file an appeal, which might well not be granted on the merits of the case.

The Constitutional Court, in a landmark decision, agreed with the applicant, refused to abide by the EAW, and did not apply the norm of the Framework Decision, stating that there would be a risk in surrendering him and that his human dignity (*Würde des Menschen*), a supreme constitutional value enshrined in art. 1 of the Basic Law (*Grundgesetz*), is untouchable (*unantastbar*).

Through this decision, however, the Court challenged a fundamental principle of EU law, that of mutual recognition, forbidding a Member State to refuse the execution of a legitimate

⁸³ O. POLLICINO, M. BASSINI, “La Corte di Giustizia e una trama ormai nota: la sentenza Tele2 Sverige sulla conservazione dei dati di traffico per finalità di sicurezza e ordine pubblico - Nota a Corte Giustizia UE, sent. 21 dicembre 2016, Tele2 e Watson, cause riunite C-203/15 e C-698/15”, *Diritto Penale Contemporaneo*, 9 January 2017, available online at <http://www.penalecontemporaneo.it/d/5162-la-corte-di-giustizia-e-una-trama-ormai-nota-la-sentenza-tele2-sverige-sulla-conservazione-dei-dati>.

⁸⁴ B. FAVREAU, “L’Europe à la poursuite des droits fondamentaux”, *eu crim*, 2016, issue 2, pp. 104-109, at p. 116.

⁸⁵ *Bundesverfassungsgericht* (Federal Constitutional Court), 26 January 2016, order of 15 December 2015, 2 BvR 2735/14. F. MEYER, “From Solange II to Forever I: The German Federal Constitutional Court and the European Arrest Warrant (and how the CJEU responded)”, *New Journal of European Criminal Law*, 2016, vol. 7, issue 3, pp. 277-294; D. SARMIENTO, “The German Constitutional Court and the European Arrest Warrant: The latest twist in the judicial dialogue”, *EU Law Analysis*, 27 January 2016, available online at: <http://eulawanalysis.blogspot.it/2016/01/the-german-constitutional-court-and.html>; T. WAHL, “Federal Constitutional Court invokes identity Review in EAW Case”, *eu crim*, issue 1, p. 17.

EAW on other grounds that those listed in the EAW Framework Decision, as stated also in the renowned 2013 *Melloni* judgment.⁸⁶

The Court appeals to the duty of the EU to respect the constitutional identities of the Member States as part of their national identity (art. 4(2) TEU) and thus affirms that the decision does not clash with the principle of sincere cooperation between the Member States and the EU (art. 4(3) TEU) and with that of the primacy of EU law.

With this judgment, the German Constitutional Court seems to move beyond its own traditional “Solange” principle in EU law, which stated that the Court would not review Union acts in light of the fundamental rights of the Basic Law as long as the EU’s level of protection of fundamental rights were substantially equal to the protection afforded by the German constitution. Indeed, it seems to state that the most basic rights granted in the Basic Law are protected by an “eternity clause,” which does not allow for a constitutional reform thereon, and shall be safeguarded without any limitation arising out of EU law, thus openly rejecting the principle stated by the CJEU in the *Melloni* case.

In the same month of January, a Tribunal in Athens was also faced with a case to some extent similar to the German one. In this case, an Italian “judge of freedoms”⁸⁷ had issued an EAW for the execution of precautionary measures against five young Greek nationals that had taken part in violent no-global riots in Milan on 1 May 2015. The Athenian Court refused the surrendering of the five individuals on the ground of a visible disproportionality of the sanctions provided for in the Italian Penal Code for the offences (of fascist origin) of damaging and ransacking as compared to the relevant Greek legislation.⁸⁸ Moreover, the Court argued that crimes of that nature entail a sort of “collective responsibility” which is not provided for in the Greek legal system.

Although this could be viewed as a minor decision, since it also dealt with pre-trial measures, it should be noted that it seems to have had an impact on ongoing proceedings: after said refusal, the prosecutor opted for the severance of the investigations on foreigners from the main investigation and only recently filed a request for indictment.⁸⁹

4.2 The theory of counter limits in Italy after the *Taricco* judgment

Other signals of the above-mentioned revival of national sovereignty may be seen in the critical approach of Member States to the interpretation of the CJEU itself. The wake caused

⁸⁶ Judgment of the Court (Grand Chamber) of 26 February 2013 - Criminal proceedings against Stefano Melloni (Case C-399/11).

