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#### NOTE

From:	Presidency
To:	Delegations
Subject:	Legislative files with a criminal law dimension handled outside of the JHA sector

#### **DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (07.03.2024)**

The work of the Council is organised around different formations of the Council, with numerous working parties and committees doing the preparatory work. Legislative files related to criminal law and cooperation in criminal matters are in principle dealt with by the JHA Council with a preparation by the COPEN Working Party. But some legislative files primarily dedicated to issues different from criminal law are therefore dealt with in other formations of the Council while containing some aspects directly relevant for the criminal law sector.

During meetings of the CATS committee during Czech and Swedish Presidencies, the agenda included information points on such legislative files handled outside of the JHA sector and having an impact on criminal law. Delegations expressed a strong interest for these information points as they are useful to raise awareness and can therefore facilitate coordination at national level. The Presidency shares the view expressed by some delegations that a written information would help to achieve these objectives.

Delegations will therefore find below a state of play on legislative files dealt with outside of the JHA area while having a criminal law dimension. The objective is to inform delegations.

Discussions are to take place in the competent working party for each file. The description below aims only to give a very general idea of the link with criminal law and does not constitute a legal analysis.

## 1. **Package on road traffic offences**

On 1 March 2023, the Commission submitted a package on road safety which includes :

- a proposal for a Directive on the Union-wide effect of certain driving disqualifications;
- a proposal for a Directive amending Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences, hereafter the CBE proposal.

Both files are handled in the Working Party on Land Transport. Information on this package was provided in the COPEN Working Party on 25 October (14048/1/23).

### a) *The proposal on driving disqualifications*

The proposal “*lays down rules providing for a Union-wide effect of driving disqualifications for major road-safety-related traffic offences committed in a Member State other than the one that issued the driving licence of the person concerned*” (art. 1).

The proposal is relevant in terms of criminal law because offenses covered by the instrument and giving rise to a disqualification may be criminal offenses and because the idea of giving a Union-wide effect to such disqualifications raises the issue of the relation with mutual recognition.

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According to the proposal, the Member State of the offence would, using a specific certificate, notify the disqualification to the Member State of issuance of the driving license (art. 4 and 5). The Member State of issuance would have to take the appropriate measures to ensure that the driving disqualification has Union-wide effect (art. 7) under its national law. Mandatory “grounds for exemption” (art. 8(1)) include for example the fact that (wording is not exhaustive) the certificate is incomplete or incorrect, the disqualification is statute-barred, there is a privilege or immunity, the person concerned did not appear in person at the trial or the risk of a breach of a fundamental right. The proposal also includes non-mandatory grounds for exemption, including the fact that the notification relates to an offence that would not be sanctioned with a driving disqualification under the national law of the State of issuance.

The proposal contains rules on information exchange and consultations between the Member States of the offence and of issuance, obligation to inform the person concerned (art. 13) as well as legal remedies (art. 14). In this respect, it is also important to note that only a driving disqualification which is no longer subject to a right of appeal in the State of offence may be notified to the State of issuance.

Article 18 provides that the Directive shall not affect the rights and obligations stemming from the following legal acts:

- (a) Council Framework Decision 2008/947/JHA [mutual recognition, supervision of probation measures and alternative sanctions];
- (b) Council Framework Decision 2005/214/JHA [mutual recognition, financial penalties];
- (c) the rights of suspects and accused persons as provided for in Directive 2010/64/EU, Directive 2012/13/EU, Directive 2013/48/EU, Directive (EU) 2016/343, Directive (EU) 2016/800 and Directive (EU) 2016/1919 of the European Parliament and of the Council.

b) *The proposal on cross-border exchange of information on road-safety-related traffic offences*

As regards the proposal for a Directive amending Directive (EU) 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences (hereafter the CBE proposal), the Presidency aims at reaching a general approach at the Transport Council on 4 December 2023.

The existing Directive 2015/413 aims to increase road safety by helping authorities in different EU countries share information on road-safety related traffic offences and this way reduce the impunity related to these offences when committed by non-residents. In particular, the Directive has made it easier for national authorities of the Member State where the offence is committed to identify the concerned (driver or the otherwise responsible) person based on the registration number issued in another Member State. One of the goals of the new proposal is to move forward on this point of the identification of the concerned person. To this end, the proposal would insert a new Article 4a on “mutual assistance in identifying the liable person” applicable to cases where “Member State of the offence cannot identify the concerned person to the necessary degree of certainty required by its national legislation to initiate or conduct the follow-up proceedings” (which can include for example a financial sanction).

