Substantive criminal law as part of the EU JHA acquis in the area of criminal law

Prof Dr Gert Vermeulen
Ghent University

“acquis in the area of criminal law”
Second seminar for prosecutors
Warszaw, 27-28 November 2000
Organised by
Taiex Office of the European Commission
Polish Ministry of Justice

Structure

Main institutional & policy steps
Acquis in the area of substantive criminal law
Main institutional & policy steps

TEU (Maastricht) - November 1993
TEU (post-Amsterdam) - May 1999
Vienna action plan (December 1998)
Tampere European Council (October 1999)
OC millennium strategy (March 2000)

TEU (Maastricht)

JHA matters common interest (Art. K.1)
1. asylum policy
2. crossing/control of external borders
3. immigration/3rd country nationals
4. combating drug addiction
5. combating international fraud
6. judicial co-operation civil matters
7. judicial co-operation criminal matters
8. customs co-operation
9. police co-operation criminal matters

No legal basis for approximation of (substantive) criminal law
however: joint actions & conventions
TEU (post-Amsterdam)

proper legal basis for approximation of substantive (not: procedural) criminal law

Article 29 TEU: approximation of rules on criminal matters, in accordance with the provisions of Article 31(e)

Article 31(e) TEU: progressively adopting measures establishing minimum rules relating to constituent elements of criminal acts and penalties (substantive criminal law only) in the fields of oc, terrorism & illicit drug trafficking

Article 34(2)b: via framework decisions (3rd pillar directive - no direct effect)

jurisdiction rules in framework decisions?

Vienna Action Plan

December 1998

Council/Commission action plan on how best to implement the provisions of the A’dam Treaty on an area of freedom, security and justice

Para 10: the aim of the Treaty is not to create a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters
proper legal basis for approximation procedural criminal law is lacking

a contrario ex Art. 29 juncto Art. 31(e) TEU

Para 10 Vienna action plan

whereas the OC millennium strategy (infra) foresees

instrument introducing possibility of mitigating onus of proof regarding source of assets of a person convicted for OC-related offence

instrument on confiscation regardless of presence of offender

approximation of national legislation on criminal procedure governing investigative techniques, so as to make their use more compatible and render OC investigations more efficient

instrument on position/protection witnesses & persons cooperating with the judicial system

---

Tampere European Council

October 1999

1st EU summit ever exclusively on JHA

new developments announced at summit

(development towards mutual recognition: link with approximation substantive criminal law)

substantive criminal law approximation efforts to be focused in 1st instance on limited number of sectors, such as: financial crime, drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech and environmental crime
OC Millennium Strategy

JHA Council March 2000
adoption of a ‘European union strategy for the
beginning of a new millennium’ in the field of
prevention and control of organised crime
follow-up action plan to 1997 EU action plan to
combat organised crime
setting the lines/goals to be followed/achieved
in this area in the coming years

39 detailed recommendations in various fields
and setting target dates to implement them
approximation of substantive criminal law at
least for: financial crime (money laundering,
corruption, e counterfeiting, tax fraud), drug
trafficking and terrorism related offences,
trafficking in human beings (particularly
exploitation of women), sexual exploitation of
children, high tech (computer fraud and
offences committed by means of Internet) and
environmental crime
Acquis in the area of substantive criminal law

Drugs
Environmental crime
High tech/cyber crime
Illegal immigration
Organized Crime
Racism and xenophobia
confiscation proceeds of crime & money laundering
Counterfeiting & fraud
Pfi eu & corruption

Drugs

1996 Resolution on measures to address the drug tourism problem within the EU
1996 Resolution on measures to combat and dismantle the illicit cultivation and production of drugs within the Eu
1996 Resolution on sentencing for serious illicit drug-trafficking
1996 Joint Action on approximation of the laws and practices of the EU MS to combat drug addiction and to prevent and combat illegal drug trafficking
1999 Decision defining 4-MTA as a new synthetic drug which is to be made subject to control measures and criminal penalties
Environmental crime

CoE 1999 convention
2000 draft framework decision on the protection of the environment through criminal law