⁸⁷ *I.e.*, in Italian criminal procedure, a judge in charge of the safeguard of fundamental rights of accused persons subject to pre-trial measures who is not involved directly in the investigations.

⁸⁸ A.E. KOUROUTAKIS, “The Italian European Arrest Warrants for the Five Greeks taking part in Riots and their Rejection by the Greek Authorities”, *New Journal of European Criminal Law*, 2016, vol. 7, issue 3, pp. 295-301.

⁸⁹ ANSA (Press agency), “Scontri 1 maggio: 5 greci verso processo”, *ANSA.it*, 12 January 2017, available online at: http://www.ansa.it/lombardia/notizie/2017/01/12/scontri-1-maggio-5-greci-verso-processo_c8ac161a-3f39-4b33-a265-e23a9e5b5782.html.

by the pivotal 2015 *Taricco* judgment⁹⁰ - and its alleged threat to the fundamental principle of modern penal law of “*nulla poena sine lege*” - has not vanished in the course of 2016.⁹¹

In Italy, there was great anticipation of the upcoming decision of the Italian Constitutional Court which may even trigger the so-called ‘counter limits’. The Court may – following the lead of the Court of Appeals of Milan referring the case to it⁹² - have refused to apply the interpretation given by the EU Court and thus collide with the principle of primacy of EU law should it find that the application thereof would infringe on the most basic constitutional rights.⁹³ This theory is aligned to that of the German Constitutional Court and both these constitutional interpretations are undeniably sustained with a view to better safeguard fundamental rights. Nevertheless, in case of widespread refusals to apply EU law at the national level without recurring to the mechanism of reference for a preliminary ruling (*ex art. 267 TFEU*), there may be a risk of a general weakening of the certainty and the uniform application of the EU legal system.

The very recent decision of the Constitutional Court has instead astounded: in an order published on 26 January 2017,⁹⁴ the Constitutional Court referred the issue back to the CJEU for a preliminary ruling. Safeguarding the role of the CJEU as primary source of interpretation of EU law, the Constitutional Court requested that the CJEU adjudicates whether the *Taricco* judgment was actually meant to override the national constitutional identities of Member States, including the principle of legality applicable to all that is deemed part of the criminal law in the national tradition. It remains to be seen how the CJEU will respond to this assist.

⁹⁰ Judgment of the Court (Grand Chamber) of 8 September 2015 - Criminal proceedings against Ivo Taricco and Others - Case C-105/14.

⁹¹ E. BILLIS, “The European Court of Justice: A “Quasi-Constitutional Court” in Criminal Matters? The *Taricco* Judgment and Its Shortcomings”, *New Journal of European Criminal Law*, 2016, vol. 7, issue 1, pp. 20-38; M. CAIANIELLO, “*Dum Romae (et Brucsellae) Consulitur...* Some Considerations on the *Taricco* Judgment and Its Consequences at National and European Level”, *European Journal of Crime, Criminal Law and Criminal Justice*, 2016, Volume 24, Issue 1, pp. 1-17.

⁹² F. VIGANÒ, “Prescrizione e reati lesivi degli interessi finanziari dell’UE: la Corte d’Appello di Milano sollecita la Corte Costituzionale ad azionare i ‘controlimiti’ - Corte d’appello di Milano, II sez. pen., ord. 18 settembre 2015, Pres. Maiga, Est. Locurto”, *Diritto Penale Contemporaneo*, 21 September 2015, available online at: <http://www.penalcontemporaneo.it/d/4149-prescrizione-e-reati-lesivi-degli-interessi-finanziari-dell-ue-la-corte-d-appello-di-milano-solleciti>.

⁹³ D.U. GALETTA, *The European Union in the Constitutional Framework of Member States: The Italian case*, in R. ARNOLD (ed.), *Limitations of National Sovereignty through European Integration*, New York-London, Springer, 2016, pp. 87-97.

⁹⁴ Italian Constitutional Court, Order 1/2017, 26 January 2017, available online at: <http://www.cortecostituzionale.it/schedaUltimoDeposito.do?sessionId=445A30FF537D4ED400E24AB7B5EE596D#>.

5 Further developments

5.1 New tools in the fight against terrorism

The high level of alert on further terrorist attacks on European soil, which turned into a ghostly reality with the heinous attacks in Brussels in March, in Nice in July, and in Berlin in December, among others, prompted the EU institutions to promote further tools in the fight on terrorism.

