

## News from the EU

### Legislative Instruments

#### New negotiations:

##### *Approximation of substantive criminal law*

##### Directive on attacks against information systems (COM(2010)517 final)

This proposal for a Directive was adopted by the Commission on 30 September 2010. It would replace Framework Decision 2005/222/JHA. One of the main objectives of the proposal is to cope with large scale attacks such as those carried out via the use of "botnets". The Directive will be discussed in the Council and the Parliament through the ordinary legislative procedure (codecision).

##### *Approximation of criminal procedure*

##### Directive on the right to information in criminal proceedings (Letter of Rights) (COM(2010)392)

This proposal was submitted by the Commission on 20 July 2010. It is the second measure implementing the roadmap on procedural rights. The proposal deals with the right to information about the rights of the suspected or the accused person (with special rules on the rights related to arrest and the rights related to European Arrest Warrant proceedings), the right to information about the charge and the right to access to the case file. The Council reached a general approach on this text on 3 December 2010 with a view to starting negotiations with the European Parliament in 2011, under the ordinary legislative procedure (codecision). The Parliament will take an orientation vote on this text on 3 February 2011. For the text of the Council general approach, [click here](#).

#### External agreements

##### EU-US agreement on protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters

The Council adopted on 3 December 2010 a mandate for the Commission to start the negotiations with the United States on this Agreement. The text of the mandate is not public.

##### *Processing of data for law enforcement purposes*

##### Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

On 2 February 2011, the Commission adopted a new proposal for a Directive obliging air carriers to provide EU Member States, for law enforcement purposes, with data on passengers entering or departing from the EU. A Framework Decision had already been proposed with the same object in 2007. After a first round of sensitive negotiation and given the reaction from the European Parliament, the Council decided to wait for the entry into force of the Lisbon Treaty. A new instrument had to be resubmitted under the form of a Directive. The Directive does not simply reproduce the content of the initial draft Framework Decision. The new proposal differs on several issues. The Directive is submitted under the ordinary legislative procedure (codecision) and will therefore require agreement between the Council and the Parliament.

#### On-going negotiations:

##### *Mutual recognition*

##### Directive on the European Protection Order (EPO)

This proposal was tabled in January 2010 by 12 Member States. The objective is to make sure that a victim who is

subject to a protection measure (for example in a case of domestic violence) may still be protected when he/she moves to another Member State. The scope is therefore very close to that of [Framework Decision 2008/947/JHA](#) of 27 November 2008 (mutual recognition of probation measures) and [Framework Decision 2009/829/JHA](#) of 23 October 2009 (mutual recognition of supervision measures). These instruments, however, apply where it is the offender or the suspect (and not the victim) who leaves the territory of the Member State where the probation or surveillance measure were taken. This file, which covers to some extent non-criminal proceedings, has raised issues with relation to its legal basis. The Presidency of the Council negotiated with the Parliament on the basis of the document submitted to the JHA Council of June 2010 ([click here](#)). The Parliament voted on this file on 14 December 2010 ([click here](#) for the position of Parliament) but the current position of the Council is unclear.

#### **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. The objective is to provide a comprehensive instrument encompassing the gathering of all types of evidence on the basis of the principle of mutual recognition. It would replace [Framework Decisions 2008/978/JHA](#) on the European Evidence Warrant, [2003/577/JHA](#) on freezing orders (as far as evidence is concerned) as well as the conventions on mutual legal assistance (including the 1959 convention of the Council of Europe, the 1990 Schengen Convention and the 2000 EU Convention). The negotiation of this directive started in the Council in July 2010. A report was submitted to the Council on 3 December 2010 ([doc. 16868/10](#), [click here](#)). Negotiations will continue in the Council in 2011. Examination of the file is at a preliminary stage in the European Parliament.

#### ***Approximation of substantive criminal law***

##### **Directive on preventing and combating trafficking in human beings, and protecting victims**

This Directive was proposed by the Commission on 29 March 2010. It is related to the [proposal for a Framework Decision](#) proposed and negotiated in 2009. The proposal was not adopted before the entry into force of the Treaty of Lisbon and had to be resubmitted in the form of a proposal for a Directive. This Directive will replace [Framework Decision 2002/629/JHA](#). In December 2011, the Council and the European Parliament reached an agreement in the first reading on this file. Adoption will take place in 2011. It is the first post-Lisbon instrument on substantive criminal law. For a provisional version of the Directive agreed by Council and Parliament (before review by jurist linguists), [click here](#).

