Twenty Years since Tampere

The Development of Mutual Recognition in Criminal Matters

Lorenzo Salazar

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ABSTRACT

Twenty years having passed since the Conclusions of the European Council in Tampere, which proposed the principle of mutual recognition as the "cornerstone" of judicial cooperation within the Union, the author takes the opportunity to reflect on the main achievements in this sector before and after the entry into force of the Treaty of Lisbon. From the enthusiasm following the adoption of the European Arrest Warrant to the recently achieved European Investigation Order and the Regulation on freezing and confiscation orders, the panorama of mutual recognition still seems to be characterized by excessive fragmentation. After Tampere and following the adoption of the consecutive programmes of action of 2004 (The Hague) and 2009 (Stockholm), no really new strategic guidelines have been adopted by the heads of state and governments, notwithstanding the clear mandate assigned to them by Art. 68 TFEU. Looking forward to the new Strategic Guidelines to be adopted in March 2020, the European Council indeed seems to have for a long while abdicated from its leading role in streamlining objectives in the sector of criminal justice, an area that would enormously benefit from clear orientation guidelines for future initiatives of the new European Commission. As examples, the article proposes fostering the rationalization and simplification of the disparate instruments of cooperation and forging the future relationship between the European Public Prosecutor's Office (EPPO) and Eurojust, in particular concerning the possible expansion of their respective competences and scope.

AUTHOR

Lorenzo Salazar

Deputy Prosecutor General (ret.)
Court of Appeal of Naples, Italy

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I. Introduction

More than two decades have already passed since October 1999, when the European Council, meeting in Tampere during the first Finnish Presidency of the Council of the European Union, devoted the core of its discussions to Justice and Home Affairs – for the very first and only time. The "Tampere Conclusions" are the most far-reaching strategic document in the Justice and Home Affairs (JHA) sector to date. At the time of their adoption, they were still relatively new, having been introduced by the Maastricht Treaty only six years earlier.

Throughout these years, the European Union took the first steps in what, for it, was still *terra incognita*, until then quite exclusively populated by bilateral treaties among states and by the multilateral Conventions of the Council of Europe; the latter were often very far-reaching in their objectives but not always ratified in a complete and satisfactory manner. During this pioneer period, the Union pursued, first of all, a sort of *recycling* of already adopted Council of Europe instruments, in order to improve them and adapt them to the specific needs of the smaller community of EU Member States: the two Extradition Conventions of 1995 and 1996, together with the preparation of the mutual legal assistance Convention (which was adopted in 2000 only), were a clear example of the continuation of the "traditional" method already inaugurated with the European Political Cooperation (EPC) established under the 1986 Single European Act.

With the adoption of the Convention on the Protection of the European Communities' Financial Interests of 26 July 1995, with its Protocols, and of the Convention on the Fight against Corruption of 26 May 1997, the EU abandoned a monocultural approach based on judicial cooperation only and crossed the thin red line of the approximation of criminal law. Meanwhile, new ways to improve cooperation at a practical level were experimented with, such as the exchange of liaison magistrates, the adoption of a manual of good practices, or the creation of judicial networks. This is to say that the Tampere Conclusions were not created in an institutional wasteland: the Union was already trying, though in a hesitant way, to find its own way in the already crowded Justice and Home Affairs area. The entry into force of the Treaty of Amsterdam on 1 May 1999, with its new potential of competences and instruments in the JHA sector, made it even more urgent to find a more robust and structured policy, which the European Council provided just a few months later.

II. "The Cornerstone of Judicial Cooperation…"

Though usually associated with the Tampere Conclusions, it should be recalled that neither the idea of nor the term mutual recognition were entirely new. They originate from point 39 of the Conclusions adopted in June 1998 in Cardiff, under the UK Council Presidency, in which the European Council recognised the need to enhance the ability of national legal systems to work closely together and asked "to identify the scope for greater mutual recognition of decisions of each others' courts." The Conclusions were then further announced by the subsequent action plan,[1] adopted on 3 December 1998, which provided that a process should be initiated with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters within two years of entry into force of the Amsterdam Treaty.