In February, an Action Plan to strengthen the fight against the financing of terrorism was presented by the European Commission,⁹⁵ setting forth a programme to come up with several measures designed to disrupt the sources of revenue of terrorist organisations (see below.)⁹⁶

At the beginning of the year, a European Counterterrorism Centre was launched at Europol, with the European Parliament agreeing to bear the relevant costs in April through a budget amendment. In that context, a group of national counter-terrorism experts was created in March, named the Joint Liaison Team. In July, the development of a platform for information sharing was mandated upon the Counter Terrorism Group, a group pooling the intelligence services of all Member States, as well as those of Norway and Switzerland.⁹⁷

5.2 Europol Regulation

In 2016, a set of rules and regulation for the EU's law enforcement agency, Europol, was approved, updating its powers so as to enable Europol to step up efforts to fight terrorism, cybercrime and other serious and organised forms of crime.⁹⁸

The path that led to this Regulation has advanced slowly since its first draft proposed by the Commission in 2013 and its implementation will continue to be slow, as its transposition deadline is foreseen for 1 May 2017.

The new legislative instrument aims at bringing the framework for Europol's operations in line with the Lisbon Treaty, accounting for a parliamentary oversight mechanism.⁹⁹ At the same time, it enhances the agency's mandate, by granting it the right to directly process information and data (artt. 17-22); imposing clearer rules for its functioning and that of its units (art. 4, artt. 9-16, artt. 53-61); easing the procedures for the deployment of immediate response units in emergencies (art. 44); and allowing it to interact directly with private

⁹⁵ Communication from the Commission to the European Parliament and the Council on an Action Plan for strengthening the fight against terrorist financing, COM(2016) 50/2.

⁹⁶ T. WAHL, "Further Changes in Anti-Money Laundering Scheme Planned", *eucri*, 2016, issue 1, pp. 11-12.

⁹⁷ C. RIEHLE, "European Counter terrorism Centre (ECTC) Established at Europol", *eucri*, 2016, issue 2, pp. 69-70.

⁹⁸ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53-114.

⁹⁹ C. RIEHLE, "JHA Council Adopts Europol Regulation", *eucri*, 2016, issue 1, p. 6.

entities to issue data requests (art. 26). Said enhancements shall always comply with data protection safeguards, respect the right of citizens to lodge an individual complaint on the processing of its data by Europol (art. 47), and be subject to the constant monitoring by the European Data Protection Supervisor (art. 43) and oversight by a Joint Parliamentary Scrutiny Group (art. 51.)¹⁰⁰

5.3 Discussions on EPPO at a stall

Through the course of 2016, European institutions continued debating, for the third year in a row, on the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office (EPPO). The discussions were ongoing and made many steps forward this year, under the stimulus of the Commission,¹⁰¹ and with strong support from OLAF¹⁰² and from the Council Presidencies.

Although multiple issues were examined, scepticism from some of the Member States as to the necessity and opportunity of the establishment of said institutions could not yet be overcome.¹⁰³ Moreover, Ministers in the Council insist on applying the well-known principle of negotiation “nothing is agreed until everything is agreed,” requiring an overall agreement on the text.¹⁰⁴

At the end of the year the Slovak Presidency of the Council tabled a consolidated text¹⁰⁵ which could be of use as a basis for the following dialogues, but had to admit that there is no consensus yet after the failure of the Council of Member States' Justice Ministers to find a unanimous approach.¹⁰⁶

5.4 Trilogue agreement for the text of the PIF Directive

Solving at last a much debated question on VAT-related frauds, the Presidency of the Council, the European Parliament, and the Commission reached a preliminary agreement in December 2016 on a text for a directive on the protection of the EU's financial interests by means of criminal law (often referred to as “PIF Directive.”)¹⁰⁷ This directive should replace the Convention on the protection of the European Communities' financial interests of 26 July

¹⁰⁰ C. RIEHLE, “Europol Regulation Adopted”, *eu crim*, 2016, issue 2, p. 68.

¹⁰¹ V. Jourova, “The Cost(s) of Non-Europe in the Area of Freedom, Security and Justice. The European public prosecutor's of ce as a Guardian of the European taxpayers' money”, *eu crim*, 2016, issue 2, pp. 94-98.

¹⁰² Studies from OLAF seem to show that EPPO would “streamline the process of identifying fraudsters and bringing them to justice more swiftly”; T. WAHL, “OLAF Annual Report 2015”, *eu crim*, issue 2, . 67.

