

Substantive criminal law as part of the eu jha acquis in the area of criminal law

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“acquis in the area of criminal law”
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TaieX office of the european commission
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Structure

Main institutional & policy steps
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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)

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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

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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

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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

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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

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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

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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

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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 1996 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

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Environmental crime

CoE 1999 convention

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

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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

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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 third_country 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

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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

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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

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Counterfeiting & fraud

1999 resolution on increasing protection by penal sanctions against counterfeiting in connection with M

2000 Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with M

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

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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/oe.cd

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

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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

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(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