High tech/cyber crime

1999 Common Position on negotiations relating to the Draft Convention on Cyber Crime held in the Council of Europe
2000 draft CoE convention on cyber crime
Illegal immigration

1995 Recommendation on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control
1996 Recommendation on combating the illegal employment of thirdcountry nationals
2000 draft framework decision on strengthening the penal framework for preventing the facilitation of unauthorised entry and residence

Organized Crime

1997 action plan to combat organised crime
1998 Joint action on making it a criminal offence to participate in a criminal organisation in EU MS
1998 Resolution on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it
2000 Strategy for the beginning of the new millennium, on the prevention and control of organised crime
Racism and xenophobia

1996 Joint Action concerning action to combat racism and xenophobia

Trade in human beings and sexual exploitation of children

1997 Joint Action concerning action to combat trafficking in human beings and sexual exploitation of children
2000 Decision to combat child pornography on the Internet
confiscation proceeds from crime & Money laundering

1990 Coe Convention
1998 Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime
2000 draft framework decision on the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime

Counterfeiting & fraud

1999 resolution on increasing protection by penal sanctions against counterfeiting in connection with ₣
2000 Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with ₣
2000 draft framework decision on combating fraud and counterfeiting of non-cash payments
2000 draft framework decision on criminal law protection against fraudulent/unfair anti-competitive conduct in relation to public contracts in the common market
Pfi eu & corruption

EU

1995 PFI convention
1996 protocol to 1995 PFI convention
  Criminalisation active/passive corruption
  Likely to damage EU FI
  Extra-territorial jurisdiction
1997 2nd protocol to 1995 PFI convention
  Mandatory Liability legal persons
  Seizure & confiscation

1997 convention
  on fight against corruption involving EC or MS officials
  Similar to 1996 protocol to 1995 PFI convention
  Potential damage EU FI not required
  No liability legal persons (instead: heads businesses)
1997 common/joint positions (2)
  Aimed at safeguarding compatibility between eu instruments/initiatives and developments/negotiations in coe/oecd
1998 joint action
  on corruption in the private sector
CoE
1996 action programme against corruption
Resolution (98)7
Establishing GRECO
1999 criminal law convention
OECD
1996 recommendation on tax deductibility of bribes to foreign public officials
1997 recommendation on combating bribery in international business transactions
    Inter alia Recommending suspension from competition for public contracts of persons having bribed foreign public officials
1997 Convention on combating bribery of foreign public officials in international business transactions

Contents legal instruments
Criminalisation of
    Alltogether: all forms of passive & active domestic and foreign bribery in both the public and private sector
    Coe: broader definition, including « trading of influence »
Effective/dissuasive criminal sanctions for physical persons
Corporate liability
    criminal or non-criminal
Recognition corruption as predicate offence for money laundering
(value) Seizure and confiscation (laundered) proceeds of corruption

Improved international co-operation
- Extradition: extraditable offence & aut dedere aut judicare
- Mutual legal assistance

jurisdiction
- Oecd: only Extra-territorial jurisdiction on the basis of active personality (own nationals/officials) & assimilation
- Eu: universal regional jurisdiction

Polish situation

ratification
- To date: oecd convention only

Act of 9 september 2000/draft bill

Penal code
- Art. 229
  Level penalties depending on value of the bribes
  (« considerable value » being higher than 1,000 x lowest monthly salary) ?
  « Trading of influence » not criminalised ?
- Art. 296¹
  Essential addition (Private sector) !
Act of 9 September 2000 (continued)

Act suppression unfair competition

- Non-criminal corporate liability
- Pecuniary penalty 10% revenue legal person obtained in tax year preceding year decision
- quid recently established legal persons?
- Fines physical persons also depending on income?

Act public orders

- Exclusion from public tender procedures for legal persons held liable for bribery
- individuals behind legal persons registered?
- Also exclusion for organised crime?
- Modification Definition « Acts of unfair competition » in order to implement draft framework decision on criminal law protection fraudulent or unfair anti-competitive conduct in relation to the award of public contracts?

Rules extra-territorial jurisdiction?

Questions - discussion