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

Newsletter

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News from the EU

Legislative Instruments

New negotiations

EU agencies

Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office

On 17 July 2013, the European Commission submitted to the European Parliament and the Council a proposal (COM(2013)534) establishing the European Public Prosecutor's Office (EPPO) and laying down its competences and procedures. This proposal is based on Article 86 TFEU. It is to be read togther with the legislative proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, which defines the criminal offences as well as the applicable sanctions. Already before the publication of this proposal, France and Germany adopted a Common Position on 20 March 2013 on the EPPO. Moreover the proposal is now challenged by national parliaments on the basis of the subsidiarity principle. Using the Early Warning System, as provided for in Article 7 of Protocol N°2, they issued a Yellow Card against the EPPO proposal.

Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)

On 17 July 2013, the European Commission also submitted a proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) (COM(2013)535). This proposal, based on Article 85 TFEU, aims at providing a single and renovated legal framework, and streamlining its functioning and structure in line with the Lisbon Treaty. Several objectives are pursued such as providing Eurojust with a new governance structure, defining homogeneously the status and powers of National Members, or providing for a role for the European Parliament and national Parliaments in its evaluation. In line with the Common Approach on EU decentralised agencies, its partnership and cooperation with other EU bodies and agencies, and especially Europol, is reinforced, whilst respecting its special role regarding the coordination of criminal investigations. Finally the proposal also ensures that Eurojust can operate closely with the EPPO, once this is established. However the proposal does not fully implement the possibilities provided for in Article 85 TFEU as no binding operational powers are to be given to the new Agency, Eurojust keeping its role of mediator / facilitator (see in particular Article 4 para 2 of the proposal).

It must be stressed that the Commission proposed in parallel a Communication on the governance of the EU Anti-Fraud Office (OLAF), in order to strengthen OLAF's governance and to reinforce procedural guarantees when performing its investigations, in light to what it is foreseen for the EPPO.

Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol)

On 27 March the European Commission proposed to make the EU law enforcement Agency (Europol) more effective at collecting information, analysing it and sharing these analyses with the Member States. This will let Europol provide more concrete and targeted support to the national law enforcement authorities in their cross-border cooperation and investigations. At the same time, the proposal increases Europol's accountability to the European Parliament and the national Parliaments and strengthens the protection of personal data.

The new Regulation also reinforces the link between training and support to operational cooperation, by merging the European Police College (Cepol) within Europol and by making Europol responsible for joint training and exchange programmes for police and other law enforcement personnel.

In June 2013, the JHA Council held a debate on the text and agreed on a number of guidelines for future work at technical level. Since a large majority of delegations opposed to the merger of CEPOL with Europol, experts were instructed to work on the proposal on that basis. Within the European Parliament, on 19 June 2013, the

rapporteur presented his draft report, and amendments have been tabled in early October. Mentions to the merger of CEPOL and Europol have all been deleted.

On a related issue, in October, the Council reached a political agreement on provisional arrangements to host CEPOL seat in Budapest (Hungary), as the UK informed that it no longer wanted to host the seat on its territory.

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 two legislative proposals: the first being a proposal for a regulation, setting out a general EU framework for data protection, and repealing the existing Directive 95/46/EC; and the second a proposal for a Directive on protecting personal date processed for law enforcement purposes, currently organised 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. In October the two co-legislators discussed the package. In early October, the JHA Council held an in-depth discussion on the regulation proposal. On 21 October 2013, the Civil Liberties Committee voted new amendments providing for stronger safeguards especially for data transfer to non-EU countries. They also inserted an explicit consent requirement, a right to erasure and bigger fines for firms that break the rules. The Parliament's negotiating mandate, both for the regulation and the directive, has also been voted.

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. The negotiations have been ongoing for many months, during which all involved in the negotiations realised that the acceptance of many of the compromises that have been struck would depend on the formulation of a "fundamental right's clause" to be inserted in the directive. A compromise on the wording of this new clause, and the subsequent provisional agreement of the European Parliament, was accepted at the trilogue on 23 October 2013. A compromised text of the directive on this issue has leaked, according to which execution of an EIO may be refused when there are substantial grounds to believe that it would be incompatible with the executing MS's obligations under Article 6 TEU and the Charter of Fundamental Rights of the EU.

