

News from the EU

Legislative Instruments

New 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 has proposed a new framework for data protection in the EU. It includes a proposal for a regulation which corresponds broadly to the existing Directive 95/46/EC. It also contains 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. It would be wider than the current Framework Decision which is limited to “crossborder” data. The negotiations have just started.

Approximation of substantive criminal law

Directive on criminal sanctions for insider dealing and market manipulation

The Commission submitted on 20 October 2011 a package on insider dealing and market manipulation including a regulation and a directive. The directive is the first application of Art. 83(2) TFEU, which provides for the possibility for the EU to impose on Member States the

use of criminal sanctions where it “proves essential to ensure the effective implementation of a Union policy”. Though the proposal for a Directive provides for the criminalization of some behaviors, it does not provide for any minimum level of penalty. [Click here](#) for the text of the proposal.

Ongoing negotiations

Mutual recognition

Directive 2011/99/EU of 13 December 2011 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 Decisions 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 suspected person (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 in terms of legal basis. It was finally adopted on 13 December 2011. [Click here](#) for the final version.

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 covering 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 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 Council in July 2010. The Council reached a [general approach](#) on this file on 14 December 2001. On the side of the Parliament, the rapporteur tabled a [draft report](#) on 23 January 2012 in the LIBE Committee which is due to vote in the coming weeks.

Approximation of substantive criminal law

[Directive 2011/93/EU of 13 December 2011 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 repeals [Framework Decision 2004/68/JHA](#). It was formally adopted on 13 December 2011. [Click here](#) for the final version¹.

[Directive on attacks against information systems](#)

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 deal with large scale attacks such as those carried out via the use of "botnets". The Directive is discussed in Council and Parliament through the ordinary legislative procedure (codecision). The Council reached a general approach on this text on 10 June 2011 (see [Council doc. 11566/11](#)). On the side of the Parliament, the rapporteur tabled a [draft report](#) on 24 November 2011 in the LIBE Committee.

Approximation of procedural criminal law

[Directive on the right to information in criminal proceedings \(Letter of Rights\)](#)

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 right to information about rights of the suspected or accused person (with special rules on right related to arrest and rights related to European Arrest Warrant

proceedings), right to information about the charge and right to access to the case file. Council and Parliament reached an agreement on this file in November 2011 which was confirmed in plenary session of the Parliament on 13 December. Formal adoption should take place soon. [Click here](#) for the final version.

[Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest](#)

This Directive was proposed by the Commission on 8 June 2011. It is the third measure implementing the [roadmap](#) on procedural rights. The proposal aims at approximating national legislations on access to a lawyer and on the right to communicate upon arrest. Contrary to what was envisaged in the roadmap on procedural rights, it does not deal with the issue of legal aid. For the proposal of the Commission, [click here](#). Negotiations on this Directive started in Council in July 2011 but proved to be very difficult. While the usual procedure in these files is that the Council adopts a general approach first, it is likely in this case that the LIBE Committee of the European Parliament will take an orientation vote (around April, see the [draft report of 7 February 2012](#)) before a position has been agreed upon in the council.

[Directive establishing minimum standards on the rights, support and protection of victims of crime](#)

This Directive was proposed by the Commission on 18 May 2011. It aims at approximating national legislation and practices on protection of victims, in particular during criminal proceedings. It would replace Framework Decision [2001/220/JHA](#) of 15 March 2001 on the standing of victims in criminal proceedings, which partly covers the same scope but is less detailed. Negotiations in the Council and in the Parliament are ongoing.

Processing of personal data for law enforcement purposes

[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

¹ The number of the Directive has been corrected afterwards and is 2011/93/EU instead of 2011/92/EU. See the [corrigendum in the OJ](#).

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 to the ordinary legislative procedure (codecision) and will therefore require agreement between the Council and the Parliament. Negotiations are ongoing in each institution. [Click here](#) for the draft report of the LIBE committee.

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 negotiations with the United States on this Agreement. The text of the mandate is not public. Negotiations between the Commission and the US government continued during the second semester 2011.

Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR)

The agreement replaces the [agreement signed in 2008](#) which was provisionally applicable even if it had never been ratified by the EU. Under the Lisbon Treaty, conclusion of the 2008 agreement by the EU required approval by the European Parliament. The European Parliament postponed its vote, thereby enabling the agreement to remain applicable, but required the negotiation of a new agreement.

The Council adopted the mandate for negotiations on 2 December 2010. Negotiations between the Commission and the Australian government were finalized during the first semester 2011 ([COM\(2011\)280](#)) and the agreement was signed on 29 September 2011. The Parliament gave its consent to the conclusion of the Agreement on 27 October. The Decision to conclude the agreement was adopted on 13 December 2011. Australia has not yet ratified the new agreement. [Click here](#) for the final text.

Agreement between the European Union and the United States on the processing and transfer of Passenger Name Record (PNR)

The EU and the US signed a [first agreement in 2004](#) which had to be terminated following a [decision by the Court of Justice](#) (lack of legal basis). A [provisional agreement](#) was signed in 2006, later replaced by a [new agreement in 2007](#). The 2007 agreement is not concluded yet but is provisionally applicable. Under the Lisbon Treaty, conclusion of the 2007 agreement by the EU required approval by the European Parliament. The European Parliament postponed its vote, thereby enabling the agreement to remain applicable, but required the negotiation of a new agreement.

The Council adopted the mandate for negotiations on 2 December 2010. The negotiations were finalized during the second semester 2011. The Council approved the signature of the Agreement on 13 December 2011. The conclusion needs the approval of the European Parliament. The LIBE Committee rejected on 27 March 2012 the [recommendation from the rapporteur](#) to reject the agreement and call for a new negotiation. The final decision will be taken by the plenary meeting of the Parliament, probably in April. [Click here](#) for the final text.

Agreement between the European Union and Canada on the processing and transfer of Passenger Name Record (PNR)

The European Community and Canada signed a [first agreement in 2005](#). Though no challenge was brought against that agreement, it was indirectly affected by the annulment of the agreement with the US as the legal basis was the same. A legal vacuum emerged when the Commission did not renew its decision on the adequacy of data protection in Canada. Transmission of PNR data continued on the basis of unilateral commitments from Canada. The Council adopted the mandate for negotiations for a new agreement on 2 December 2010. The mandate and the negotiations are confidential. Negotiations between the Commission and the Canadian government are ongoing.

Case Law

Rights of victims

[ECJ, 15 September 2010, judgment, joint-cases C-483/09 and C-1/10, Gueye and Salmeron Sanchez](#)

The judgment delivered on 15 September 2011 in the framework of the joint-cases Gueye and Salmerón Sánchez concerns references for preliminary ruling on the interpretation of articles 2, 8 and 10 of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. The offenders of the joint-cases had been condemned for domestic violence with sentences imposing the prohibition to approach their victims. In spite of this, the offenders continued to cohabit with them until they were declared guilty of non-respecting the sentence. The question the Spanish Courts interrogated themselves upon is whether a protection measure to the victims may be imposed even when it is against her/his free will (in this specific case the victim wanted to continue living with her husband). In its response, the ECJ underlines that the Framework Decision does not give any right to the victims to choose the form of penalty nor its level. Moreover, the Court states that the FD only draws minimum standards for the protection of victims of crimes and that the binding/optional character is left to the national authorities.

[ECJ, 21 December 2011, judgment, C-507/10, M. X](#)

The judgment delivered on 21 December 2011 also concerns the interpretation of the Framework Decision 2001/220/JHA relating to the standing of victims in criminal proceedings. In this case, the victim was a girl under 18 whose father was suspected of having committed acts of sexual nature on her. The questions referred by the Tribunal of Florence doubted the compatibility with the Framework Decision of the procedural rules of the “*incidente probatorio*”, as set out in the Italian CCP and whose monopoly of initiative is of the defendant and of the Public Prosecutor. The Tribunal doubted the compatibility of the procedural rules applicable to minor victims with the FD because those rules impose no obligation on the Public Prosecutor to take any action, even if it is a request made by the victim him/herself. The referring Court wanted to know if the Framework Decision provides a minor victim with the right to bring an appeal before a court against that decision of the Public Prosecutor rejecting her/his request to be heard and to give evidence under those arrangements. In its judgment, the ECJ (Second Chamber) reminds that the FD does not impose to Member States the obligation to give the victims a specific treatment best suited to their circumstances. Therefore, the ECJ concludes that the Italian CCP should be considered as compatible with the Framework Decision.