##### **Directive on combating the sexual abuse, sexual exploitation of children and child pornography**

This Directive was proposed by the Commission on 29 March 2010. It is related to the [proposal for a Framework Decision](#) proposed and negotiated in 2009. The proposal was not adopted before the entry into force of the Treaty of Lisbon and had to be resubmitted in the form of a proposal for a Directive. This Directive would repeal [Framework Decision 2004/68/JHA](#). The Council reached a general approach on this file on 3 December 2010. The text agreed in the Council represents the initial position of the Council for the negotiations with the Parliament which will start in 2011, once the Parliament has taken an orientation vote on this file. For the version of the text agreed in Council on 3 December 2010, [click here](#).

#### ***Approximation of criminal procedure***

##### **Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings**

This initiative was proposed by 13 Member States at the end of December 2009. The content of the proposal, except for some aspects such as its legal nature (Directive instead of Framework Decision), is the result of the negotiation of the draft [Framework Decision](#) on which the Council had reached a political agreement on 21 October 2009. Because the Framework Decision had not been formally adopted at the time of the entry into force of the Treaty of Lisbon, it had to be resubmitted in the form of a proposal for a Directive. The proposal came from a group of Member States. There is also a [proposal for a Directive submitted by the Commission](#) on the same issue. The Parliament decided however to work formally on the basis of the first proposal (Member States), while supporting the proposal of the Commission on the substance. The Council and the European Parliament reached an agreement on this file in June 2010. The Directive was formally adopted on 20 October 2010. This Directive is the first measure foreseen in the framework of the [roadmap on procedural rights](#) adopted by the Council on 30 November 2009.

#### **External agreements**

##### **Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (“Swift Agreement”)**

The objective of this instrument was “to make sure that designated providers of international financial payment messaging services [in reality, the agreement is primarily intended to cover the company “Swift”] make available to the US Treasury financial payment messaging data stored in the territory of the EU necessary for preventing and combating terrorism and its financing”. This agreement follows a change in the architecture of Swift: while all data managed by Swift were previously stored in

the US, an important part of these data will soon be stored only in the EU. Provisional application as from 1/2/2010 was provided. Due to the entry into force of the Lisbon Treaty, the approval of the European Parliament was necessary before the conclusion of the Agreement. The European Parliament rejected the agreement on 11 February 2010. A new EU-US negotiation started in May 2010 and led to a [new agreement](#) signed on 28 June 2010 and approved by the European Parliament on 8 July 2010. The agreement was published in the Official Journal ([click here](#)) and entered into force on 1 August 2010.

#### **Agreement between the European Union and Japan on mutual legal assistance in criminal matters**

This agreement was signed on 30/11/09 by the EU and on 15/12/09 by Japan. The agreement covers only mutual legal assistance and is therefore not applicable for example to extradition procedures. Although the negotiation and the EU signature took place under the Treaty of Nice, the conclusion was governed by the Treaty of Lisbon. After the approval of the European Parliament, the conclusion of the Agreement was decided by Council on 7 October 2010. The agreement enters into force on 2 Jan. 2011.

## Case Law

### **European Arrest Warrant**

#### **ECJ, 21 October 2010, judgment C-306/09, I.B.**

The judgment delivered on 21 October 2010 in the *I.B.* case concerns references for preliminary ruling on the interpretation and validity referred by the Belgian *Cour Constitutionnelle*. Two of the questions referred to the ECJ aimed at enquiring whether articles 4(6) and 5(3) of the Framework Decision of 13 June 2002 on the European arrest warrant can be interpreted as meaning that, the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed *in absentia* - according to article 5(1) - can be subordinated to the condition that the national or resident of the executing member State is returned to this last one in order, as the case may be, to serve there the sentence passed against him following a new trial organised in his presence in the issuing Member State. The ECJ considers that there isn't anything that indicates that the European Union legislator wished to exclude from the objectives of articles 4(6) and 5(3) – and particularly the one of increasing the requested person's chances of reintegrating into society – the people requested on the basis of a sentence imposed *in absentia*. The situation of these people, who still dispose of the possibility of applying for a retrial, is comparable to that of a person who is the subject of a European arrest warrant for the

purposes of prosecution. Therefore, there is no objective reason precluding an executing judicial authority which has applied article 5(1) from applying the condition contained in article 5(3). The executing Member State may therefore make the surrender of a person in a situation such as that of *I.B.* subject to the joint application of the conditions laid down in article 5(1) and article 5(3).