The request for mutual assistance aims to obtain information for identifying the concerned person, which may include (wording not exhaustive) to establish the identity of the concerned person (including by using national databases such as driving license or population registers) or to ask the owner, holder or end user of the vehicle to provide information on the identity of the liable person.

The proposal includes various aspects often found in instruments of judicial cooperation in criminal matters such as the principle that the requested State should apply to some extent the procedures requested by the Member State of the offence (art. 4a(4)) or grounds for refusal (art. 4a(7)), including immunities and privileges, ne bis in idem, ...

Articles 5 and 5a detail the information which needs to be communicated to the concerned person and how it should be notified.

Furthermore, the last revised text (7444/7/26) of the Presidency includes an additional article 8b on “mutual assistance in enforcement activities”, providing for assistance between Member States for the enforcement of administrative decisions on road traffic fines.

The new article would also include rules on the use of a standard electronic form as well as grounds for refusal to recognise and enforce administrative decisions on road traffic fines, including (wording non exhaustive) ne bis in idem, immunity, lapse of time, fundamental rights, etc.

## **2. Regulation on AI**

The proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) was submitted by the Commission on 21 April 2021. It is handled in the Working Party on Telecommunication and Information society (WP TELECOM).

The Council reached a general approach on the proposal on 6 December 2022<sup>1</sup>. Trilogues have taken place on 14 June, 18 July, 2 and 3 October as well as on 24 October 2023. The objective is to reach an agreement with the Parliament by the end of the year. The negotiation is intense given the complexity, importance and sensitivity of the instrument.

One of the objectives of the proposal is to ensure that AI systems placed on the Union market and used in the Union are safe and respect existing law on fundamental rights and Union values.

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<sup>1</sup> 14954/22

Relying on a risk-based approach, the proposal sets out different obligations and requirements in particular for “high-risk AI systems”. This notion of “high-risk AI systems” is therefore a key parameter. The use cases falling into this category are listed in Annex III of the proposal. For the purpose of this document, two areas referred to in Annex III are relevant: “law enforcement” (point 6) and “administration of justice and democratic processes” (point 8). Regarding the use cases referred to under “Law enforcement”, some may, depending on the exact scope and the Member State concerned, at least partly cover criminal procedure aspects (e.g. AI systems intended to be used to evaluate the reliability of evidence in the course of investigation or prosecution of criminal offences (point 6(d) of Annex III)). Some aspects are among the remaining issues in the negotiations, including the systems used to assess the risk of a person offending or reoffending (point 6(a) of Annex III). Regarding the use cases referred to under “Administration of justice and democratic processes”, it may impact existing tools which are being used to assist judicial authorities in researching and interpreting fact and the law, and in applying the law to a concrete set of facts.

In addition, the proposal lists some prohibited AI systems such as real-time biometric identification for law enforcement in publicly accessible spaces, which might only be used exceptionally and under certain conditions. Such conditions might be related to the type of crimes or might consist in prior authorisation by a judicial authority.

Obligations and requirements for high-risk AI systems include, for example, a risk management system to be implemented throughout the lifecycle of the system, safeguards related to data sets, automatic recording of events (“logs”), information to users and transparency obligations, human oversight,... High-risk AI systems will also need to go through a conformity assessment procedure before they are placed on the market or put into service. Post-market surveillance is also provided.

Market surveillance authorities will play an important role in the implementation of the future Regulation. For example, when such authorities would have sufficient reasons to consider that an AI system presents a risk to the fundamental rights of a person, it would have to carry out an evaluation of that system to assess its compliance with the obligations and requirements laid down in the Regulation. They might also have to act upon a complaint made by a legal or natural person. For high-risk AI systems related to law enforcement and administration of justice, the Council's general approach provides that the market surveillance authority would be either the national authorities supervising the activities of the law enforcement or judicial authorities, or the competent data protection supervisory authorities. The Parliament only envisages the data protection authorities.