Against this background, the Tampere Conclusions dealt with all the traditional matters of Justice and Home Affairs: "Asylum and Immigration, Civil and Criminal Justice, Fight against Crime and External Policy." Under the chapter entitled "A Genuine European Area of Justice," together with the subjects of access to justice and convergence in civil law matters, special attention was devoted to mutual recognition of judicial decisions. Under point 33 of the Tampere Conclusions, after having affirmed that cooperation between authorities and the judicial protection of individual rights would be facilitated by enhanced mutual recognition of judicial

decisions and judgements and the necessary approximation of legislation, the European Council endorsed the principle of mutual recognition as "the cornerstone of judicial cooperation in both civil and criminal matters within the Union," which should apply both to judgements and to other decisions of judicial authorities.

While calling for the adoption, by December 2000, of a programme of measures to implement the principle of mutual recognition, the Tampere Conclusions also indicated the first priorities to be pursued through its implementation: in the first place, the replacement of extradition by the simple transfer of persons already sentenced and fast- track procedures for other cases; secondly, application of the principle to pre-trial orders, in particular to measures aimed to freeze and seize evidence or assets. The programme of measures requested by the European Council was promptly drafted by the Commission and discussed by the JHA Council at the end of 2000, then published in January 2001.[2] It listed a set of 24 measures hierarchically ordered by a scale of priorities from 1 to 6. This was just a few months before the 9/11 attacks in New York and Washington that suddenly also revolutionized this scale of priorities – together with the world as we used to know it.

III. How it Should Have Gone and How it Went

"9/11" provoked the effect, among others, of reverting the order of priorities just established in the Action Plan to implement the principle of mutual recognition. Though rated only in the third place in the order of priorities established by the Commission, the European Arrest Warrant became a top priority after the extraordinary European Council meeting held on 21 September 2001. The heads of state and government convened in the aftermath of the attacks and put the introduction of a European Arrest Warrant in first place among the different measures aimed to enhance police and judicial cooperation. The arrest warrant had to be adopted, as a matter of urgency, by December of the same year, which ultimately happened despite fierce opposition by the Italian Government till the very final stage.

It only took less than ten weeks of intense negotiations to agree an instrument,[3] which was destined to have an unprecedented impact on judicial cooperation in criminal matters in Europe, far more important than any other previous or future instrument at that time. This was obviously only possible as a result of the unique political pressure that ensued after the terrorist attacks in the USA, which also enabled fast agreements to be reached on the establishment of Eurojust, on the definition of a terrorist act, and on the agreements on extradition and mutual legal assistance between the EU and the United States.

The rest of the story can be read in the pages of the EU's Official Journal: the European Arrest Warrant was soon followed by the framework decision on the execution of freezing orders,[4] in 2003 already, but it then took much more time to reach an agreement on the 2005 framework decision on the application of the principle of mutual recognition to financial penalties[5] and on the one on confiscation orders adopted in 2006.[6] It was then quite on the eve of the entry into force of the Lisbon Treaty, with the perspective of its "ordinary legislative procedure" (co-decision with the European Parliament and qualified majority), when a last set of framework decisions was adopted in 2008: on taking account of previous convictions in another Member State of the EU,[7] on recognition of judgments in criminal matters for the purpose of their enforcement in the EU and for allowing the transfer of prisoners between Member States,[8] on the supervision of probation measures and alternative sanctions,[9] and on the European Evidence Warrant (EEW).[10] In 2009, it was the turn of the framework decisions on enhancing the procedural rights of persons in case of decisions rendered *in absentia*[11] and on mutual recognition of decisions on supervision measures as an alternative to provisional detention.[12]

After the entry into force of the Lisbon Treaty, a number of mutual recognition directives were adopted, as leftovers from the previous era, i.e., the directive on the European protection order,[13] which offers protection

beyond borders to victims, in particular women, of violent behaviour and stalking, and the directive on the European Investigation Order (EIO) in criminal matters,[14] which replaced the unfortunate precedent of the European Evidence Warrant.

