



PROCEEDINGS OF THE SEMINAR

**The Significance of EU Criminal Law
in the 21st Century:
The Need for Further Harmonisation
or New Criminal Policy?**

(SHORT PAPERS)

28-29th January, 2021 Vilnius University Faculty of Law

Virtual seminar



Faculty of
Law

Eclan
European Criminal Law Academic Network



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[SHORT PAPERS]

Virtual seminar, 28-29th January, 2021
Vilnius University Faculty of Law

INFORMATION ABOUT THE SEMINAR

Platform: Virtual Seminar

Date: 28-29 January 2021

SCIENTIFIC COMMITTEE OF THE CONFERENCE

Prof. dr. Anne Weyembergh (*Université Libre de Bruxelles*)

Prof. dr. Katalin Ligeti (*University of Luxembourg*)

Prof. dr. Sabine Gless (*University of Basel*)

Prof. dr. Pedro Caeiro (*University of Coimbra*)

Prof. dr. Robert Kert (*Vienna University*)

Prof. dr. Valsamis Mitsilegas (*Queen Mary University of London*)

Prof. habil. dr. Gintaras Švedas (*Vilnius University*)

All submitted short papers have been reviewed.

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Foreword by the Dean

Vilnius University Faculty of Law

Vilnius University Faculty of Law was honoured to host the 9th European Criminal Law Academic Network (ECLAN) PhD Seminar on European Criminal Justice “*The Significance of EU Criminal Law in the 21st Century: The Need for Further Harmonisation or New Criminal Policy?*” on 28-29 January 2021. This was the first time the ECLAN seminar was organised in Lithuania, which in the midst of the global pandemic was made possible (virtually) with the joint effort of the ECLAN and the members of Criminal Department of the Faculty of Law.

The Seminar provided aspiring scholars with an invaluable opportunity not only to share their research in various topics, inter alia, the rule of law, cross-border legal cooperation in criminal matters, mutual recognition instruments and institutional framework, the impact of Brexit on EU criminal law and future cooperation with the UK, issues related to EU substantive criminal law, recent trends in the case law of the Court of Justice, and rights of defendants and victims in criminal proceedings, but also to receive feedback from recognised legal minds who moderated the panels of the event members (Prof. dr. Anne Weyembergh (*L'Institut d'études européennes de l'Université libre de Bruxelles*), Prof. dr. Katalin Ligeti (*Université du Luxembourg*), Prof. dr. Sabine Gless (*Universität Basel*), Prof. dr. Pedro Caeiro (*Universidade de Coimbra*), Prof. dr. Robert Kert (*Universität Wien*), Prof. Valsamis Mitsilegas (*Queen Mary University of London*), Prof. habil. dr. Gintaras Švedas (*Vilniaus universitetas*)). Moreover, the participants of the Seminar had a unique opportunity to attend a guest lecture given by Prof. Valsamis Mitsilegas (*Queen Mary University of London*) on the topic: “*Brexit and Legal Cooperation with the UK*”.

Therefore, this year, it was decided to finalise the event with a publication of short papers on the findings of the participants' original research. Thus, the reader is presented with this relatively brief publication of the collection of the peer reviewed short papers on the topic of the future of the EU criminal law. Hopefully, this edition of short papers will be a perfect way to deepen knowledge in the subtle matter of many EU criminal law's modern aspects and will be helpful for students, scholars and practitioners.

Prof. dr. Tomas Davulis, L.L.M.

Seminar Programme



ECLAN PhD Seminar 2021

The Significance of EU Criminal Law in the 21st Century: The Need for Further Harmonisation or New Criminal Policy?