¹⁰³ J. VAN DER HULST, “No Added Value of the EPPO? The Current Dutch Approach”, *eu crim*, issue 2, pp. 99-104.

¹⁰⁴ T. WAHL, “Dutch Presidency and EPPO”, *eu crim*, issue 2, pp. 72-73.

¹⁰⁵ Council document 15200/16 of 2 December 2016.

¹⁰⁶ T. WAHL, “No agreement on EPPO”, *eu crim*, 2016, issue 4, p. 159.

¹⁰⁷ Progress report on PIF: Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (First reading), Council document 15130/16 of 2 December 2016.

1995, including the Protocols thereto of 27 September 1996, of 29 November 1996 and of 19 June 1997.¹⁰⁸

The stall in negotiations had been caused by the strong opposite positions taken by the Parliament and the Council on whether to include VAT-related frauds within the scope of the proposed directive. Following the controversial CJEU judgment in the *Taricco* case,¹⁰⁹ the Council had expressed strong views against the broadening of the scope of the legislation to those cases, while the European Parliament had resisted by announcing that no compromise text might have been approved unless the text – at least partially – discussed VAT-related frauds.¹¹⁰

The preliminary compromise reflects said request, foreseeing the applicability of the Directive to serious cross-border VAT fraud above a certain threshold.¹¹¹

In the final document dated 2 December 2016, the Parliament reserves the right to consult with its members on whether it can approve the preliminary agreement. The Council shall then be informed by letter and requested to confirm the agreement. Further developments are therefore to be expected in the course of the semester of Maltese presidency.

5.5 Commission's proposal for a Regulation on mutual recognition of confiscation and freezing of assets orders

At the end of the year 2016, the EU Commission presented to the Council a proposal for a future Regulation dealing with the mutual recognition of freezing and confiscation orders.¹¹² Said proposal is integrated in the wider context of the European Agenda on Security¹¹³ and of the Action Plan to strengthen the fight against the financing of terrorism (see above), striving to strengthen the EU's action against specific criminal offences, specifically within a unified package on terrorism financing including a proposal to harmonise money laundering offences and sanctions (see below) and a proposal to tackle illicit cash

¹⁰⁸ Art. 16 of the compromise text.

¹⁰⁹ Judgment of the Court (Grand Chamber) of 8 September 2015, Criminal proceedings against Ivo Taricco and Others, Case C-105/14.

¹¹⁰ T. WAHL, "Preliminary agreement on PIF Directive", *eu crim*, 2016, issue 4, pp. 158-159.

¹¹¹ The compromise now found in Art. 2 (2)) states that: "In respect of revenue arising from VAT own resources, this Directive shall only apply in cases of serious offences against the common VAT system. For the purposes of this Directive, offences against the common VAT system shall be considered serious when the intentional acts or omissions defined in Article 3(d) are connected with the territory of two or more Member States of the European Union and involve a total damage of at least EUR 10 million." However, art. 3(2) introduces a flexibility clause, providing that the efficacy and appropriateness of the specific threshold shall be assessed by the Commission after 36 months since the Directive's deadline for implementation.

¹¹² European Commission, Proposal for a Regulation on the mutual recognition of freezing and confiscation orders, 21 December 2016 (COM(2016) 819).

¹¹³ Factsheet of the European Commission, "A European Agenda on Security. State Of Play: October 2016", 12 October 2016, available online at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/fact-sheets/docs/20161012/factsheet_security_union_en.pdf.

movements. A further aim is to bring the general EU legislation in line with the provisions of the 2014 Directive on proceeds of crime, to be implemented in national legislations.¹¹⁴

The Commission's proposal aims at improving the efficiency of the recovery of profits of crime, ensuring better compensation for victims of crime and at the same time allocating at least portions of retrieved criminal profits to the national and EU budgets, thus reducing the social costs of fraud and corruption (para. 4).

The provisional contents envisioned in the proposal should focus on improving the current framework on the mutual recognition of the relevant acts, while at the same time safeguarding the fundamental rights of individuals who may be subject to the orders and explicitly demanding the application of the Directives on procedural rights in criminal proceedings.

Said instrument, if approved, would be the first Regulation ever issued in the field of cooperation in criminal matters on the basis of art. 82(1) TFEU, and it would benefit greatly in uniformity of application of its immediate direct applicability in all Member States.¹¹⁵ The rationale behind this innovative choice is explained in the proposal itself by the fact that in cross-border procedures there would be "no need to leave a margin to Member States to transpose such rules" (para. 2).

