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European Criminal Law: Impact on National Defence Practice.

Competences of the EU, Instruments,
Institutions, Developments

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European Criminal Law

European Criminal Law is a branch of law with a *sui generis* nature

It comprises:

- legal acts of the union relevant for criminal proceedings,
- local international law and
- national penal law provisions that are influenced by the law of the EU

European Criminal Law

Case C-176/03

Commission of the European Communities

v

Council of the European Union

(Action for annulment – Articles 29 EU, 31(e) EU, 34 EU and 47 EU – Framework Decision 2003/80/JHA – Protection of the environment – Criminal penalties – Community competence – Legal basis – Article 175 EC)

Opinion of Advocate General Ruiz-Jarabo Colomer delivered
on 26 May 2005

Judgment of the Court (Grand Chamber), 13 September
2005

Case 176-03

Commission v Council

Para 47 “As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence”

Para 48 “However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.”

European Criminal Law

Case C-440/05

Commission of the European Communities

v

Council of the European Union

(Action for annulment – Articles 31(1)(e) EU, 34 EU and 47 EU – Framework Decision 2005/667/JHA – Enforcement of the law against ship-source pollution – Criminal penalties – Community competence – Legal basis – Article 80(2) EC)

Opinion of Advocate General Mazák delivered on 28 June
2007

Judgment of the Court (Grand Chamber), 23 October 2007

Case 440/05

Commission v Council

Para 68 – “Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence ----the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective.”

European Criminal Law

- TEU - the *Treaty on European Union*
- TEC – the *Treaty Establishing the European Community*
Has been renamed the “*Treaty on the Functioning of the Union*” – TFEU
- The word “Community” has been replaced by the word “Union” throughout the treaties

The Area of Freedom, Security and Justice (Art. 67 ff. TFEU)

Definition of the term

Measures: abolition of border checks within the internal market, effective surveillance of the external borders, a common policy on asylum and refugees, judicial cooperation in civil and criminal matters (Art. 82 ff. TFEU) as well as police cooperation (Art. 87 ff. TFEU)

The AFSJ –the element of security

Measures for coordination and cooperation between police and judicial authorities and other competent authorities by establishing European institutions

- e.g. Europol (Art. 87 ff. TFEU), Eurojust (Art. 85 TFEU), European public prosecution office (Art. 86 TFEU)

Mutual recognition of judgments in criminal matters (Art. 82 Abs. 1 TFEU)

- Principle of mutual recognition as cornerstone of the judicial cooperation in criminal matters
- European Arrest Warrant
- European Evidence Warrant

Approximation of criminal law provisions (competences of the EU)

Competences of the EU in the field of criminal law

- area of freedom, security and justice as part of the shared competence (Art. 4 par. 2 lit. j TFEU)
- legislative competences vs. competences of approximation of legislation

Competences of the EU in the field of criminal law

- **Art. 82 par. 1 subpar. 2 TFEU:**

measures to promote cooperation between judicial authorities of the MS in relation to proceedings in criminal matters, forms of action: directives, regulations, decisions and more

- **Art. 82 par. 2 TFEU:**

approximation competence in the field of criminal procedure law, form of action: directives

- **Art. 83 par. 1 TFEU:**

approximation competence in the field of substantial criminal law, form of action: directives

Competences of the EU in the field of criminal law

- **Art. 83 par. 2 TFEU:**

approximation competence in the field of substantial law for areas which have been subject to harmonisation measures, form of action: directives

- **Art. 325 TFEU:**

legislative competence to protect the financial interests of the EU, form of action: regulations

Art. 82 par. 1 subpar. 2 TFEU

(1) Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the MS in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between MS;
- (c) support the training of the judiciary and judicial staff;
- (d) facilitate cooperation between judicial or equivalent authorities of the MS in relation to proceedings in criminal matters and the enforcement of decisions.

Art. 82 par. 2 TFEU

(2) To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the MS.

They shall concern:

- a) mutual admissibility of evidence between MS;
- b) the rights of individuals in criminal procedure;
- c) the rights of victims of crime;
- d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent MS from maintaining or introducing a higher level of protection for individuals.

Art. 83 par. 1 TFEU

(1) The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

Art. 83 par. 2 TFEU: „Annex – competence“

(2) If the approximation of criminal laws and regulations of the MS proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

Legislative competence to protect the financial interests of the European Union (Art. 325 TFEU)

(1) The Union and the MS shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

(2) MS shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

(3) Without prejudice to other provisions of the Treaties, the MS shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

Legislative competence to protect the financial interests of the European Union (Art. 325 TFEU)

(4) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the MS and in all the Union's institutions, bodies, offices and agencies.