Vilnius University Faculty of Law

Online on MS Teams

28–29 January, 2021



**Vilnius
University**

Thursday, 28 January 2021

10.00-10.15 **Opening remarks**

Dean Prof. dr. Tomas Davulis (Vilnius University)

Prof. dr. Anne Weyembergh (Université Libre de Bruxelles, ECLAN)

1st Panel: EU substantive criminal law and its national implementation

Moderators: *Prof. dr. Anne Weyembergh (Université Libre de Bruxelles)*

Prof. habil. dr. Gintaras Švedas (Vilnius University)

10.15-10.45 **Two Steps Forwards, One Step Back With the Harmonisation of Substantive Criminal Law: the Environmental Crime Directive**

Ieva Marija Ragaišytė (Vilnius University)

10.45-11.15 **The Impact of European Union Law on the Distinction Between Tax Evasion and Fraud in the Criminal Code of the Republic of Lithuania**

Martynas Dobrovolskis (Vilnius University)

11.15-11.45 **Is there the Need for Further Harmonisation on Corruption Offences in the European Union?**

Laura Mickevičiūtė (Vilnius University)

11.45-12.15 **Principle of Efficiency in EU Criminal Law**

Rasa Volungevičienė (Vytautas Magnus University)

12.15-13.00 **Lunch break**

2nd Panel: Combating organised crime and the EPPO

Moderators: *Prof. dr. Katalin Ligeti (University of Luxembourg)*

Prof. dr. Sabine Gless (University of Basel)

13.00-13.30 **A Network Perspective on the Law of Organised Crime: A Case Study of England and Wales**

Santiago Wortman Jofre (Queen Mary University of London)

13.30-14.00 **European Investigation Order as an Instrument for The Fight Against Organised Crime**

Serena Cacciatore (University of Burgos and the University of Palermo)

14.00-14.30 **EPPO**

Dimitris Nomikos (Democritus University of Thrace Greece)

14.30-15.00 **Coffee break**

15.00-15.30 **Defence in Cross-Border Investigations of the EPPO**

Merve Yolaçan (University of Freiburg)

15.30-16.00 **European Investigation Order Directive: What About Defence Rights?**

Chloé Fauchon (University of Strasbourg and University of Salamanca)

- 16.00-16.30 **The Independence of Prosecutors and the Rule of Law**
Simone Rivabella (University of Luxembourg)
- 16.30-17.00 **Guest lecture. Brexit and legal cooperation with the UK.**
Prof. dr. Valsamis Mitsilegas (Queen Mary University of London)

Friday, 29 January 2021

3rd Panel: Criminal policy and human rights

Moderators: *Prof. dr. Pedro Caeiro (University of Coimbra)*
Prof. habil. dr. Gintaras Švedas (Vilnius University)

- 10.00-10.30 **Human Smuggling, Penal Populism and the Rule of Law: Lessons from Italy**
Marta Minetti (Queen Mary University of London)
- 10.30-11.00 **Criminal Law & Populism - Is There a Place for Human Rights?**
Pavlo Demchuk (Ivan Franko National University of Lviv)
- 11.00-11.30 **Reshaping Plea Bargaining in European Criminal Justice**
Simona Garbatavičiūtė (Ljubljana University)
- 11.30-12.00 **The Right to Legal Assistance in Criminal Proceedings**
Oaskars Kulmanis (University of Latvia)
- 12.00-12.45 **Lunch break**

4th Panel: Cooperation in criminal matters and other legal instruments

Moderators: *Prof. dr. Robert Kert (Vienna University)*
Prof. Valsamis Mitsilegas (Queen Mary University of London)

- 13.00-13.30 **Civil Asset Confiscation Law – New Criminal Policy or Restrictions out bounding Criminal Procedure?**
Laura Martinaitytė (Vilnius University)
- 13.30-14.00 **Bail as Social phenomena's Applicability in Legal Liability Forms**
Justinas Bagdžius (Vilnius University)
- 14.00-14.30 **Assessment of Social Rehabilitation as the Main Purpose of Framework Decision 2008/909/JHA on the Transfer of Prisoners in the Light of the Lithuanian Experience**
Ugnė Markevičiūtė (Vilnius University)
- 14.30-15.00 **Closing remarks**
Prof. dr. Valsamis Mitsilegas (Queen Mary University of London)
Prof. dr. Anne Weyembergh (Université Libre de Bruxelles, ECLAN)



