Eclan European Criminal Law Academic Network
Réseau académique de droit pénal européen

Newsletter

Issue No. 9, November 2012 – March 2013

News from the EU

Legislative Instruments

New negotiations

Proposal for a Directive of the European Parliament and of the Council on the protection of the euro and other currencies against counterfeiting by criminal law, replacing Council Framework Decision 2000/383/JHA

On 5 February 2013, the European Commission submitted to the Parliament and the Council a new proposal for a Directive on the protection of the euro and other currencies (2013/0023). This text defines the offences, which have to be investigated, but introduces also a minimum level of sanctions for those who counterfeit the euro. It would replace Council Framework Decisions 2000/38/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro. This proposal, based on article 83(1) of the TFEU, is still under discussion in the Council.

Ongoing negotiations

Processing of personal data for law enforcement purposes

Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data

The Commission proposed a new framework for data protection in the EU. This framework includes: a proposal for a regulation, which corresponds broadly to the existing Directive 95/46/EC; a proposal for a Directive for the law enforcement sector, which is currently dealt with under Framework Decision 2008/977/JHA. The Directive would apply to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Its scope would be broader than that of the current Framework Decision, which is limited to "cross-border" data. The rapporteur wrote a first report on the proposal for the LIBE Committee of the European Parliament on 20 December 2012 - 2012/0010 (COD) –. After this report, the LIBE Committee amended the Proposal several times, the last amendment being on 8 March 2013.

Mutual recognition

Directive regarding the European Investigation Order in criminal matters (EIO)

This initiative has been submitted on 21 May 2010 (Doc. Council 9288/10) by a group of seven Member States. Its purpose is to provide a comprehensive instrument covering the gathering of all types of evidence on the basis of the principle of mutual recognition. The negotiation of this directive started in the Council in July 2010. The Council reached a general approach on this file on 14 December 2011. On the side of the Parliament, the LIBE Committee took an orientation vote on 8 May 2012 on the basis of the draft report presented by the rapporteur. Trilogue meetings are on-going.

Approximation of substantive criminal law

Directive on the fight against fraud to the Union's financial interests by means of criminal law

On 11 July 2012, the Commission submitted to the European Parliament and the Council a proposal for a Directive on the protection of the financial interests of the EU (COM(2012)363). This instrument provides for the obligation to criminalise the behaviours described in the proposal and contains rules on imprisonment thresholds, types of sanctions, liability for legal persons, freezing and confiscations, jurisdiction, etc. However, it is not based on Article 83 TFEU (the general basis for approximation of substantive criminal law) but on Article 325(4) TFEU (prevention of and fight against fraud affecting the financial interests of the Union): therefore, special rules

related to article 83 (the "opt out" provision for UK, Ireland and Denmark and the safeguard clause of article 83(3)) do not apply. The Directive would replace the Convention on the protection of the European Communities' financial interests of 26 July 1995, including its Protocols of 27 September 1996, 29 November 1996 and 19 June 1997. Negotiations are still on-going in the Council. The aim is to obtain a general approach under the Irish Presidency.

Directive on the freezing and confiscation of proceeds of crime in the European Union

On 12 March 2012 the Commission submitted a proposal for a Directive on the freezing and confiscation of proceeds of crime in the EU. This instrument aims to make it easier for Member States' authorities to confiscate and recover the profits that criminals make from cross-border serious and organised crime. It lays down minimum rules with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation (in restricted circumstances) and third-party confiscation. It replaces partially the Joint Action 98/699/JHA and Framework Decisions 2001/500/JHA and 2005/212/JHA. On 6 and 7 December 2012, the Ministers agreed on a general approach (17315/12). The Parliament postponed the orientation vote several times.

Directive on attacks against information systems

The Commission submitted a proposal for a Directive on 30 September 2010. One of the main purposes of the proposal is to deal with large scale attacks such as those carried out via the use of "botnets". The Council reached a general approach on this text on 10 June 2011 (see Council doc. 11566/11). The LIBE Committee of the Parliament adopted a first orientation vote on 27 March 2012 (click here for more info on the situation in Parliament). Formal adoption has not yet been possible.

