EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Review of the CCF Statute

The CCF plays a vital role in protecting INTERPOL's systems from misuse and safeguarding its immunity. As the CCF Chairperson stated at the 2023 General Assembly:

> *"I believe we all agree that the work of the Commission protects INTERPOL's credibility within the international community, its reputation before the public, and its immunity before judicial tribunals and courts. That immunity is crucial for INTERPOL. I know that the Secretary General has said on several occasions that if we did not have an independent Commission, we would not still have red notices."*

We welcome that CPD is consulting on significant proposed changes to CCF Statute.

1. The constitutional issue

1.1 The CCF "*shall ensure that the processing of personal information by the Organization is in compliance with the regulations*" (Constitution Art 36). Under both Art 36 and Statute Art 29(1), the CCF is competent to deal with requests where there is data processed in INTERPOL's information system. Data is processed from the moment a red notice request is received by IPSG (see Art 1(5) RPD and general data protection principles).

1.2 Under Statute Art 28, the CCF has exclusive authority to decide whether a matter is within its competence – as defined by the Constitution. This reflects the UN Basic Principles on the Independence of the Judiciary (§3), relevant by analogy. The Statute cannot and should not seek to qualify powers that are constitutionally conferred.

1.3 The aim of sequencing of decisions (compliance review by IPSG, as the executive body, with independent CCF review thereafter) is not inherently problematic. However, the current proposals do not reflect the CCF's constitutional role.

1.4 This is not a theoretical issue. There may be exceptional cases, e.g. where an individual urgently requires travel for medical reasons, in which the CCF should be empowered to intervene independently and in parallel to IPSG's compliance review. It would be perverse if the Statute prevented the CCF from acting in such situations.

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1.5 We therefore recommend that the proposed amendments to Articles 33 and 37 be expressly qualified with language such as "*in principle*" and "*unless, exceptionally, the CCF deems that the interests of justice require otherwise*". This would preserve the intended sequencing while respecting the CCF's constitutional powers and ensuring flexibility.

2. Arts 33 and 37: the crucial role of provisional measures

2.1 We do not generally object to the principle that the IPSG should in most cases do its compliance review first, subject to subsequent CCF review. But, for its oversight to be effective, the CCF must be able to order provisional measures (**PMs**) before publication.

2.2 INTERPOL data processing may cause serious harm. If an applicant only turns to the CCF post-publication, this may be unavoidable. But it is not an acceptable outcome where IPSG knows the CCF is already seized prior to publication and may wish to issue PMs – the very purpose of which is to prevent harm accruing pending its final decision.

2.3 Currently, there is adequate protection against unjustified harm being caused which is later found to be unjustified. In pre-emptive cases, our experience is that the information may be blocked from view until the CCF issues its decision. The precise legal pathway for this is not always clear. Whatever the detail, from the applicant's or rule of law perspectives, the system avoids harm prior to the CCF's final decision.

2.4 The proposed changes could entail an unacceptable departure from this position. Under Art 37(1) as proposed, the CCF may "*at any time during the examination of a request*" issue provisional measures. But under proposed new Art 33(1), the CCF "*shall examine an admissible request only after [IPSG] has taken a final compliance decision*".

2.5 If a "*final compliance decision"* of IPSG were synonymous with "*publication"* of the notice by the IPSG within the meaning of RPD Art 74(1), this would be highly concerning: publication would cause immediate harm before the CCF could issue PMs. Even if the CCF issues PMs swiftly and later finds the data non-compliant, the effectiveness of both rulings will be undermined. Deletion may not suffice to remedy the damage and the CCF may have to issue compensatory remedies under Statute Art 39.

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2.6 IPSG could theoretically issue PMs itself in such cases, although it may be hard to reconcile the fact that the IPSG has made a finding of compliance at the same time as having a "*doubt … regarding compliance*" (Art 129(1)). In practice, it is also very likely that in some cases the information available to the IPSG to make its compliance decision will be different from that available to the CCF. It is also possible that there is divergence between the CCF and IPSG on how to interpret INTERPOL's substantive rules.