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European Investigation Order as Instrument for the Fight Against Organised Crime

Serena Cacciatore¹

Keywords: transnational evidence gathering, mutual recognition, judicial cooperation in criminal matters

According to Art. 1 of Directive 2014/41/EC (hereinafter: DEIO) of the European Parliament and of the Council of the 3 April 2014 (OJ No. L 130 of 1 May 2014)² a European Investigation Order (hereinafter: EIO), “is a judicial decision which has been issued or validated by a judicial authority of a Member. State (‘OG the issuing State’) to have one or several specific investigative measure(s) carried out in another Member. State (‘the executing State’) to obtain evidence in accordance with this Directive”³. An instrument that is working well as reveals the recent Report published by EUROJUST in November 2020 which in two years has registered 1529 cases, most of them defined with success.

In this area, two interesting judgments of the ECJ have been detected:

The judgment related to the Case (C-324/17) criminal proceedings against Ivan Gavanozov, that concerns peculiarities of the Bulgarian criminal proce-

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E-mail: sscacciatore@ubu.es; <https://orcid.org/0000-0002-8123-5666>
- ² Published in G.U. C. E., May 1, 2014, n. 130, pp. 1-37. The deadline provided for in Art. 36 par. 1 was set up the 22 May 2017. In this regard, BACHMAIER WINTER, Lorena, “Prueba transnacional penal en Europa: la Directiva 2014/41/CE relativa a la orden europea de investigación”, *Revista General de Derecho Europeo* 2015, n. 36, available at <http://www.iustel.com> (Last accessed: December 4, 2020).
- ³ In accordance with MANGIARACINA Annalisa, “A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order”, *Utrecht Law Review* 2014, n.1, available at <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.260/> (Last accessed: December 4, 2020).

dure. An interpretation was requested as regards Art. 14 DEIO, which provides that the Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO (Art. 14 (1)).

The substantive reasons for issuing the European Investigation Order may be challenged only in an action brought in the issuing State, without prejudice, to the guarantees of fundamental rights in the executing State (Art. 14 (2)).

The second judgment of the Court (Grand Chamber), of 8 December 2020, reveals that the EIO is not purely a mutual recognition instrument. It is demonstrated by the checks requested on both States –requesting and executing, especially on fundamental rights.

The reference for a preliminary ruling concerns the interpretation of Articles 1(1) and Article 2 (c) of the Directive on the EIO in criminal matters. That application was made in the context of a request for execution, in Austria, of a European order for criminal investigation issued by the public prosecutor's office of Hamburg against an individual and other unknown persons suspected of having falsified bank transfer orders.

The intent of the research is to analyse the principle of mutual recognition of judicial decisions with the aim of testing how it has been applied in the content of the Directive of the European Investigation Order, moreover, to examine how the Directive has been implemented in Italy and Spain.

In the era of globalization, one of the most alarming offences is that related to organised crime. For this reason, another purpose of my research is to verify whether some specific investigative instruments provided for by the EIO can represent an added value in the fight against transnational organised crime. Interpretative/qualitative considerations inspired by the recent process of globalization, which imply the gradual weakening of the barriers, have been done. This has developed a great impact in the interconnections between the economies and criminals of different countries, highlighting the systematic aspects of relationships between societies and States.

From the European perspective, in relation to organised crime, the contribution of the European Union has been particularly significant in substantive and procedural law under the enactment of specific rules, but also in the establishment of *ad hoc* bodies in order to promote a better coordination between the judicial and police authorities of each Member State. The Eurojust, in par-

ticular, although not expressly mentioned in the content of DEIO, is playing an important role in the context of this instrument: it intervenes at all the stages of proceedings, sometimes before the issuing of an EIO.⁴ In addition, the Eurojust, the European judicial network and the liaison magistrates in relation with judicial authorities as well as OLAF and Europol in relation with police authorities are the milestones made by the European institutions since the Tampere European Council of 15 and 16 October 1999, which has led to considerable results.

