

## News from the EU

### Legislative Instruments

#### **New negotiations:**

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

The Commission submitted on 11 July 2012 a proposal for a Directive on the protection of financial interests of the EU ([COM \(2012\) 363](#)). It 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 ... It is however 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). 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](#).

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

The Commission submitted on 12 March 2012 [a proposal for a Directive](#) on the freezing and confiscation of proceeds of crime in the European Union. The directive deals with approximation of legislation. It touches on extended powers of confiscation, non-conviction based confiscation and confiscation from a third party. It also provides safeguards for the individuals affected by the confiscation. It had been envisaged that the directive will be proposed together with an instrument on mutual recognition of decision of confiscation but that is not the case. The Directive would replace Framework Decisions [2001/500/JHA](#) (reservations to the Council of Europe convention and rule on value confiscation) and [2005/212/JHA](#) (extended powers of confiscation). Negotiations are ongoing in the Council and are at a preliminary stage in the Parliament.

#### **Ongoing negotiations:**

In June 2012, the conference of the Presidents of the political groups of the European Parliament decided to suspend the negotiations on several instruments. This decision followed the position of the Council of 6 June 2012 regarding the draft Regulation on the Schengen evaluation mechanism, where the Council approved a legal basis which excludes the European Parliament from the legislative procedure. Three of the instruments concerned are dealt with in this newsletter: the draft Directive on the European Investigation Order, the draft Directive on attacks against information systems and the draft Directive on the "EU PNR". Due to progress made on the Schengen issue, negotiations have started again in September on these instruments. .

#### **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. 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 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 ([click here](#) for more info on the situation in the Parliament). Negotiations between Parliament and Council were suspended as part of the Parliament's reaction on the reform of Schengen governance (see above).

## **Approximation of substantive criminal law**

### **Directive on attacks against information systems**

The Commission adopted on 30 September 2010 this proposal for a Directive. 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 (co-decision). The Council reached a general approach on this text on 10 June 2011 (see [Council doc. 11566/11](#)). On the side of the European Parliament, the LIBE Committee adopted a first orientation vote on 27 March 2012 ([click here](#) for more info on the situation in Parliament). Informal agreement has been reached in June between the institutions. Formal adoption has been suspended following Schengen dispute between European Parliament and Council.

### **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 last version of the text of the proposal as discussed in the Council (doc. Council EU 14511/12). The directive will have to be adopted in co-decision by the Council and the Parliament.

## **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**

The Commission proposed this Directive 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. 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 ([click here](#) for more info on the situation in Parliament).

## **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 negotiations 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 to the ordinary legislative procedure (co-decision) and will therefore require agreement between the Council and the Parliament. The Council reached a [general approach](#) on this text on 26 April 2012. On the side of the Parliament, the rapporteur issued its draft report but the negotiation is suspended as part of the row on Schengen ([click here](#) for more info on the situation in Parliament).

### **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 that 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 "cross border" data. Negotiations are focusing on the draft Regulation for the moment. They have not really started yet with regard to the draft Directive.

## **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 are ongoing.

### [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.

## [Adopted texts](#)

### **Approximation of procedural criminal law**

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

The Commission submitted this proposal 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. [Directive 2012/13/EU](#) was formally adopted on 22 May 2012 (OJ L 142, p. 1).

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

The Commission proposed this Directive 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. The negotiations between Council and Parliament were successful and the Parliament voted on the [final text](#) on

12 September 2012. The Directive has been formally adopted by the Council on 4 October 2012 and should soon be published in the Official Journal.

### **External agreements**

#### [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 has never been concluded but was 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 Parliament approved the Agreement, against the [recommendation from the rapporteur](#). The decision to conclude the Agreement was taken by the Council on 26 April 2012 and the Agreement [entered into force](#) on 1 July 2012. [Click here](#) for the final version of the agreement.

## Case Law

### [ECJ, 10 April 2012, Judgment of the Court, C-83/12 PPU, Minh Khoa Vo.](#)

Mr. Vo, a Vietnamese national residing in Germany, has been found guilty of the offence of human smuggling in that he secured the entry into Germany territory of third country nationals holding visas obtained by fraud. Mr. Vo brought an appeal claiming an infringement of substantive law as the smuggled persons were formally in possession of visas and did not enter illegally into the territory of Germany. The appeal judge decided to refer the case to the Court of Justice wondering whether the criminal liability of Mr. Vo should not be engaged until the visas in cause have been annulled according to the procedure set up in the Visa Code. The Court notes that *“criminal proceedings, which (...) may involve investigative confidentiality and the adoption of urgent measures, cannot always comply with a requirement that a visa must first have been annulled by the competent authorities”* (§46). Consequently Mr. Vo's criminal liability can be engaged prior to the formal annulment of the visas.