News from ECLAN and other academic activities

The 9th Contact Points meeting will take place in Brussels at the Institute for European Studies of the ULB (IEE-ULB) on 26 April 2012.

The 5th meeting of the Management Committee was held at the University of Luxembourg on 29 November 2011. The next one will take place at the IEE-ULB on 26 April 2012.

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 and the organization of two conferences regarding EU criminal law. The project started on 1 September 2010 and will end on 31 August 2012.

Research Projects

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

Financed by the European Commission (Criminal Justice

FP7 Project: Surveillance and the Challenges for the security of the citizen

SURVEILLE systematically reviews the impact of different surveillance systems, and also helps manufacturers and end-users better develop and deploy

these systems. It is a multidisciplinary project combining law, ethics, sociology and technology analysis in a small number of highly collaborative, cross-cutting work packages. SURVEILLE will assess surveillance technology for its actual effectiveness in fighting crime and terrorism, for its social and economic costs, and will survey perceptions of surveillance in the general public and certain identified target groups. The project aims at wide dissemination, including amongst European and national decision-makers. It will also contribute in the field of training judges, prosecutors and the police.

ECORYS-ECLAN: Impact assessment on a new legislative instrument replacing the Council Framework Decision 2004/757/JHA on illicit drug

The Commission is exploring the possibility to replace the Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (the Framework Decision). The purpose of this study is to provide the Commission with the necessary elements for drafting an impact assessment, fully in line with the requirements established by the Commission's Impact Assessment Guidelines.

Publications

Martijn Zwiers, *The European Public Prosecutor's Office: analysis of a multilevel Criminal Justice System*, Maastricht, Intersentia, January 2012, 502 pp.

J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office*, Rijksuniversiteit Groningen, Europa Law Publishing, 2011, 308 pp.

André Klip, *European Criminal Law*, Antwerp, Intersentia, 2nd edition, January 2012, 580 pp.

Daniel Flore, Stéphanie Bosly, Amandine Honhon and Jacqueline Maggio (eds), *Probation Measures and Alternatives Sanctions in the European Union*, Mortsel, Intersentia, February 2012, 622 pp.

Upcoming Events

Conference: *EU Criminal Law for Defence Counsel* (ERA, Edinburgh, 20-21 April 2012). [For info, [click here](#)]

Conference: *Approximation of Substantive Criminal Law in the EU: The Way Forward* (ECLAN, 27-28 April 2012) [for more info: eclan@ulb.ac.be]

ECBA Spring Conference (ECBA, Geneva, 27-28 April 2012). [for info, [click here](#)]

Conference: *Ne bis in idem as a General Principle of EU Law* (ERA, Paris, 3-4 May 2012). [for info, [click here](#)]

Conference: *Fighting Cybercrime - Between Legislation and Concrete Action* (ERA, Milan, 24-25 May 2012). [For info, [click here](#)]

Conference: *EU Criminal Justice for Defence Counsel* (ERA, Prague, 22-23 June 2012). [for info, [click here](#)]

Summer Schools

The 9th edition of the Summer School "*The EU Area of Criminal Justice*" organised by the Institute for European Studies (IEE-ULB) in collaboration with ECLAN, will take place in Brussels from 2 July to 6 July 2012.

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 or visit: www.summerschool-ulb-criminaljustice.eu

The ERA Summer Course "*The European Criminal Justice*" will take place on 2 to 6 July 2012 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 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.

Members of the European Criminal Bar Association (ECBA) and the European Criminal Law Academic Network (ECLAN) receive a -15% discount. For more information, [click here](#).



Hart Publishing is pleased to offer 20% discount on their criminal law titles to ECLAN members. If you would like to place an order you can do so directly through the Hart Publishing website (please mention the reference 'ECLAN' in the special instructions field to receive the discount).

<http://www.hartpub.co.uk/books/search.asp?st=0&s=Criminal+Law>

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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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