These issues, and in particular those related to prohibited uses cases, their possible exceptions and other provisions related to law enforcement access and use of certain AI systems will be discussed at the upcoming trilogue on 6 December 2023.

### **3. Media Freedom Act (article on spyware)**

The proposal for Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act, EMFA) and amending Directive 2010/13/EU was submitted by the Commission on 16 September 2022. It is handled in the Audiovisual and Media Working Party.

Coreper approved a mandate for negotiations with the Parliament on 21 June 2023. The first trilogue was held on 19 October 2023. Negotiations are ongoing at technical level and two other trilogues are foreseen under the Spanish Presidency (29 November, 15 December) with the objective of reaching an agreement with the Parliament.

On the substance, the EMFA Regulation proposal, based on art. 114 TFEU (approximation of laws for the achievement of the internal market objectives), aims at establishing a common framework for media services in the internal market. It builds on the 2018 Audiovisual and Media Services Directive (AVMSD) and amends certain provisions of this directive. The EMFA covers complex and sensitive areas with links to other policy areas such as Rule of Law and Justice and Home Affairs, and it is the first time that the EU aims at legislating in the fields of media freedom, media pluralism and editorial independence.

The first part of the proposal contains safeguards for and duties of media service providers. In particular, Article 4 of the proposal deals with the rights of media service providers, including the protection of the confidentiality of journalistic sources. This Article is particularly relevant for the criminal law sector, as it contains limitations to “detention, sanction, interception, surveillance, search or seizure” of media service providers, their staff, their family members (in the Commission’s proposal and the Parliament’s position) and their sources. It also contains specific provisions applicable to the deployment of spyware/intrusive surveillance software on devices used by journalists, their staff, their family members (in the Commission’s proposal and the Parliament’s position) and their sources. On this last point, the Commission proposes a prohibition of the deployment of spyware, unless it is justified on a case-by-case basis, on grounds of national security and is in compliance with Article 52(1) of the Charter and other Union law or the deployment occurs in serious crimes investigations.

The Council’s position maintains the safeguards regarding the protection of journalistic sources, while amending the scope of the exemptions – in particular on grounds of an overriding requirement in the public interest or for the fight against serious crimes. It also specifies that these provisions are without prejudice to the Member States’ responsibility for safeguarding national security.

The Parliament’s position contains additional prohibitions on the use of intrusive surveillance measures, and access to encrypted content data, but allows for exemptions for all of the abovementioned measures under specific conditions, for instance where it is ordered by judicial authorities and these measures are used for the purpose of a serious crime.

In addition, the Commission’s proposal on Article 2 includes a definition of “serious crime” by reference to a list of specific offences that would justify the deployment of spyware under specific circumstances. This definition is deleted in the Council’s position but remains in the Parliament’s position.

Article 4 will be discussed with the European Parliament at the trilogue planned for 15 December.



#### 4. Directive on Ship Source Pollution

On 1 June 2023, the Commission presented a package on maritime safety, including a proposal amending Directive 2005/35/EC on ship-source pollution. The proposal is handled in the Working Party on Shipping. The objective is to reach a general approach at the Transport Council on 5 December.

The proposal only contains a short provision on criminal law (Article 3). It needs to be understood in conjunction with the proposal for a Directive on the protection of the environment through criminal law, currently in negotiation and on which the Presidency hopes to reach soon an agreement with the Parliament.

The existing Directive 2005/35/EC was adopted together with Framework Decision 2005/667/JHA which contained the criminal law measures. Framework Decision 2005/667/JHA was annulled by the Court of Justice. Directive 2009/123/EC amended Directive 2005/35/EC to introduce criminal law provisions.

The new proposal for a Directive on the protection of the environment through criminal law will address ship source pollution (art. 3(2)(h)) and will refer to Directive 2005/35/EC.

Article 27 of this proposal provides that Directive 2009/123/EC shall cease to apply to the Member States participating in this new Directive on the protection of the environment through criminal law.

Article 3 of the new proposal for a Directive on ship-source pollution would complement this by providing that Member States not bound by the new Directive on the protection of the environment through criminal law remain bound by Directive 2005/35/EC as amended by Directive 2009/123/EC.