Approximation of substantive criminal law

Directive 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. In July 2013, the Draft report was tabled before the LIBE Committee, and amendments to the text are still under consideration. During the JHA Council in October 2013, the Council agreed on a general approach on the proposal.

Directive in 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). 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. 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. Whereas the proposal was initially based on Article 325 (4) TFEU (prevention of and fight against fraud affecting the financial interests of the Union), the Council changed last June its legal basis for Article 83 (2) TFEU. The Council general approach adopted the same day is only valid under this assumption. Within the European

Parliament, the joint report from the CONT Committee and the LIBE Committee is still awaited. For the moment, only the Legal Affairs Committee, involved as associated committee, has published its Draft Opinion.

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 20 May 2013, the Committee on Civil Liberties, Justice and Home Affairs adopted the report by Ms. Macovei (EPP, RO) on the proposal but the Plenary vote on the text is still pending.

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. The Regulation so establishes a common regulatory framework on insider dealing, misuse of inside information and market manipulation as well as measures to prevent market abuse to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence and those markets. It aims at increasing transparency and at tightening up the penalties. On 10 September 2013, a provisional agreement between the Parliament and the Council has been reached. The Parliament adopted a legislative resolution on the proposal.

Adopted texts

Approximation of substantive criminal law

Directive on attacks against information systems

On 12 August 2013, the Directive on attacks against information systems was adopted. It establishes minimum rules concerning the definition of criminal offences and the sanctions in the area of attacks against information systems. It also aims at facilitating the prevention of these offences and at improving cooperation between judicial and other competent authorities. It also defines the terms of 'without right' and 'interception' but also provides for the penalties linked with offences. This directive repeals the Council Framework Decision 2005/222/JHA.

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 22 October 2013, was adopted the Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. Known as the Salduz Directive, this text is the third measure implementing the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. The directive harmonises the conditions in which a person deprived of liberty can have access to a lawyer, from the first stage of police questioning and throughout criminal proceedings. Are also guaranteed the right to communicate with their family and, for the suspecs abroad, the right to be in contact with their country's consular authorities. Most importantly, for persons subject to a European arrest warrant, dual representation, both in the executing and the issuing States, is foreseen.

Regulation on investigations conducted by the European Anti-Fraud Office (OLAF)

On 11 September 2013, the Regulation concerning investigations conducted by the European Anti-Fraud Office (OLAF) was adopted. This text aims at improving its operation in the existing framework by focusing on strengthening the procedural rights of the persons concerned by OLAF investigations and on enhancing the efficiency of the OLAF's investigations, as well as on improving the cooperation with its partners (EU institutions and bodies, Member states, international organisations). The text also aims at clarifying the role of the OLAF Supervisory Committee and establishing an exchange of views with the institutions at political level to discuss OLAF's policy priorities.

Case Law

ECJ, 25 April 2013, Judgement of the Court (Third Chamber), C-212/11, Jyske Bank Gibraltar Ltd

The directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing imposes certain disclosure obligations, in particular, on credit institutions. Spanish legislation requires credit institutions operating in Spain, regardless of the place of their establishment, to inform the Spanish Financial Intelligence Unit (FIU) of account transfers of more than €30 000 to or from tax havens and uncooperative territories, such as Gibraltar.

Jyske, a credit institution established in Gibraltar, operating in Spain under the rules on the freedom to provide services, complied partially with a request of the Spanish FIU to disclose certain information. After being condemned for insufficient cooperation, Jyske brought an action before the Supreme Court, claiming that the directive imposes an obligation of disclosure only vis-à-vis the Gibraltar FIU, and that Spanish legislation does not comply with the directive.

The ECJ declares that the directive does not expressly preclude the possibility of requiring credit institutions carrying out activities in Spain, under the freedom to provide services, to forwad the required information directly to the Spanish FIU. However, in order to comply with the freedom to provide services, the legislation must be applied in a non-discriminatory manner and be proportionnate. Since there is no effective mechanism, at the time of the facts, ensuring full and complete cooperation between the FIUs, and allowing money laundering and terrorist financing to be combatted just as effectively, the Spanish legislation is proportionate.