### **European Arrest Warrant - *Ne bis in idem***

#### **ECJ, 16 November 2010, judgment C-261/09, Mantello**

The judgment delivered on 16 November 2010 in the framework of the *Mantello* case, for the first time concerned the interpretation of the ground for mandatory non-execution provided in article 3(2) of the Council Framework Decision on the European arrest warrant. In respect to this, the *Oberlandesgericht Stuttgart* (Germany) referred two questions to the ECJ for a preliminary ruling. The first one aimed at ascertaining whether the concept of *idem* (that is the notion of « same acts »), constitutes an autonomous concept of European Union law. The Court replied affirmatively and declared that the interpretation given in the context of article 54 of the Convention implementing the Schengen Agreement (CISA) is equally valid in this context. The second question covered the situation where, when the judgment for illicit trafficking of narcotic drugs was delivered, the investigating authorities were in possession of evidence which could have proved the participation in a criminal organization but - for strategic reasons - did not submit the evidence to the court. The ECJ was asked to indicate whether this importation could be regarded as constituting a "same act" as the participation to a criminal organization intended for trafficking in narcotic drugs. The ECJ does not answer the question about the same act, but deals with it under the perspective of the *bis* concept. Considering that the definitive character of a judgment is given by the national law of the Member State where the decision was issued, the Court bases itself on the position of the issuing authority. In this case, it stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant. Consequently, the Court concludes that the executing judicial authority has no reason to apply the ground for mandatory non-execution provided for in article 3(2) of the Framework Decision.

### **Black Lists for terrorists or terrorist groups**

#### **General Court, 30 September 2010, judgment, T-85/09, Kadi II**

The insertion of the applicant in the EU black list of terrorists and terrorist organizations (which implements the UN black list) implied the freezing of the person's assets. The initial insertion of the applicant in the EU black list had been annulled by the Court of Justice (see

“Kadi I” case, C-402/05). As a consequence, the Commission adopted a new regulation reinserting the applicant in the list with a modified procedure. In its decision, the General Court (new name under the Lisbon Treaty for what was formerly the Tribunal of First Instance) notices that the ECJ “Kadi I” decision has been criticized and mentions the arguments. The General Court nevertheless maintains the same reasoning and concludes that, in the case concerned, measures taken at UN level and the new procedure followed at EU level are not sufficient to correct the gaps identified by the ECJ in “Kadi I”. The General Court also questions the conservatory nature of the freezing of assets which, in the case concerned, has been maintained for nearly ten years. The General Court annuls, as far as the applicant is concerned, the regulation through which the applicant was reinserted in the list.

### Schengen cooperation

#### ECJ, 26 October 2010, judgment, C-482/08, UK v. Council

On 23 June 2008, the Council adopted Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. The UK challenged that Decision before the Court because the UK, following the application of the protocols on Schengen cooperation, had not been permitted to take part in the Decision. The UK argued that Decision 2008/633/JHA was a measure of police cooperation in which the UK is authorized to participate. The Court concluded that “the Council did not commit an error of law when it took the view that that “Decision 2008/633 constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not participate and refused to allow that Member State to participate in its adoption.” The Court therefore dismissed the action.

### Rights of victims

#### ECJ, 21 October 2010, judgment, C-205/09, Eredics

The judgment delivered on 21 October 2010 in the *Eredics* case concerns reference for preliminary ruling on the interpretation of articles 1(a) and of 10(1) of the Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings. Firstly, the Hungarian *Szombathelyi Városi Bíróság*, wished to know whether, within the definition of «victim» for the purposes of the promotion of mediation in criminal proceedings, could also fall «legal persons». The ECJ stated that the definition of «victim» provided in the *Dell’Orto case* (C-467/05) is equally valid in this context and defined the victim as a «natural person», therefore excluding the extension of the notion of victim also to legal persons. Secondly, the referring court wanted to enquire into the apparent difformity between the Hungarian legislation and the provisions contained in Framework Decision 2001/220/JHA about the possibility of mediation in criminal proceedings. It asked whether article 10(1) had to be interpreted as containing no possibility of discretion for the Member States to decide when to take the option of mediation in criminal proceedings. The ECJ recalled that the Framework Decision leaves to the Member States the choice to determine for which offences mediation should be possible. The Court therefore replied that article 10(1) has to be interpreted as « not requiring Member States to make recourse to mediation possible for all offences, the substantive components of which - as defined by the national legislation - correspond essentially to those offences for which mediation is expressly provided for by that legislation ».

## News from ECLAN and other academic activities

The 7<sup>th</sup> Contact Points meeting took place at the University of Luxembourg on 21 October 2010. The 8<sup>th</sup> Contact Points meeting will take place in Brussels, at the IEE-ULB on 26 May 2011.

The 3<sup>rd</sup> meeting of the Management Committee was held at the IEE-ULB on 3 July 2010. The next one will take place at the IEE-ULB on 4 February 2011.