Only recently, at the end of 2018, the first Regulation in the field of mutual recognition, on freezing and confiscation orders was agreed.[15] It was adopted in order to replace the provisions of Framework Decision 2003/577/JHA, as regards the freezing of property only but leaving aside the freezing of evidence, and of Framework Decision 2006/783/JHA on confiscation. The added value of the regulation is not limited to its self-executing legal value, when compared with the pre-Lisbon framework decisions, but is amplified by the fact that freezing and confiscation orders are not confined to proceeds of a criminal offense only but can be imposed more extensively "within the framework of proceedings in criminal matters."

IV. The Epigones of Tampere

After Tampere, the European Council adopted two other comprehensive action programmes in the JHA sector, i.e., the "Hague Programme"[16] in 2004 and the "Stockholm Programme"[17] in 2009, respectively, at the end of a Dutch and a Swedish Presidency. It is a commonly shared opinion that, when compared to Tampere, the added value of these further programmatic documents is not necessarily proportionate to the growing number of pages they occupy in the Official Journal and that, irrespective of their dimension, none of them has presented a content of substance which could be compared with the 1999 Tampere Conclusions.

The 2004 Hague Programme, adopted with the Constitutional Treaty still in prospect, proposed that further realization of mutual recognition should be pursued through the development of equivalent standards for procedural rights in criminal proceedings, "based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions." This certainly had the merit to call to attention the urgent need to foster the protection of the rights of individuals in the context of the common Area of Freedom, Security and Justice. It did not, however, successfully contribute to the conclusion of already ongoing negotiations on the proposal for a framework decision on certain procedural rights in criminal proceedings throughout the European Union,[18] which was not adopted by the end of 2005, as requested by the European Council. We had to wait for the new Treaty of Lisbon and the adoption of the Roadmap on procedural rights,[19] which paved the way for the directives on procedural rights adopted after the entry into force of the new Treaty. The heads of state and government also invited the Council to adopt, by the end of 2005, the Framework Decision on the European Evidence Warrant and invited the Commission to present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular those of sex offenders, thus laying the foundation for the ECRIS system.

The 2009 Stockholm Programme, coincidentally adopted with the entry into force of the Lisbon Treaty, stressed the need to enhance the cross-border dimension of judicial cooperation in criminal matters by using the principle of mutual recognition. The European Council stated that existing instruments in the area were to be considered as constituting "a fragmentary regime", while a new approach should have been "based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance." Without naming and shaming it explicitly, the Conclusions intended to refer to the substantial failure of negotiations on the European Evidence Warrant (EEW) concluded just a few months earlier. The EEW was in fact only applicable to evidence that already existed and therefore covered only a limited spectrum of judicial cooperation in criminal matters with respect to evidence, while the new model praised in the Stockholm Programme was to have a broader scope, covering as many types of evidence as possible. The conclusions of the European Council certainly promoted the adoption of the directive on the European Investigation Order, which has been in force in Member States since mid-2017, but did not seem to provide substantial additional input in the field of judicial cooperation or mutual recognition but encouraging

the extension of the principle to "all types of judgments and decisions of a judicial nature, which may, depending on the legal system, be either criminal or administrative". [20].

As explicitly stated in the text, the Stockholm Programme was the first to define strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice in accordance with the new Art. 68 TFEU. Unfortunately, it was not only the first but also the last of the strategic guidelines...