ECJ, 30 May 2013, Judgment of the Court (Second Chamber), C-168/13 PPU, Jeremy F. v Premier Ministre

The "Jeremy F" case concerns the interpertation of Articles 27 and 28 of the EAW FD, dealing notably with the procedure applicable when the issuing authority decides, after the surrender of the person, to extend the prosecution to other offences, and must obtain the consent of the executing authority.

The French executing authority consented to the extension of the prosecution against Jeremy. F. Under French law, no appeal against that decision was provided and for the person concerned, this could lead to a denial of his right to an effective judicial remedy, a situation incompatible with French constitutional norms. The Contitutional Court was seised of the question via a Priority Question of Constitutionality, and decided, for the first time in its existence, to refer a question to the ECJ for a preliminary ruling. The question was in substance whether the relevant provisions of the FD could be interpreted as precluding Member States from providing for an appeal with suspensive effect.

Firstly, for the ECJ, the FD does not regulate the possibility for Member States to provide for an appeal suspending execution of decisions relating to the EAW. Such an absence of regulation means that Member States are neither prevented nor required to introduce such an appeal. And even though the FD in itself already provides for a procedure in compliance with fundamental rights, Member States are not precluded from providing for an appeal with suspensive effect.

However, certains limits must, nonetheless, be imposed on the discretion that Member States have in that regard. Respect for the time-limits is essential, and the final decision on the execution of the EAW must be adopted within the time-limits laid down in Article 17 of the FD (maximum of 90 days in exceptional circumstances).

ECJ, 18 July 2013, Judgment of the Court (Grand Chamber), Joined cases C-584/10 P, C-593/10 P, and C-595/10 P, Commission, Council and UK 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.

Diverging from the conclusions of AG Bot, rendered in March 2013, the ECJ dismissed their appeals. The Court insisted that in proceedings relating to *blacklisting,* the individual concerned must be able to obtain the summary of reasons provided by the Sanctions Committee to support its decision to impose restrictive measures on him. That authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds relied on against him,

and must examine, in the light of comments made by the individual concerned, whether those reasons are well founded. Furthermore, it is its task to establish, in the event of challenge before the EU Courts, that the reasons relied on against the person concerned are well founded. The person concerned must not adduce evidence of the negative. If the authority is unable to accede to the request of the EU Courts, it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them. And if that material is insufficient to allow a finding that a reason is well founded, the EU Courts shall disregard that reason as a basis for the contested decision to list or maintain a listing.

Opinion of Advocate General E. Sharpston, delivered on 18 July 2013, C-60/12, Marián Baláz

By this request for a preliminary ruling from the Vrchní soud v Praze (Czech Republic), the Court is asked to interpret article 1(a)(iii) of Framework Decision 2005/214/JHA, which extends the application of the principle of mutual recognition to financial penalties imposed by an authority of the issuing State other than a court in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, « provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters ».

Bearing in mind that the term 'court having jurisdiction in particular in criminal matters' plays a crucial role in determining the scope of the Framework Decision, and following the reasoning of the Court in Mantello and Kozłowski , AG Sharpston suggests the term must be given an autonomous and uniform interpretation. Turning then to its defining characteristics, she sets aside a formalistic approach and argues that the Court given jurisdiction over such financial penalty decisions in the issuing State must be one whose constitution, procedures and scope of review secure the minimum guarantees applicable under Articles 47 and 48 of the Charter (equivalent to those embedded in article 6 ECHR) when a person is charged with a criminal offence. The question whether the Austrian *Unabhängiger Verwaltungssenat* fulfills such criteria is a matter for the national court to decide with the assistance of the issuing authority with whom direct contacts should be established in case of doubt.

As to the meaning to be given to 'an opportunity to have the case tried', she considers that there is no objection to access to the court being afforded only after a further administrative stage, as long as the conditions do not render the right theoretical or illusory, that being a matter for the national court to decide. Finally, the court must be able to review the case in its entirety both in fact and law so as to ensure compliance with article 6 ECHR requirements.

