REPORT OF THE WORKING GROUP

WAYS TO BRUSSELS

EAJ - COPENHAGEN MEETING – MAY 2019

INTRODUCTION

The "Ways to Brussels" working group was established by the EAJ for the purpose of monitoring legislative initiatives, and implementing actions, by institutions of the European Union that have the potential to impact on the judiciaries of member states, or more widely. This is with a view to making timely representations to the legislators or policy makers concerned in the hope that legitimate concerns of EAJ members would be recognised and considered.

The members of the working group met in Paris on the 15th of February.

We decided to draft a letter to the President, the first Vice-President and the Commissioner for Justice of the European Commission.

We went through the work programs of the relevant European institutions, looking for the proposed measures that may impact directly on our work as judges or the work of the courts. We selected more than 20 proposals which seemed to be of potential interest. After analysis, some of them held the attention of the working group.

I – THE LETTER TO THE EUROPEAN COMMISSION

The draft letter is attached. The purpose is to present the EAJ and the IAJ and to draw attention to the object of the working group.

José Igreja Matos already agreed on the draft letter. If the members of the EAJ also agree, it would be sent by the President of the EAJ, after the European Parliament elections, to the President, the first Vice-President and the Commissioner for Justice of the European Commission.

II – THE EUROPEAN UNION WORK PROGRAM

CIVIL AND COMMERCIAL MATTERS

- The **Directive on the digital content** and the **Directive on the sales of goods** are waiting for the last approval of the Council to be finally adopted. The first one intends to regulate the private law relationship between traders and consumers in the supply of digital contents. The second one replaces the Consumer Sales Directive and the Directive providing mandatory rules governing all

distance consumer sales contracts. They should not have obvious consequences for the judges or the work of the courts.

- The proposal for a **Regulation on promoting fairness and transparency for business users of online intermediation services** has been adopted by the Parliament on April 17th and is waiting for the final approval of the Council to be published and enter into force. It creates a new set of legislation addressing the online intermediated business-to-business (B2B) relations. It aims at ensuring a fair, predictable, sustainable and trusted legal environment for business users, corporate website users, providers of online intermediation services and online search engines. This proposal opens a new range of possible lawsuits. It must still be voted in plenary by the European Parliament and formally adopted by the Council to complete the legislative procedure

- The proposal for a **Directive on representative actions for the protection of the collective interests of consumers**, and repealing Directive 2009/22/EC, presented as part of the "New Deal for Consumers", aims to enable consumers across the EU to use representative actions to demand compensation from companies that infringe their rights.

The proposal also promotes collective out-of-court settlements, subject to court or administrative authority scrutiny. Final decisions of a court or authority establishing that a trader has infringed the law will be irrefutable evidence in redress actions (within the same Member State) or a rebuttable presumption that the infringement has occurred (for cases brought in another Member State). More class actions will be possible, even for very small amount of damages per person. It should have an impact on the courts. The proposal has been adopted by the European Parliament on the 26th of March 2019 (1st reading). It is awaiting Council position.

- Proposal for a **Regulation amending Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ("Service Regulation").** The points of most interest are likely to be: (a) the establishment of decentralised IT systems across Member State bodies (including courts); (b) the provisions for the electronic service of documents; (c) the possible development in national law of a judicial remedy to assist in determining the address of the person to be served with documents.

  Proposal for a **Regulation amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters ("Evidence Regulation").** The most significant provision is the one allowing for evidence to be taken by videoconference in the courts of another Member State. It will also be noted that the requesting and hosting courts are required to agree on the practical arrangements for the taking of such evidence. The Legal Affairs Committee proposed two amendments of note. First, that the Regulation refer to videoconference "or other available communications technology". Secondly, that a new art. be added to the effect that "Any electronic system for the taking of evidence shall ensure that professional secrecy and legal professional privilege are protected". The latter amendment is likely to be welcome.

Both proposed Regulations now require approval by the Council and Parliament.

- The proposal for a **Directive on the protection of persons reporting on breaches of Union law (Whistleblower Directive)**. The proposed Directive aims to guarantee a high level of protection

for whistleblowers who report breaches of EU law by setting new, EU-wide standards. It is very difficult to foresee the practical importance of the new rules, especially the possible effects on the workload of the courts. It should not affect the independence of the judiciary. This proposal has been adopted by the Parliament and is awaiting Council 1st reading position.

- The **Brussels IIa Regulation (EC) No2201/2003** is about to be reviewed. The Council has agreed on the amendments in December 2018. The agreement includes:
  - abolition of *exequatur* for all decisions in matters of parental responsibility
  - obligation to give the child a genuine and effective opportunity to express his/her views
  - harmonisation of certain rules on the enforcement procedure
  - in child-abduction cases: clear deadlines to ensure these cases are treated in the most expeditious manner (time-frame for the return proceedings and their enforcement)
  - clearer rules on the circulation of extra-judicial agreements (with a special certificate).

The refinement of the final Regulation should be done within the next few months.

CRIMINAL MATTER

- The **Directive on non-cash payment fraud** replaces the Council Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment.

It establishes minimum rules concerning the definition of criminal offences and sanctions in the area of fraud and counterfeiting of non-cash means of payment. Minimum terms of imprisonment are required. Natural and legal persons must be held liable. This Directive has been adopted by the Parliament and the Council. Its publication in the Official Journal of the European Union should come soon. The member States will then have 24 months to bring into force the legal provisions necessary to comply with the Directive.