The European Council made a new attempt in its conclusions adopted in June 2014,[21] but they are so general and vague that they cannot be termed "strategic guidelines." Such guidelines should be adopted (at least) at the beginning of each new EU legislature, which also coincides with the renewal of the Commission and the appointment of the President of the European Council (which was indeed also the case from Tampere to Stockholm even without the new Treaty in force). For almost a decade since Stockholm, the European Council indeed seems to have abdicated from establishing such long-term, strategic planning in the justice sector, confining its role to taking care of recurring "emergencies," such as illegal migration and terrorist attacks, only.

Since nature dislikes vacuum, it is evident that the space left by the European Council has been occupied by others, in particular by state governments and by the European Commission. The latter grasped the possibility not only to implement the 2009 Stockholm Programme and the Roadmap on procedural rights in the last ten years but also to elaborate autonomous strategies without being bound by the natural checks and balances established under the Lisbon Treaty. Looking at the annual Commission Work Programmes,[22] it can be readily observed that, in the field of justice, the programmes merely provide a list of instruments already on the table or that are in the Commission service pipeline. They have no strategic added value, while trying at the same time running after the recurrent emergencies in the field of terrorism and security or immigration.

On 20 June 2019, the European Council adopted a new Strategic Agenda 2019-2024,[23] which, among the other priorities, also emphasises the importance of protecting citizens and freedoms and promoting European interests and values on the global stage, though in very general terms. On the same occasion, the European Council also announced that it will follow the implementation of these priorities closely and define further general political directions and priorities as necessary.

V. The Way Forward

In order to strike the right balance in the present situation – as it is and as it could or should be – it must be stressed that the "strategic guidelines" to be defined by the European Council under Art. 68 TFEU only have an inspiring and orientating role of a political nature. The guidelines should not interfere, as they have not in the past, with the European Commission's right to initiate legislative proposals, which is nonetheless still not a monopoly under Art. 76 TFEU. The demand for a revised role of the European Council in the medium-/long-term program planning of the JHA sector should under no circumstances be understood undermining the essential role of the Commission in the preparation of new legislative initiatives or as a *reprise en main* attempt by national governments in an old-fashioned intergovernmental atmosphere. A renovated strategic planning would help prevent the risk of such initiatives being adopted under the duress of events only or of being deprived of a different perspective when taking into consideration the interests of the stakeholders – i.e., judges, prosecutors, defense lawyers, victims, and accused persons – notwithstanding the well-established procedures of consultation already in place in the Commission.

Today, a new Commission and a new President of the European Council are in charge. The 2020 Croatian Council Presidency, building on the work of the Romanians and the Finns, has already provided food for

thought to "feed" the more general Strategic Agenda 2019-2024. At the informal Justice and Home affairs Council organised on 23-24 January 2020 in Zagreb, Croatia, the draft Strategic Guidelines were presented for consideration by the Ministers[24], starting a process that – after endorsement by the Council (Justice and Home Affairs) on 12-13 March 2020 – will be submitted to the European Council meeting on 26-27 March 2020 which shall eventually adopt the new Guidelines under the chapeau of Art.68 TFEU. As far as criminal justice is concerned, the draft Guidelines put emphasis on improving the implementation of existing instruments, filling gaps in the legislative framework where they exist, strengthening mutual trust among Member States, developing networks and fostering coordination and synergies between them. Regarding substantive criminal law, the clear message is that it should only be developed "cautiously [and] where necessary" while new *acquis* in the area of criminal law must be "based on the real needs of the EU", a precondition which "is relevant to the extension of the competence of the EPPO as well". As anybody can see, nothing to really write home about…

When looking at the mission letter of the new Justice Commissioner, it is very clear that upholding the rule of law across the Union will be his priority, together with more general aims, such as "enhancing judicial cooperation and improving information exchange." By contrast, he receives a much more precise and prescriptive mandate in reference to the European Public Prosecutor's Office: the Justice Commissioner will support its setting-up but will also have to "work on extending its powers to investigate and prosecute cross-border terrorism." The mission letter seems to take a clear stand on the option proposed by paragraph 4 of Art. 86 TFEU, which provides that the European Council, acting "unanimously after obtaining the consent of the European Parliament and after consulting the Commission," may decide to extend the powers of the EPPO to include other forms of serious crime having a cross-border dimension.[25]