5.6 Commission's proposals on anti-money laundering

Notwithstanding the approval of the fourth anti-money laundering Directive¹¹⁶ in May 2015, the Commission believes that there are many potential improvements to effectively counter the newest criminal phenomena that may rely on money laundering, first and foremost terrorist financing. This has been provoking a flurry of proposals to sharpen the legislative tools available at EU level to battle money laundering as an intermediate crime for several other serious crimes.

In July 2016 the Commission thus proposed a test to amend said directive with a view to further reinforcing EU rules on anti-money laundering to counter terrorist financing and increasing transparency about the actual beneficial owners of companies and trusts.¹¹⁷

¹¹⁴ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, pp. 39–50.

¹¹⁵ T. WAHL, "Commission Presents new Mutual Recognition instrument of Freezing and Confiscation Orders", *eu crim*, 2016, issue 4, p. 165.

¹¹⁶ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, pp. 73–117.

¹¹⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, 5 July 2016, COM(2016) 450 final.

The Proposal aimed to follow up on the Commission's efforts in encouraging Member States to anticipate the transposition date of the fourth anti-money laundering Directive, and it would have amended the implementation date, bringing it forward by around six months, from 26 June 2017 to 1 January 2017. However, this suggested earlier target date has already passed without approval of the amending directive.

The proposed measures concern to various degrees the tackling of terrorism financing as well as stricter transparency rules on the prevention of tax avoidance and money laundering, ensuring transparency, improved communication and interoperation, among Member States' competent authorities and battling corporate anonymity.¹¹⁸

Within the same context of the proposal for a regulation on mutual recognition of confiscation and freezing of assets orders (see above), in December, the European Commission also presented a different proposal for a Directive to elicit the harmonisation of the money laundering offence throughout national legislations.¹¹⁹ In fact the Proposals focuses on the definition, scope, and sanctions of the money laundering offence, in the belief that asymmetries in current national legislations and the lack of cooperation among national authorities may be exploited by criminal offenders.¹²⁰

5.7 Poland "pre-article 7" procedure

In January 2016, an unprecedented procedure to assess and react to the alleged threats to the rule of law in Poland was initiated by the European Commission. It was the first-ever instance of implementation of the mechanism to prevent the escalation of systemic threats to the rule of law, set forth in in the 2014 Commission's document "A new EU Framework to strengthen the Rule of Law,"¹²¹ the so-called "rule-of-law procedure." This tool is known as a "pre-article 7" procedure as it has been inserted as a prerequisite or an early warning tool for the possible application of a preventive or sanctioning mechanism of art. 7 on the Treaty of European Union in cases of "clear risk of a serious breach of the [Union's] values" (Article 7(1) TEU) or of "the existence of a serious and persistent breach" of the Union's values (Article 7(2) and 7(3) TEU) respectively.

The events that triggered the opening of said procedure were specifically: the removal of five constitutional judges appointed by previous governments; the order given to a now

¹¹⁸ A. MET-DOMESTICI, "The Fight against Money Laundering in the EU. The Framework Set by the Fourth Directive and Its Proposed Enhancements", *eucri*, 2016, issue 4, pp. 171-179; M. LASSALLE, "La révision de la quatrième directive anti-blanchiment à la lumière des droits fondamentaux", *eucri*, 2016, issue 4, pp. 184-188; T. WAHL, "Commission Proposes Amendments to Anti-Money-Laundering Legislation", *eucri*, 2016, issue 2, p. 73.

¹¹⁹ European Commission, Proposal for a directive to counter money laundering by criminal law, 21 December 2016, COM(2016) 826 final.

¹²⁰ T. WAHL, "Commission tables Plans for Harmonisation of Money Laundering", *eucri*, 2016, issue 4, pp. 159-160.