- The proposal for a **Regulation on preventing the dissemination of terrorist content online** allows "competent authorities" to issue a decision requiring a "hosting service provider" (which offers services online in the EU) to remove terrorist content or disable access to it. These authorities are not defined. Hosting services and members States shall establish a contact point for better communication. The principal problem is that the framework is not a criminal proceeding.

- The **E-Evidence package** contains four proposals : a regulation to obtain e-evidence cross-border straight from providers abolishing exequatur, a directive introducing an obligation for provider with foreign head offices to establish legal representatives within a EU member state and two mandates for negations on the Budapest Convention and on the exchange of e-evidence with the US authorities:
  1.) Proposal for a **Regulation on European Production and Preservation Orders for electronic evidence in criminal matters;**
  2.) Proposal for a **Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings;**
  3.) Recommendation for a Council Decision authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime;

4.) Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters.

The central proposal is the e-evidence regulation, which will establish a European Production Order (EPO) to allow a judicial authority in one Member State to request electronic evidence straight from a service provider offering services in the Union and established or represented (due to the obligation to do so created by the directive) in another Member State. The idea of the EPO is to provide prosecutors and judges much faster with e-evidence as compared to the existing European Investigation Order or Mutual Legal Assistance procedure. The proposed regulation also establishes a European Preservation Order (EPA), which prevents data being deleted by allowing a judicial authority in one Member State to oblige a service provider in another Member State to preserve specific data to enable the authority to request this information later via mutual legal assistance, a European Investigation Order or a European Production Order. The EPA and the EPO can be issued only in the framework of criminal proceedings.

The regulation is a first but very significant step forward to exclude the judicial authorities of the executing Member States from participating in the execution of gathering evidence in criminal matters. The EPO and the EPA will be addressed directly to a legal representative designated by the service provider, without any validation by the national authorities. The requested data will be transmitted directly to the issuing authority. In addition, the principle of double criminality in both Member States is required to issue an EPO or an EPA. But the service provider required will then be the only one to verify that condition. During the 12th of October meeting of the Justice and Home affairs council, many member states asked for a compromise around the inclusion of some sort of notification procedure. The Parliament will probably debate on the proposal at the end of 2019.

Enhancing cybersecurity has been made a priority by the Romanian Presidency of the Council of the EU (January-June 2019).

The working group drafted a statement to lay stress on the lack of guaranties provided by the proposal.

- Proposal for a **Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences** and repealing Council Decision 2000/642/JHA

This proposal seeks to provide for direct access to national centralised bank account registries/data retrieval systems to competent authorities in order to combat the transfer of assets by criminal groups. Regarding procedural rights, removing the need for judicial authorisation that some Member States require would have a very serious impact.

- Proposal for a **Direction of the European Parliament and Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS),** and replacing Council Decision 2009/316/JHA
  Proposal for a **Regulation of the European Parliament and of the Council establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to**

supplement and support the European Criminal Records Information System (ECRIS-TCN system) and amending Regulation (EU) No 1077/2011

It aims at creating a centralised system to efficiently identify which Member State/s hold conviction information on TCN. Convicting Member States have to create a data record in the Central ECRIS-TCN system for each convicted TCN in a timely fashion. This record is limited to the identity information of TCN convicted by a criminal court in the EU, including alphanumeric and fingerprint data, and facial images. The historical convictions (prior to the enactment of this Regulation) must also be entered into the system. A Member State wishing to identify a Member State holding criminal record information on a TCN can perform a "hit/no hit" search in the centralised system, which will display only the verification of the identity of the TCN. The existence of previous convictions can then be confirmed based on information received from the criminal records of the relevant Member States.

These proposals shall simplify the search for criminal records of TCN.

IMMIGRATION MATTER

- The **proposal for a Regulation of the European Parliament and Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person** is a recast of the Dublin III Regulation. It should not have any major effect on the work of the courts.

- The proposal for a **Directive on common standards and procedures in Member States for returning illegally staying third-country nationals** is a recast of the "Return Directive" 2008/115/EC.

It makes it necessary to afford to the third-country national an effective remedy to appeal against or seek review of decisions related to return before a competent judicial authority. It is not possible any more to grant an appeal before an administrative authority. The exercise of the right to an effective remedy is limited to 5 days and before a single level of jurisdiction against the return decision where that decision is based on a decision rejecting an application for asylum that was already subject to an effective judicial review.

This proposal is still under discussion in the European Council and should not have significant impact on courts, expect in countries where the appeals were before an administrative authority.

III – STRENGTENING THE RULE OF LAW WITHIN THE EU

On the 3rd of April 2019, the European Commission launched a reflection process on the rule of law in the European Union. (See press release : http://europa.eu/rapid/press-release_IP-19-1912_en.htm). At the same time, the Commission also launched an infringement procedure by sending a Letter of Formal Notice to Poland regarding the new disciplinary regime for judges.

The Commission invited "the European Parliament, the European Council and the Council, and the Member States as well as relevant stakeholders, including judicial networks and civil society, to

reflect on the issues presented in today's communication and contribute with concrete ideas on how the rule of law toolbox could be enhanced in the future."

The working group drafted a statement supporting the initiative of the Commission.

Céline Parisot

25 April 2019