### [ECJ, 22 May 2012, Judgment of the Court \(GC\), Case C-348/09, P.I.](#)

According to the Citizenship Directive, an EU citizen who has resided in the host Member State for the ten previous years can only be expelled on imperative grounds of public security. Mr. I., an Italian national, has lived in Germany since 1987. In 2006, he was sentenced for the sexual assault, sexual coercion and rape of a young girl. In 2008, the German authorities determined that Mr. I. has lost the right of entry and residence on grounds relating to the serious nature of the offences committed and the risk of re-offending. Preliminary reference is made to know whether the grounds invoked can be covered by the concept of imperative grounds of public security. The Court outlines that any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned represent a genuine and present threat to public security. And the host Member State must take into account considerations such as the duration of the residence, the age, state of health, family and economic situation of the person concerned.

### [ECJ, 28 June 2012, Judgment of the Court, C-192/12 PPU, Melvin West.](#)

The reference for a preliminary ruling made by Korkein oikeus - Finland concerns the interpretation of Article 28(2) of Council Framework Decision 2002/584/JHA of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States. It

concerns Mr. West who was the subject of three successive European arrest warrants. The Court concludes that Article 28(2) must be interpreted as meaning that, where a person has been subject to more than one surrender between Member States pursuant to successive European arrest warrants, the subsequent surrender of that person to a Member State other than the Member State having last surrendered him is subject to the consent only of the Member State which carried out that last surrender. Such conclusion is especially based on the objective pursued by the Framework Decision of accelerating and simplifying judicial cooperation between the Member States.

### [ECJ, 12 July 2012, Judgment of the Court, C-79/11, Maurizio Giovanardi and Others.](#)

In 2010 the public prosecutor requested the indictment of Mr. Giovanardi and others for having negligently contributed to causing the death of one person and the very serious injuries suffered by other persons. He also requested the indictment of two legal persons. The natural persons charged would be held directly liable for the accident whereas the legal persons would be held administratively liable for failing to adopt more sophisticated modes of organization. The victims sought to intervene as civil parties in respect of the two legal persons. But under the national law they are not allowed to intervene as civil parties in proceedings against the legal persons concerned. The question of the compatibility of these provisions with EU law is submitted to the Court of Justice.

After establishing its jurisdiction, and excluding the application of Directive 2004/80/EC relating to compensation of crime victims in cross-borders situation, the Court gives its answer on the compatibility of the national provisions with the Framework Decision 2001/220/JHA (protection of victims). The Court stressed that the administrative offence held against the legal persons is a separate offence, which has no direct link with the harm that was caused by the criminal act committed by a natural person. Consequently *“persons harmed as a result of an administrative offence committed by a legal person cannot be regarded as the victims of a criminal act who are entitled to obtain a decision, in criminal proceedings, on compensation by that legal person.”*

### [ECJ, 5 September 2012, Judgment of the Court \(Grand Chamber\), C-42/11, João Pedro Lopes Da Silva Jorge](#)

The Reference for a preliminary ruling made by the Cour d'appel d'Amiens – France concerns the interpretation of Art. 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States and of Art. 18 TFEU. The ruling is built on its previous

judgements in Cases C-66/08 *Kozłowski*, C-123/08 *Wolzenburg* and C-306/09 *I. B.* It concludes especially that if Member States transpose Article 4(6) of Framework Decision 2002/584 into their domestic law, they cannot, without undermining the principle that there should be no discrimination on the grounds of nationality, limit that ground for optional non-execution solely to their own nationals, by excluding automatically and absolutely the nationals of other Member States who are staying or resident in the territory of the Member State of execution irrespective of their connections with that Member State.

**Opinion of Advocate General Y. Bot delivered on 12 Sept. 2012, Case 300/11, ZZ v. Secretary of State for the Home Department.**

This reference for a preliminary ruling especially concerns Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. It concerns more precisely the decision to exclude a Union citizen from a Member State on grounds of public

security and the extent of the obligation to inform the citizen concerned of the grounds for that decision.

**Opinion of Advocate General Y. Bot delivered on 2 October 2012, Case C-399/11, Stefano Melloni**

This reference for a preliminary ruling especially concerns the validity and interpretation of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

**Opinion of Advocate General E. Sharpston delivered on 18 October 2012, Case C-396/11, Ciprian Vasile Radu**

This opinion contains interesting developments related to the possibility to refuse to execute an EAW in the event of breaches of human rights.