Opinion of Advocate General Y. Bot, delivered on 10 September 2013, C-43/12, Commission v. Parliament and Council

On 25 October 2011, was adopted a new directive concerning cross-border exchange of information on road safety related traffic offences. The Council and the Parliament departed from the Commission's proposal regarding the legal basis of the text. Article 87, paragraph 2, TFEU, on police cooperation, was considered more appropriate than Article 91, par. 1, c) on transport safety. The Commission launched annulment proceedings, arguing that the main objective of the text is the improvement of road safety, and cross-border exchange of information is only a mean to attain such objective. Moreover traffic offences concerned by this exchange would be in some EU Member States considered not as criminal offences but as administrative offences.

In his conclusions, AG Bot rejects the Commission's interpretation. He firstly notes that judicial cooperation in criminal matters, as conceived under the Lisbon Treaty, can help to pursue objectives of general interest belonging to sectorial policies (here transport safety). He then stresses that the free movement of persons within the EU is often synomym of impunity for authors of traffic offences. The main objective of the directive is therefore to allow a better prosecution of traffic offences through a mechanism of police cooperation based on exchange of information. This objective and the improvement of road safety are closely linked, however the first one should prevail, as it is the most immediate and direct objective. Thirdly, the content of the directive also reveals that the text mainly aims at making a new tool available to national authorities for the identification of foreign authors of traffic offences. Finally he rejects the Commission's restrictive interpretation of Article 87 TFEU. A functional approach of criminal law, chosen by the EU legislator, is necessary to ensure the efficiency and the uniform application of police and judicial cooperation in relation to offences and sentences not having been yet subject of approximation measures, and classified either as administrative or as criminal offences in the national legal orders.

Academic activities

The Management Committee met in Brussels at the Institute of European Studies of the ULB (IEE-ULB) on 18 October 2013.

The 10th meeting of the Contact Points Meeting was held at the Institute for European Studies of the ULB (IEE-ULB) on 16 May 2013 as well as the Annual ECLAN Conference on 'Do labels still matters?' the day after.

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 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

Samuli Miettinen, *Criminal Law and Policy in the European Union*, Routledge, November 2012, 304 pages.

Serge de Biolley, Henri Labayle, Maïtena Poelemans, Anne Weyembergh, *Code de droit pénal de l'Union européenne – 2013,* Larcier, January 2013, 1424 pages.

Martin Böse, Frank Meyer, Anne Schneider (Eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union Volume I: National Reports and Comparative Analysis*, Nomos Publishers, May 2013, 446 pages.

Tom Daems, Dirk van Zyl Smit, Sonja Snacken, *European Penology?*, Hart Publishing, May 2013, 370 pages.

Malin Thunberg Schunke, *Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU*, Intersentia, July 2013, 160 pages.

Francesca Galli, Anne Weyembergh (Eds.), *Approximation of substantive criminal law in the EU: The way forward*, Editions de l'Université de Bruxelles, October 2013, 256 pages.

Jan Van Gaever, *Het Europees aanhoudingsbevel in de praktijk*, October 2013, Kluwer, 410 pages.

Diane Bernard, Yves Cartuyvels, Christine Guillain, Damien Scalia, Michel Van de Kerchove (Eds.), *Fondements et objectifs des incriminations et des peines en droit européen et international*, November 2013, Anthémis, 712 pages.

Upcoming Events

Conference: *Assises de la Justice*, European Commission, 21-22 November 2013, Brussels, Belgium [for info click here]

Seminar: *The EU's strategy to combat terrorism: Latest developments and future challenges,* ERA, 28-29 November 2013, Trier, Germany [for info click here]

Conference: *NJLP conference, Presumption of Innocence,* 29 – 30 November 2013, Amsterdam, the Netherlands [for info click here]

Seminar: *Access to Justice for Crime Victims in the EU*, ERA, 2 – 3 December 2013, Trier, Germany [for info click here]

Seminar: *The improvement of conditions relating to detention at an EU level: best practice, legislation and the European Commission's Green Paper on detention,* ERA and Council of Europe, February 2014, Trier, Germany.

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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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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