(5) The Commission, in cooperation with MS, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

Mutual Recognition of Judicial Decisions as structural Principle of European Criminal Law - Instruments

- ▣ European Arrest Warrant
- ▣ European Evidence Order
- ▣ transnational “*ne bis in idem*“ throughout the Union

Mutual Recognition of Judicial Decisions as structural Principle of European Criminal Law – instruments

- ❑ mutual recognition of fines
- ❑ mutual recognition of previous convictions
- ❑ development of electronic systems for the exchange of information on criminal records
- ❑ transferability of evidence throughout the EU

EU Institutions in the Area of Criminal Law

Objective: strengthening cooperation between the MS

- Europol
- Eurojust
- European Anti-Fraud Office (“OLAF”)
- European Judicial Network (EJN)

Role and Activities of Europol

Criminal intelligence agency allocated in The Hague

Was established by the Europol Convention of 26 July 1995

Became fully operational on 1 July 1999

Aim – to improve the effectiveness and cooperation between the competent authorities of the MS primarily by sharing and pooling intelligence to prevent and combat serious international organized crime.

Europol takes action when two or more MS are affected by serious international organised crime in such a way as to require a common approach by the MS owing to the scale, significance and consequences of the offences concerned.

Role and Activities of Europol

This covers an increasing number of areas, namely:

- preventing and combating terrorism;
- drug trafficking and trafficking in human beings;
- illegal immigrant smuggling;
- trafficking in nuclear and radioactive substances;
- motor vehicle crime;
- counterfeiting and forgery of means of payment;
- money laundering (except for predicate offences).

Europol pursues its mission by...

- ... the exchange of information between the MS
- ... the collection und analysis of information and “intelligence“
- ... informing the authorities of the MS about connections identified between criminal offences
- ... supporting investigations of the MS
- ... the coordination of Joint Investigation Teams (“JITS“)
- ... the maintenance of automatized information systems

Role and Activities of Eurojust

- Europol's mirror image in the field of judicial cooperation
- Exchange of information between the judicial authorities of the MS

Role and Activities of Eurojust

- Enhancing the effectiveness of the national authorities when they are dealing with the investigation and prosecution of cross-border and organized crime
- Coordination and support of transnational investigations

Role and Activities of Eurojust

- Eurojust was set up to stimulate and to improve coordination and cooperation between competent judicial authorities of the MS
- It shall improve judicial cooperation between the MS of the EU, especially by facilitating international mutual legal assistance and the implementation of extradition requests

Eurojust

Stimulate and improve co-ordination of investigations and prosecutions among competent judicial authorities of MS in dealing with serious cross-border and organised crime

Stimulate and improve co-ordination of investigations and prosecutions between national authorities

Deal with requests from competent authorities in MS

International mutual legal assistance and implementation of EAWs

Assist between MS and non-MS or MS/Commission with offences regarding EU's financial interests

V A R U L

Eurojust

Works through National Members or as College

Requests/allocate tasks to national authorities

Set up joint investigation teams

Co-ordination of functions

Co-operates with Europol, EJM and OLAF

Europol – functions

Sharing and pooling intelligence on serious international organised crime

Support service for law enforcement agencies of the MS

Information exchange, intelligence analysis, expertise, training

Overcome language barriers – requests dealt with in own language

Europol – cooperation

Technical – or to provide training

Strategic – exchange intelligence on organised crime and how to fight it

Exchange of personal data (data security and data protection)

European Judicial Network

Secretariat co-located with Eurojust

Contact points in each MS – whole of country

Periodic Meetings of MS representatives

Up to date background information

Necessary information to Council/Commission



OLAF

European Anti-Fraud Office

OLAF investigates fraud against the EU budget, corruption and serious misconduct within the European institutions, and develops anti-fraud policy for the European Commission.

European Public Prosecutor

86(1) In order to combat crimes affecting the financial interests of the Union, the Council---- may establish a European Public Prosecutor's Office from Eurojust

EPP – would prosecute in MS concerned

Powers could be extended

Commission/Council/Parliament

Roadmap

Legislation under Articles 82/83

Article 82

- (2) To the extent necessary to facilitate mutual recognition of judgments etc. in criminal matters *having a cross-border dimension*, the EP and C may---establish **minimum rules**, concerning
- (a) Mutual admissibility of evidence between MS,
 - (b) The rights of individuals in criminal procedure
 - (c) The rights of victims of crime
 - (d) Any other specific aspects of criminal procedure which the Council has identified in advance by a decision

Article 83(1)

(1) The EP and the Council may ---establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis

Article 83(1)

Terrorism, trafficking, sexual exploitation, illicit drug trafficking, illicit arms trafficking money laundering, corruption, counterfeiting of means of payment, computer crime, organised crime

Article 83(2)

(2) If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned

Developments

- The EU has many of the institutions and competences necessary to run criminal law system
- Commission anxious to “put meat on bones” of the European Charter of Fundamental Rights
- What’s next? EPP prosecuting in MS courts
European Criminal Court?

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