¹²¹ Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

paralysed Constitutional Court not to publish judgments that were expected to criticize the strong influence exerted by the executive onto the judiciary power;¹²² as well as concerns on media plurality.¹²³

After a first round of dialogues with the relevant Member State and at the end of a thorough assessment process, and notwithstanding some minor adjustments to the Polish Constitutional Court Law, the Commission's findings highlighted a systemic threat to the rule of law in Poland, recommending the Polish government to increase the independence of the judiciary.¹²⁴ Given the absence of significant replies, the European Parliament adopted a non-legislative resolution urging Poland to voluntarily cooperate with the Commission's recommendations.¹²⁵ The Commission itself reiterated its Recommendation in December, allowing Poland a further two-month timeframe to reply and show progress on these issues, thus postponing all further measures to after 21 February 2017.¹²⁶

Although a preliminary assessment may indicate that the endeavours of the European institutions are frustrated by the lack of answers on the part of the Republic of Poland, the insistence of the European Union on inducing and securing respect of fundamental rights, as laid down in the Charter of Fundamental Rights of the European Union, within Member States on the basis of a commonly agreed-upon legislative instrument, even at a time when renewed nationalistic pleas seem to lead political discourses, should be positively acknowledged.

¹²² In one of the "banned" judgments, the Constitutional court had specifically declared a new law on the functioning of that same Court unconstitutional.

¹²³ European Commission - Press release, "Commission adopts Rule of Law Opinion on the situation in Poland", Brussels, 1 June 2016, IP/16/2015. On these events, see: S. LABAYLE, "Respect des valeurs de l'Union européenne en Pologne: première application du nouveau cadre pour renforcer l'État de droit", *European Papers*, 15 October 2016, available online at: <http://www.europeanpapers.eu/en/europeanforum/respect-des-valeurs-de-lunion-europeenne-en-pologne-premiere-application-cadre-renforcer-etat-droit>; A. RADWAN, "Chess-boxing around the Rule of Law: Polish Constitutionalism at Trial", *Verfassungsblog*, 23 December 2015, available online at: <http://verfassungsblog.de/chess-boxing-around-the-rule-of-law-polish-constitutionalism-at-trial/>.

¹²⁴ Commission Recommendation of 27.7.2016 regarding the rule of law in Poland, C(2016) 5703 final.

¹²⁵ European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union, 2016/2774(RSP); European Parliament - Press release - Fundamental rights in Poland: MEPs want government to heed recommendations, 14.9.2016, available online at: <http://www.europarl.europa.eu/news/en/news-room/20160909IPR41714/fundamental-rights-in-poland-meps-want-government-to-heed-recommendations>. See also T. WAHL, "MEPs Back Commission's Rule-of-Law Mechanism against Poland", *eucri*, 2016, issue 3, pp. 122-123.

¹²⁶ Commission Recommendation of 21.12.2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374, C(2016) 8950 final.

5.8 Financial Markets Regulation

In the specific field of market abuses, 2016 was marked by the entry into force, on 3 July 2016, of the Market Abuse Directive,¹²⁷ approved in 2014 in connection with a Regulation¹²⁸ containing relevant definitions and the regulation of market abuses in cases not constituting criminal offences. The Regulation and the Directive jointly replaced the former 2003 Market Abuse Directive¹²⁹ with a more stringent legislative framework to ensure the efficiency and transparency of financial markets.

The Regulation became *ex se* immediately applicable throughout the European Union, and triggered the approval, before the entry into force of the Regulation, of several instruments of second- and third-level legislation,¹³⁰ *i.e.* delegated and implementing legislation of the Commission, which better defined the most technical issues. On the contrary, the Directive still awaits national implementation in all those countries where the standards for fighting market abuses through criminal offences were lower than the one set at the European Union level.

The aforementioned framework shall only be deemed complete after the legislative instruments on financial markets and instruments, namely MiFIR¹³¹ and MiFID(II),¹³² will also have achieved full implementation. Taking into account the complexity of the required conditions and duties linked to those legislative instruments, the European Parliament acknowledged the impossibility for Member States to successfully endeavour to timely implement it and consequently postponed the implementation deadline to 3 January 2018.¹³³

¹²⁷ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive), OJ L 173, 12.6.2014, pp. 179–189.

¹²⁸ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text, OJ L 173, 12.6.2014, pp. 1–61.

¹²⁹ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, pp. 16–25.

¹³⁰ The full list of implementing and delegated legislation is available online at: http://eur-lex.europa.eu/search.html?LB=32014R0596&qid=1485190425788&SELECT=LB_DISPLAY&DTS_DOM=ALL&type=advanced&lang=en&SUBDOM_INIT=ALL_ALL&DTS_SUBDOM=ALL_ALL.

¹³¹ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.6.2014, p. 84–148.

¹³² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, pp. 349–496.

¹³³ Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016 amending Directive 2014/65/EU on markets in financial instruments, OJ L 175, 30.6.2016, pp. 8–11.