The two implemented methods have been the deductive and the inductive method.

For what concerns the deductive method, the consultation of literature, case-law and legislation from the European and national law, has been carried out according to the analysis of the data obtained. At the same time, discussions with experts and academics on different topics related to the European Investigation Order, through attendance to seminars and/or conferences took place.

On the other hand, the Inductive method has been developed addressing questionnaires online, as well as face-to-face or remote interviews held with judges, prosecutors, police officers, lawyers, and other legal professionals. Adequate visits to EU and national institutions and other bodies have taken place such as Courts of Justice, Prosecution Offices, Police Offices in Italy and Spain.⁵

The instrument is working well, also in the context of pandemic⁶. The Eurojust and European Judicial Network collected information from Member

⁴ On the regulatory plan, first the framework decisions and, with the entry into force of the Treaty of Lisbon of 13 December 2007, Directives are the European Union's privileged source of legislation in the field of judicial cooperation in civil and criminal matters. Member States have a specific obligation to implement these instruments.

⁵ For instance, I visited Eurojust last November (2019) where I had the opportunity to interview face-to-face a Spanish Member of Eurojust, Francisco Jiménez-Villarejo, as well as Filippo Spiezia Vice President of Eurojust. Moreover, I had the opportunity to interview Davide Spina a public prosecutor's office.

⁶ In this regard, JIMENO BULNES, Mar "Emergencia judicial ante la crisis sanitaria originada por el COVID-19" Blog Rights International Spain 2020, available at <http://rightsinternationalspain.org/es/blog/165/emergencia-judicial-ante-la-crisis-sanitaria-originada-por-el-covid-19> (Last accessed: December 4, 2020).

States on the: “The Impact of COVID-19 on Judicial Cooperation in Criminal Matters”. In some States, the instrument is being issued and translated, but its transmission to the executing State is being affected, suspended or postponed, except when it is urgent. Where this prioritisation applies, the main criteria used besides urgency are, for instance, the seriousness of the offence, the risk that evidence will be lost and the stage of the proceedings in which the evidence is to be gathered. A case-by-case evaluation in principle applies. The majority of the States recommend electronic transmission of requests (i.e., e-mail) as the most effective means in the current situation. The Eurojust and European Judicial Network can help with the transmission of the instrument, facilitating exchange of information and identification of the competent executing authority.

The European Investigation order is a hybrid instrument: it is a consequence of the lack of previous harmonisation of rules related to the law of evidence. A concrete example could be the temporary transfer to the issuing State (Article 22 DEIO). There are different opinions on the basis of national laws in relation to the provision that “The transferred person shall remain in custody in the territory of the issuing State” (Article 22(6) DEIO).

Another example could be given by the Interception of telecommunications. However, we must distinguish between the Interception of telecommunications with technical assistance and the Interception of telecommunications without technical assistance.

For what concerns those with technical assistance (Article 30 DEIO), different opinions prevail concerning whether or not this provision could be applied to a request to install a covert listening device (e.g., bugging of a car).

While different opinions exist on whether this provision also applies in the case of a covert listening device (e.g., bugging of a car) according to the Interception of telecommunications without technical assistance (Article 31 DEIO).

To conclude, the application of EIO with its double check by the issuing as well as by the executing State on the principle of legality, proportionality, on the grounds for refusal, risks to put in crisis the principle of mutual recognition which is based on mutual trust.

According to the Eurojust in practice, in some States, the control is more pervasive than it should be: without reinforcing mutual trust among States

there is a risk that cooperation might become ineffective., with consequences on the field of the fight against organised crimes that have a transnational dimension.

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About author

Serena Cacciatore is PhD Student and Personal Docente Investigador (PDI) at the Burgos University Faculty of Law and the Palermo University Faculty of Law. Her research interests are European context, fight against organised crime and European criminal procedure.