It is true that the Commission already presented a communication[26] on this subject to the European Parliament and to the European Council as a contribution to the leaders' meeting in Salzburg on 19-20 September 2018. If one analyses the outcome of the discussions at the summit, however, it would be pretentious to conclude that the heads of state and government devoted any special attention to the document; it hardly found any mention in the "Leaders' Agenda" on internal security,[27] while the Strategic Agenda 2019-2024, adopted in June 2019, does not contain any reference to it at all.

The possible extension of the EPPO's competences to cover cross-border terrorist crimes is *the* good example of how the absence of clear strategic planning by the European Council – which is not only in charge of, but also the sole legislator of, the specific file on the EPPO – can be detrimental and leave the room open for uncoordinated interventions inside or outside the EU institutional framework. Ten years have elapsed since the Lisbon Treaty entered into force, and the European Council had all the time needed to carefully consider the issue, even before presentation of the proposal[28] for the Regulation on the establishment of the EPPO by the Commission in July 2013, all throughout the negotiations and after their conclusion in October 2017.

In this context, it should also be recalled that Art. 85 TFEU deals with another fundamental actor in the area of European criminal justice, i.e., Eurojust, defining its mission but at the same time also providing the legal basis for conferring new tasks to the agency, in particular the initiation of criminal investigations, their coordination, and the resolution of conflicts of jurisdiction among the prosecutorial authorities of Member States. None of the new powers specifically set by the Treaty was provided to the agency by the recently adopted Regulation on Eurojust;[29] no discussion on the opportunity or desirability of using the legal basis provided by the Treaty to move towards a real "Eurojust 2.0," by conferring more incisive and binding powers of intervention to the agency, took place during the never-ending negotiations.

It could be argued that a strengthened Eurojust may also play a vital role in the fight against "serious crimes having a cross-border dimension," which is also a prerequisite for the possible scope of a "Super EPPO"

under paragraph 4 of Art. 86 TFEU. It would be easy to find arguments for and against the question of whether a more robust Eurojust could better serve in scope to fight serious transnational crime in a more or less efficient way than a strengthened EPPO. At the same time, due consideration should also be given to the different procedures provided for implementing the two provisions of the Treaty: an ordinary legislative procedure of co-decision for Art. 85 and a special procedure of adoption by the European Council "acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission" for Art. 86 para. 4 TFEU.

It is beyond the scope of this contribution to take a final stand on which of the two solutions should be given preference or priority – but the issue raised demonstrates the persistent need for political and more explicit guidance in the JHA sector by the body in charge of it, i.e., the European Council, in this way respecting the specific role of each institution in the delicate balance of powers provided by the Lisbon Treaty.

VI. Final Remarks

What has been achieved in view of the *implementation* of the principle of mutual recognition twenty years after the European Council's Conclusions of Tampere? A similar, rather critical conclusion must be drawn as that reached above on the absence of political guidance by the European Council. The "fragmentary regime," which was already denounced in the 2009 Stockholm Programme, did not disappear after the adoption of the European Investigation Order; practitioners are still obliged to make use of a variegated set of different legal tools, depending on the subject matter (extradition, mutual legal assistance, transfer of prisoners, pre- and post-sentence surveillance, etc.); depending on the Member States involved, they sometimes even need to apply other sets of instruments. The Stockholm Programme already asked for the new instruments to be more "user-friendly" for practitioners – which is the absolute prerequisite for a new legal regime when replacing an already established instrument – and to focus on problems that are recurring in cross-border cooperation, such as issues regarding time limits and language conditions or the principle of proportionality. The recent case law of the European Court of Justice has, in the past decade, also contributed to further defining and clarifying the concepts of mutual recognition and mutual trust, with particular reference to their impact on practical implementation of the European Arrest Warrant, where the rights of the person to be surrendered are considered to be potentially jeopardized.[30]

On the one hand, any future reconsideration of existing instruments in the field of mutual recognition should therefore take into account the need to avoid further fragmentation, promoting instead a process of simplification of the instruments to be put at the disposal of the practitioners; such instruments should become even more user-friendly by also taking inspiration from the flexibility of the traditional system of mutual legal assistance. It should not, for instance, be necessary to fill out a long and sometimes complicated multilingual form just to request information from another judicial authority when a simple and short mail message in a commonly understood language would be sufficient.