## Academic activities

### News from ECLAN

The 6<sup>th</sup> meeting of the Management Committee was held at the Institute for European Studies of the ULB (IEE-ULB) on 3 July 2012.

The next one will take place at the IEE-ULB in January 2013.

### Research Projects

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

Commissioned by the European Commission (DG Justice). The Project started in September 2011 and ended in June 2012.

The final report has been submitted to the Commission and we are now awaiting comments and approval.

*ECORYS-ECLAN: Study on the impact of the different policy options to protect the financial interest of the Union by means of criminal law, including the possibility of establishing a European public prosecutor's office (EPPO)*

Commissioned by the European Commission (OLAF). The project started in April 2012 and would end in November 2012.

The key objective of this study is to define and assess policy options that need to ensure a consistent, coherent and effective investigation and prosecution of crimes against the financial interests of the European Union, with a special focus on the possible establishment of an establishing a European public prosecutor's office. The costs and benefits that these policy options would produce will be analyzed.

*ECORYS (PwC) - ECLAN : OLAF project on the development of an EU evaluation mechanism in the area of anti-corruption with a particular focus on identifying and reducing the costs of corruption in Public Procurement involving EU Funds*

The project aims at further developing the Network in order to be able to keep functioning and reach all its objectives. The project started in March 2012 and it is still ongoing. The project leader is PwC. ECLAN is so far involved in the 1<sup>st</sup> phase as a subcontractor of ECORYS for the purpose of data collection.

**ECORYS-ECLAN: Study on the impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests (JUST/A4/2011/EVAL/01)**

Commissioned by the European Commission (OLAF). The key objective of the study is formulated as follows: *to define and assess procedural policy options that address the need to ensure consistent, coherent and effective investigations, prosecutions and trials throughout the EU for crimes affecting the financial interest of the Union; and to analyze the costs and benefits that these policy options would produce.*

## Publications

Serge DE BIOLLEY, Henri LABAYLE, Maiténa POELEMANS, Anne WEYEMBERGH, *Code of Criminal Law of the European Union – 2012*, 2<sup>nd</sup> edition, Bruxelles, Bruylant, June 2012, 1250 pages.

Esther HERLIN-KARNELL, *The Constitutional Dimension of European Criminal Law*, Oxford, Hart Publishing, May 2012, 284 pages.

Steve PEERS, *EU Justice and Home Affairs Law*, 3rd edition, Oxford, OUP, August 2012, 1104 pages.

Francesca GALLI, Anne WEYEMBERGH, *EU counter-terrorism offences: what impact on national legislation and case-law?*, Bruxelles, Editions de l'Université Libre de Bruxelles, September 2012, 320 pages.

Helmut SATZGER, *International and European Criminal Law*, Oxford, Hart Publishing, September 2012, 308 pages.

Jeroen BLOMSMA, *Mens rea and defences in European criminal law*, Antwerpen, Intersentia, October 2012, 624 pages.

## Upcoming Events

Conference: **10 YEARS OF EUROJUST - Operational Achievements and Future Challenges**, co-organised by the Academy of European Law (ERA) and Eurojust, 12-13 November 2012, The Hague, The Netherlands [for info [click here](#)]

Conference: **Recent Jurisprudence of the ECtHR in the Area of Criminal Law**, ERA, 13 & 14 November 2012, Strasbourg, France [for info: [click here](#)]

Conference: **The New EU Drugs Strategy 2013-2020**, ERA, 10 & 11 December 2012, Brussels, Belgium [for

info: [click here](#)]

Conference : **Combating Cyber Crime, Legal and Technical Standardization and Cooperation on a National, European, and Global Scale**, 13 December 2012, Koninklijke Schouwburg, The Hague, The Netherlands [for info: [click here](#)]

Conference: **Combating Cyber Crime, Legal and Technical Standardization and Cooperation on a National, European, and Global Scale**, International Criminal Law Network, 13 December 2012, Koninklijke Schouwburg, The Hague, The Netherlands [for info: [click here](#)]

Conference: **Towards the European Public Prosecutor's Office**, ERA Forum, 17 & 18 January 2013, Trier, Germany, [for info: [click here](#)]

## 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](mailto:Irene.wieczorek@vub.ac.be). A blind peer review system will be carried to ensure the quality and the originality of the Journal.

*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).

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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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