2.7 The CPD should clarify that "*final compliance decision* is in fact not synonymous with actual publication. Under RPD Art 74(2), IPSG is responsible for "*publishing, as soon as possible, any notice requests it deems to be in compliance*". This confirms that the reaching of a compliance decision and publication are distinct. "*As soon as possible*' does not imply that IPSG must publish immediately, even if it knows that the CCF may be considering PMs. This would undermine the purpose of Statute Art 37 – and the rule of law.

2.8 There is surely much less downside for INTERPOL and NCBs in in delaying publication briefly versus rushing to publish and causing harm and entailing potential compensatory remedies and litigation risk.

2.9 We therefore recommend that, if the Statute is amended as envisaged, Art 74(2) RPD should be amended in parallel to add this after the end of the current Art 74(2)(a):

> *"However, where IPSG has been forwarded information under Art 33(3) of the CCF Statute, it shall not publish a notice request it deems compliant until the CCF has notified it of its decision on provisional measures."*

3. Access requests pending IPSG compliance decision

3.1 As proposed, amended Art 33(1) might prevent the CCF from examining admissible requests for access before IPSG's final compliance decision. This would mean that:

3.1.1 Where no INTERPOL data processing has been requested by an NCB, the CCF would be unable to examine and respond to an admissible request for access because, by definition, there can have been no final compliance decision.

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3.1.2 It would be impossible for the CCF to examine and respond to an admissible request for access in cases where a request has been made for data processing by an NCB and where the compliance review has not yet been completed.

3.2 Such a result would be incompatible with the CCF's role in processing '*requests concerning the information contained in the Organization's files*', which is a crucial data protection safeguard. Art 15 of the EU's General Data Protection Regulation, for example, states '*The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed*'.

3.3 To avoid this result, which we doubt was intended, we would suggest this amendment to the proposed text of Art 33(1):

> *"The Requests Chamber shall examine an admissible request <u>for correction or deletion</u> only after the Secretariat has taken a final compliance decision on the data concerned."*

4. <u>Sharing of information between the CCF and IPSG</u>

4.1 We are concerned about the implications of the proposed addition of the second sentence to Statute Art 33(3) which appears to require the CCF to provide the IPSG with all information it receives from an applicant prior to IPSG's final compliance decision. This conflicts with Statute Art 35 which recognises that the CCF must be able to restrict communication including "*to protect the rights and freedoms of an applicant or third parties*" and is incompatible with its role as an independent oversight body.

4.2 Given the number of seconded staff at the IPSG, applicants are often concerned about the information they provide being shared with the IPSG in case this is leaked to the prosecuting country which might retaliate e.g. against family members. Many are more comfortable sharing sensitive information with the CCF as an independent oversight body. A refugee, for example, may often be willing to provide this sensitive information to the CCF but not willing to share it with the IPSG.

4.3 In practice, if there is a risk that the CCF will be required to share all of the information they receive with the IPSG, this will have a number of undesirable consequences for the CCF's effectiveness and, potentially, its workload:

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4.3.1 Some people will be deterred from making any use of the CCF procedure. This is most likely to affect those with the greatest concerns about retaliatory measures and the greatest chances that data is non-compliant.

4.3.2 Many will make only an access request, and have to engage in complex correspondence about the way forward with the CCF, even where there is a straightforward basis for deletion (such as the grant of asylum). This would result in delays in deletion of non-compliant data and complicate CCF casework.

4.3.3 It could affect the type of information applicants are willing to provide to the CCF in a deletion request. A refugee may for example be unwilling to disclose their status if they believe that information must be provided to the IPSG. Instead, they may provide a far more complex basis for non-compliance.

As most applicants do not know whether a final compliance decision has been made by the IPSG at the time of applying to the CCF, these impacts will apply in the majority of cases.

4.4 To prevent these consequences, we suggest the following revision to the final sentence of Art 33(3) of the Statute:

> *"The Requests Chamber shall, subject to confidentiality requirements, make the information contained in the request available to the General Secretariat so that it may be considered in any future compliance review…"*

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