Directive on criminal sanctions for insider dealing and market manipulation

This proposal for a "market abuse directive" (16000/11) presented by the Commission in October 2011 is part of a broader "package" of measures, including a Regulation on insider dealing and market manipulation - "MAR" (***16010/11***), which sets up a common regulatory framework on market abuse. Based on Art. 83 para 2, the draft directive establishes minimum rules with respect to the most serious market abuse offences, namely insider dealing and market manipulation. If committed intentionally, these should be regarded as criminal offences and subject to criminal sanctions, which are effective, proportionate and dissuasive. On 3 December 2012, the Council agreed on a general approach (***16820/12***). This general approach constitutes the basis for negotiations with the European Parliament. In this regard, progress is directly linked to the Regulation on the same subject.

Approximation of procedural criminal law

Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

On 8 June 2011 the Commission submitted a proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (2011/0154). By contrast to what was envisaged in the roadmap on procedural rights, this instrument does not deal with the issue of legal aid. Negotiations started in the Council in July 2011 but proved to be very difficult. The Council reached a general approach on 7 June 2012. On the side of the European Parliament the LIBE Committee took an orientation vote on 10 July 2012. The aim is to finalise the adoption of the text under the Irish Presidency.

Adopted texts

Approximation of substantive criminal law

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

This Directive 2012/29/EU, adopted by the European Parliament and the Council on 25 October 2012, aims at approximating national legislation and practices. Its main purpose is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. It replaces Framework Decision 2001/220/JHA.

Case Law

ECJ, 26 February 2013, Judgment of the Court (Grand Chamber), C-617/10, Åklagaren v Hans Åkerberg Fransson

The request for a preliminary ruling was made by a Swedish jurisdiction and concerned the interpretation of the ne bis in idem principle as secured by Art. 50 of the Charter of fundamental rights of the EU.

The decision of the ECJ, taken by the Grand Chamber, first rejected the arguments of some Governments and of the European Commission disputing the jurisdiction of the Court on the basis of the fact that the penalties imposed on Mr Fransson and the criminal proceedings brought against him did not arise from implementation of EU law as required by Art. 51(1) of the Charter. In order to do so, the ECJ resorted to a broad interpretation of the scope of application of the Charter and especially of the words "only when implementing Union law".

It then gives its joint reply to the main questions submitted, namely that the *ne bis in idem* principle, laid down by Art. 50 of the Charter, does not preclude a Member State from imposing consecutively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.

ECJ, 26 February 2013, Judgment of the Court (Grand Chamber), C-399/11, Stefano Melloni

The request for a preliminary ruling was made by the Spanish Constitutional Court. It concerned the interpretation and validity of Art. 4a(1) of Council Framework Decision on the European arrest warrant as amended by Council Framework Decision on decisions rendered in the absence of the person concerned at trial.

According to the Court (Grand Chamber), such provision must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing MS.

The ECJ then declares the compatibility of the same provision with Arts. 47 and 48(2) of the Charter of fundamental rights of the EU.

Finally, the ECJ examines the quite sensitive question of the relation between EU law and national constitutional law. It rejects the approach of the Spanish constitutional Court according to which Art. 53 of the Charter authorizes a MS to give priority to national constitutional higher standard of fundamental rights over the application of EU law. It concludes in favour of the primacy of EU law, considering that Art. 53 of the Charter must be interpreted as not allowing a MS to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing MS, in order to avoid an adverse effect on the right to a fait trial and the rights of the defence guaranteed by its constitution.

ECJ, 29 January 2013, Judgment of the Court (Grand Chamber), C-396/11, Ciprian Vasile Radu

The request for a preliminary ruling was introduced in the context of proceedings relating to the execution of 4 European arrest warrants (EAW) issued against Mr Radu for the purposes of prosecution in respect of acts of aggravated robbery. The main question referred is whether an executing authority may refuse to execute a European arrest warrant on the grounds of infringement or risk of infringement of an individual's fundamental rights.

The Judgment of the ECJ only analyses whether the Framework Decision on the EAW must be interpreted as meaning that the executing judicial authorities can refuse to execute a EAW, issued for the purposes of conducting a criminal prosecution, on the ground that the issuing judicial authorities did not hear the requested person before the EAW was issued. The negative answer of the Court is based on its concerns on the effectiveness of the very system of surrender, and the damage that could be caused by the introduction of an obligation for the issuing judicial authorities to hear the requested person before issuing an EAW. The Court also insists on the fact that "the European legislature has ensured that the right to be heard will be observed in the executing Member State".