### Research Projects

#### ***ECLAN II project: Development of ECLAN – Phase II (2010-2012)***

Financed by the European Commission (Criminal Justice

Programme, Call for proposals 2009), the Ministry of Justice of the Grand Duchy of Luxembourg and the IEE-ULB.

The main objectives of the project are the enlargement of the academic network ECLAN, the improvement of its internal organization, the development of new communication tools to disseminate information, the organization of two conferences regarding EU criminal law. The project started on 1 September 2010.

## Publications

Steve Peers, *EU Justice and Home Affairs Law (Third edition)*, Oxford, Oxford University Press, January 2011, 1104 pp.

Annika Suominen, *The principle of mutual recognition in cooperation in criminal matters – A study of the principle in four Framework Decisions and in the implementation legislation in the Nordic member States*, Bergen, Universitetet I Bergen, 2011, 436 pp.

## Upcoming Events

*Annual Forum on Combating Corruption in the EU* (ERA, Trier, 10-11 February 2011). [for info, [click here](#)]

Conference: *Child Pornography on the Internet and cooperation with internet service providers* (ERA, Lisbon, 17-18 March 2011). [for info, [click here](#)]

Conference: *Interests and Actors in European Police and Criminal Justice Cooperation: Legal and Practical Challenges* (Uppsala University, 18-19 April 2011). [for info, [click here](#)]

*ECBA Spring Conference* (ECBA, Budapest, 6-7 May 2011). [for info, [click here](#)]

Conference: *SIENA, Prüm, SIS II, VIS, Eurodac – Law enforcement and information exchange in the EU today* (ERA, Trier, 19-20 May 2011). [for info, [click here](#)]

Conference: *Criminal Law and Law Enforcement: Poland - Meet the Presidency 2011/2* (Brussels, RECL and ECLAN in collaboration with ULB and VUB, 26 May 2011). [for info, [click here](#)]

Conference: *E-evidence: validity and admissibility of electronic evidence in criminal proceedings* (Barcelona, 26-27 May 2011). [for info, [click here](#)]

Conference: *EU Counter-Terrorism Offences: What Impact on National Legislation and Case-Law?* (Brussels, IEE-ULB, 27-28 May 2011). [for info, [click here](#)]

Conference: *The European Criminal Records Information System (ECRIS)* (ERA, Budapest, 9-10 June 2011). [for info, [click here](#)]

## Summer Schools

The 8th edition of the Summer School “*The EU Area of Criminal Justice*” organised by the Institute for European Studies – ULB in collaboration with ECLAN, will take place in Brussels from 27 June to 1 July 2011. The objective of the Summer School is to provide participants with an extensive knowledge of EU criminal law.

For more information, please send an email to [eclan@ulb.ac.be](mailto:eclan@ulb.ac.be) or visit: [www.ulb.ac.be/iee/penal/summerschool](http://www.ulb.ac.be/iee/penal/summerschool)

The ERA Summer Course “*The European Criminal Justice*” will take place on 27 June 2011 – 1 July 2011 in Trier, Germany. This course is intended as an introduction to EU criminal law and to the instruments for cooperation in criminal justice. It considers the origins, legal framework and institutional system of criminal justice cooperation in the EU.

For more information, [click here](#).

## New Journal of European Criminal Law

ECLAN recently joined the European Criminal Bar Association (ECBA) as patron of the New Journal of European Criminal Law (NJECL) which is published by *Intersentia*. NJECL serves as a forum for both legal practitioners and academics interested in issues related to European Criminal Law. Its editorial board comprises a cross-section of the legal profession as wide as possible. The New Journal of European Criminal Law solicits articles from all those involved in criminal law in its European dimension. It seeks a large variety of articles, on a spectrum starting with short case notes with little or no commentary, to articulated comments on recent developments to long in-depth critiques of judgments, legislative measures with proposals for reform or change. To ensure originality, the New Journal of European Criminal Law applies a peer review system to long, in-depth articles.

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## **EU Meetings**

Inter-parliamentary meeting *Democratic Accountability and operational coordination in the future European Internal Security Strategy* (Brussels, European Parliament, 4-5 October 2010), ECLAN was represented by Emanuela Politi [*meeting report provided on request*].

Experts Meeting on *Procedural rights: access to a lawyer and communication while in detention* (Brussels,

European Commission, 11-12 October 2010), ECLAN was represented by Anne Weyembergh, Gisèle Vernimmen-Van Tiggelen and Stefan Braum [*meeting report provided on request*].

Hearing on *Data Protection in a Transatlantic Perspective – Future EU-US agreement in the framework of police and judicial cooperation in criminal matters* (Brussels, European Parliament, 25 October 2010), ECLAN was represented by Emanuela Politi [*meeting report provided on request*].

**Next issue: July 2011**

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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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