On the other hand, real mutual trust must be established and reinforced among all judicial authorities required to implement and put into practice the principle of mutual recognition. We are all well aware that this trust cannot be established by decree but should be based on respect for the rule of law by all the actors involved in judicial cooperation in criminal matters. Their respective state governments, which are frequently accused (not without reason) of infringing this principle, in particular by exercising various forms of undue pressure on the judiciary, should also pay heed.

Against these flagrant violations, the European Union is already considering appropriate reactions, such as the ones put forward in the recent proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States,[31] which includes reductions in

commitments and the suspension of payments. As an alternative, or in parallel with them, other innovative avenues could also be explored that are directly related to judicial cooperation, including the possibility to suspend cooperation based on mutual recognition instruments with those Member States who would be declared to be in serious breach of the founding values referred to in Art. 2 TEU.

Mutual recognition is a privilege; it cannot and should not be accorded for free…

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2. *O.J.* C 12, 15.1.2001, 10-21.↩
3. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J.* L 190, 18.7.2002, 1-18.↩
4. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *O.J.* L 196, 2.8.2003, 45-55.↩
5. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *O.J.* L 76, 22.3.2005, 16-30.↩
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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, *O.J.* L 81, 27.3.2009, 24-36.↩
12. Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, *O.J.* L 337, 16.12.2008, 20-40.↩
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15. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *O.J.* L 303, 28.11.2018, 1-37. See also T. Wahl, "Regulation on Freezing and Confiscation Order, (2018) *eucrim*, 201.↩
16. *O.J.* C 53, 3.3.2005, 1-14.↩
17. *O.J.* C 115, 4.5.2010, 1-37.↩
18. COM(2004) 328 final.↩
19. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *O.J.* C 295, 4.12.2009, 1-3.↩
20. See point 3.1.1. of the Conclusions↩
21. Extract from the 26 – 27 June 2014 European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues, *O.J.* C 240, 24.7.2014, 13-15.↩
22. See COM(2018) 800 final, 6-7; COM(2017) 650 final, 7-8; COM(2016) 710 final, 11-12; COM(2015) 610 final, 11-12.↩
23. Available at: https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024-en.pdf; see also T. Wahl, "European Council: Security Remains Priority Area in the Next Five Years", (2019) *eucrim*, 86.↩
24. See joint discussion paper for both justice and home affairs submitted by the Croatian Presidency to the other delegations and debated at the Informal JHA Council in Zagreb on January 23rd-24th 2020, available at: https://eu2020.hr/Events/Event?id=149↩
25. For the discussion on the extension of EPPO's consequences, see also C. Di Francesco Maesa, "Repercussions of the Establishment of the EPPO via Enhanced Cooperation", (2017) *eucrim*, 156, and F. De Angelis, "The European Public Prosecutor's Office – Past, Present, and Future" in this issue.↩
26. "A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to crossborder terrorist crimes", COM(2018) 641 final; see also T. Wahl, "COM Communication Extending EPPO Competence", (2018) *eucrim*, 86.↩
27. Available at : https://www.consilium.europa.eu/media/36409/leaders-agenda-note-on-internal-security.pdf.↩
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29. Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, *O.J.* L 295, 21.11. 2018, 138-183.↩
30. See, in particular, CJEU, Joint Cases C-404/15 and C-659/15 (*Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*).↩

31. COM(2018) 324 final.↩

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