ECJ, 15 November 2012, Judgment of the Court, Joined cases C-539/10 P and C-550/10 P, Stichting Al-Aqsa v Council of the European Union and Kingdom of the Netherlands v Stichting Al-Aqsa

The Al-Aqsa foundation has been engaged since 2003 in judicial proceedings challenging its inclusion and its continued inclusion in the list drawn up by the Council of persons and entities whose assets have been frozen in the fight against terrorism.

In 2007, a judgment of the General Court annulled Council decisions on the ground of inadequate statement of reasons. In 2010, the General Court also annulled a series of measures adopted between 2007 and 2010, because the Netherlands had repealed the ministerial regulation on sanctions against terrorism.

The appeal brought by Al-Aqsa (case C-550/10 P) is declared inadmissible, in that it seeks only the amendment of certain grounds of the judgment under appeal. But as regards the appeal of the Netherlands (case C-539/10 P), the Court of Justice finds that the General Court erred in law.

After setting the judgment at first instance aside, the Court itself gives the final judgment on the initial action brought by Al-Aqsa seeking the annulment of the Council's decisions to freeze funds. The Court findings could be summarised as follows. Firstly the Council held precise information and evidence in the file showing that a decision, falling within the criteria established by European Union law, had been taken by a competent Netherlands authority against Al-Aqsa (existence of evidence or serious and credible clues as to the involvement of the person concerned in terrorist activities). Secondly, the Council did not fail to comply with its obligation to review whether the grounds justifying the decisions to freeze funds still exist. And the Council's decisions do not infringe Al-Aqsa's rights to property. Finally the Court rejects Al-Aqsa's argument that the Council's decision does not satisfy the duty to state reasons laid down in EU law. Consequently, the Court of Justice dismisses the initial action brought by Stitching Al-Aqsa.

Opinion of Advocate General Y. Bot, delivered on 19 March 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Commission, Council and United Kingdom v Yassin Abdullah Kadi

The Kadi saga started with the adoption of Regulation N° 881/2002 of 27 May 2002 providing for the freezing of Mr Kadi's funds. Mr Kadi brought an action before the General Court, arguing that his rights of defence and his right to effective judicial review had been infringed.

In 2005, the General Court delivered its first judgments, holding that the EU regulations implementing the measures of the UN Security Council are largely exempt from judicial review. In 2008, the Court of Justice took the opposite view and held that obligations imposed by an international agreement cannot prejudice the principle that fundamental rights must be respected. Accordingly, it annulled the Regulation. Subsequent measures were taken by the Commission, leading to the adoption of a new Regulation N° 1190/2008, maintaining the freezing of Mr Kadi's funds, and against which Mr Kadi brought a new action. In 2010, interpreting the judgment of the Court of Justice, the General Court annulled the new Regulation adopted by the Commission, taking the view that it was required to undertake a full and rigorous judicial review of the lawfulness of that act. The Commission, the Council and the United Kingdom appealed against that judgment.

The Advocate General Y. Bot delivered his conclusions. He takes the view that the principle of judicial review laid down by the Court of Justice requires further clarification, as judicial review of the kind required by the General Court in the judgment under appeal should not represent a rule which must be followed. In his view, the formal and procedural aspects of the contested act should be subject to normal review (review of external lawfulness) and the EU judicature should undertake a rigorous review of whether such an act has been adopted under a procedure, which respects the rights of the defence. By contrast, the EU judicature must exercise a limited review of the merits of the statement of reasons (review of internal lawfulness) and simply ascertain that there was no manifest error. He concludes that the Court should set aside the judgment under appeal.

Academic activities

The 10th Contact Points meeting will take place in Brussels at the Institute for European Studies of the ULB (IEE-ULB) on 16 May 2013.

The 7th meeting of the Management Committee was held at the Institute for European Studies of the ULB (IEE-ULB) on 15 January 2013.

Research Projects

"Evaluation of the Legal Framework Applicable to Combating Terrorism in the EU Member States"

ECLAN is involved in this project (request for services of the EU Commission, DG Home) as subcontractor of CSES.

The project started officially in February 2013 and will end in August 2013.

The objectives of this study are to provide the Commission with: (1) Updated information on the *legally binding rules* adopted by the Member States to fight against "public provocation to commit a terrorist offence", "recruitment for terrorism", "training for terrorism" and ancillary offences as defined in the Framework Decision 2008/919/JHA ; (2) Factual information on the *practical implementation* of the existing legal framework by presenting data on the number and type of cases relating to the offences covered by the Framework Decision which have been reported to and dealt with by competent national authorities. (3) A description of the *state of play* in each Member State assessing the correctness or incorrectness of the transposition.

The above information will contribute to an assessment of the added value and impacts of the Framework Decision in the Member States.

Publications

Petter Asp, *The Substantive Criminal Law Competence of the EU,* Jure, 2013, 258 pages.

Thomas Cassuto (ed.), *Une Europe, deux lois pénales,* Bruylant, December 2012, 246 pages.

Ian Cameron, *EU sanctions: Law and Policy Issues concerning Restrictive Measures,* Intersentia, March 2013, 266 pages.

Catherine Flaesch-Mougin, Lucia Serena Rossi, *La dimension extérieure de l'espace de liberté, de sécurité et de justice après le Traité de Lisbonne,* Bruylant, March 2013, 696 pages.

Johannes Keiler, *Actus reus and participation in European criminal law,* Intersentia, April 2013, 586 pages.

Katalin Ligeti (ed), *Towards a prosecutor for the European Union, Volume 1, A comparative analysis,* Oxford, Hart Publishing, December 2012, 1096 pages.

Cristina Mauro, Francesca Ruggieri (ed), *Droit pénal, langue et Union européenne,* Bruylant, December 2012, 254 pages.

Helmut Satzger, *International and European Criminal Law,* C.H. Beck, Hart, Nomos, September 2012, 301 pages.

Upcoming Events

Conference: *Access to Justice for Crime Victims in the EU,* ERA, 18 – 19 Avril, Trier, Germany [for info click here]

Conference: *Comparative Criminal Procedures: The Case of Terrorism Investigations and Prosecutions*, co-organised by the School of Law and the Criminal Justice Centre of Queen Mary, University of London and ECLAN, 10 May, London [for info click here]

Conference: *Making Legal Remedies in EU Criminal Justice more efficient,* ERA, 16 – 17 May, Brussels [for info click here]

Conference: *Do labels still matter? Blurring boundaries between administrative and criminal law,* co-organised by ECLAN and IEE - ULB, 17 May 2013, Brussels

Summer School: *Summer Course on European Criminal Justice,* ERA, 24-28 June 2013, Trier, Germany [for info click here]

Summer School: *The EU Area of Criminal Justice*, co-organised by ECLAN and IEE - ULB, Brussels, 1 – 5 July 2013 [for info click here]

Conference: *The European Public Prosecutor: sooner or later?*, co-organised by ECLAN, and IEE-ULB, Brussels, 2 July 2013

New Journal of European Criminal Law

The *New Journal of European Criminal law* is the leading international journal on European Criminal Law. It aims at analysing, discussing, defining, developing and improving criminal law in Europe and in particular criminal law as it is drawn up by the European Union and the Council of Europe. It embraces an encompassing approach as to the matter, which is not limited to what is traditionally considered as criminal law but it extends to and complements environmental law and competition law. As regards the latter it is the first ever legal journal to treat criminal and competition law disciplines related at their interface. Having two patrons ECLAN and ECBA it serves as a forum for both legal practitioners and academics interested in issues related to European Criminal Law. Its editorial board comprises as wide a cross-section of the legal profession as possible

The Journal solicits contributions from all those involved in criminal law in its European dimension. It seeks a large variety of articles, ranging from short case notes with little or no comment, to opinionated comments on developments to long in-depth critiques of judgments and legislative measures with proposals for reform or change and to scientific publications on the theoretical developments of this specific branch of law

Contributions should be sent to: Irene.wieczorek@vub.ac.be. A blind peer review system will be carried to ensure the quality and the originality of the Journal

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Next issue: September 2013

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The European Criminal Law Academic Network (ECLAN) aims to facilitate and strengthen academic research and education in the field of EU Criminal Law

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