

Overview of the Continuously Expanding EU Acquis in the Area of Criminal Law - Part II: Approximation of Criminal Law, "Operational" Powers for Europol, Eurojust and "Mutual Recognition"

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Structure

- methodology - sources
- preliminary questions/remarks
- link between approximation criminal law and Europol's extended powers?
- approximation criminal law as a prerequisite for Europol's extended powers?
- actual prerequisites for Europol's extended powers

1. Methodology - Sources

- TEU (post-Amsterdam/October 1997)
- Vienna action plan (December 1998)
- Tampere European Council (October 1999)
- OC millennium strategy (March 2000)
- mutual assistance convention (May 2000)
- draft implementation plan on mutual recognition (to be adopted in December 2000)
- draft decision setting up Eurojust (December 2001)

TEU

- 3rd pillar TEU: Articles 29-42
- common action in the fields of
 - police co-operation (Article 30 TEU)
 - judicial co-operation (Article 31 TEU)
- new instruments
 - framework decisions
 - 3rd pillar directive- no direct effect
 - for the purpose of approximation of the Member States' laws and regulations- i.e. in the field of substantive criminal law
 - decisions
 - no direct effect
 - for any purpose but approximation

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

Tampere European Council

- October 1999
- 1st EU summit ever of heads of state and governments specifically devoted to JHA
- new developments, announced at the summit
 - development towards mutual recognition
 - establishment of Eurojust
 - with regard to criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors

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 the EU action plan to combat organised crime, adopted in April 1997
 - 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

Mutual Assistance Convention

- additional to traditional multilateral legal instruments
 - Benelux
 - CoE
 - bilateral treaties
 - Schengen level
- tough negotiations: 1996-2000
- many new developments, inter alia
 - forum regit actum
 - joint investigation teams

Forum Regit Actum

- 1962 Benelux/1959 CoE: locus regit actum
- forum regit actum
 - undertaking to comply with formalities/procedures expressly indicated by the requesting state, provided that these are not contrary to its fundamental principles of law
 - rationale: procedural and investigative actions requested for should, to a maximum extent, be regarded as an extra-territorial extension of the criminal investigations or procedures in *forum* state
 - international compatibility of evidence gathering is of growing importance
 - not applicable as regards controlled deliveries, undercover operations and joint investigation teams

Joint Investigation Teams (1)

- composed of judicial, police and/or customs officers or even of officials of international organisations/bodies (e.g. Europol)
- may be set up for a specific purpose and for a limited period
 - where difficult and demanding investigations having links with other states are required
 - where coordinated, concerted action between the states concerned is necessary
- headed and led by an official from the state where the team is operating
- seconded team members operating in another state shall be bound by the law of that state

Joint Investigation Teams (2)

- apart from being allowed to be present when investigative measures are taken, seconded team members may be entrusted with the task of certain investigative measures
- team members may request their own authorities to take the necessary investigative measures in their own state as if they would be taken in a domestic investigation
- information lawfully obtained by seconded team members may be used in their own state
- also in Naples II Convention (different rules)

Draft Implementation Plan on Mutual Recognition

- Tampere European Council
- implementation plan of mutual recognition principle to be adopted in December 2000
- 4 categories
 - obligation to taking account of earlier, final judicial decisions
 - recognition of procedural judicial decisions
 - recognition of convicting judicial decisions
 - recognition of decisions taken in the context of the follow-up of criminal judgements
- **very ambitious French Presidency proposal**
 - programme of measures, designed as a package
 - concerning all 4 above mentioned categories

Draft Decision Setting up Eurojust

- Tampere European Council: political recognition need to establish judicial counterpart for Europol
- international body, composed of national prosecutors, magistrates or police officers of equivalent competence, detached from each MS
- to work closely together with the European Judicial Network and Europol
- legal instrument to be adopted by end 2001
- ongoing work: German proposal/4-Presidencies' proposal (Portugal, France, Sweden, Belgium)
 - decision setting up a Provisional Judicial Co-operation Unit
 - draft decision setting up Eurojust

2. Preliminary Questions/Remarks

- regarding the current developments with regard to
 - approximation of criminal law
 - substantive criminal law
 - procedural criminal law
 - Europol's extended powers, including the possibility to participate in cross-border task forces

Approximation of Criminal Law (1)

- substantive criminal law
 - proper legal basis for approximation
 - 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 in the fields of organized crime, terrorism and illicit drug trafficking (i.e. substantive criminal law only)
 - via framework decisions (Article 34(2)b)
 - in connection to that: no proper legal basis for recourse to framework decisions for the purpose of
 - introducing binding rules on extraterritorial (regional universal) jurisdiction (examples: protection against counterfeiting in connection with the introduction of the e, through penal and other sanctions -combating fraud and counterfeiting of non-cash means of payment) -convention needed
 - mutual recognition (example: orders to freeze assets)

Approximation of Criminal Law (2)

- procedural criminal law: no proper legal basis for approximation
 - a contrario ex Article 29 TEU juncto Article 31(e) TEU
 - Article 31(c): ensuring compatibility in rules applicable in MS as may be necessary to improve co-operation
 - Para 10 Vienna action plan (supra)
 - whereas the OC millennium strategy 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 of witnesses/persons co-operating with the judicial system

Europol's Extended Powers (1)

- **Article 30(2) TEU: within 5 years**
 - Europol must be enabled to facilitate/support the preparation/encourage the coordination and carrying out, of specific investigative actions by the MS, including operational actions of joint teams comprising Europol representatives in a support capacity
 - a proper legal basis must be created allowing Europol to ask the Member States to conduct/coordinate their investigations in specific cases (i.e. right of initiative)
- **Vienna Action Plan**
 - joint investigative teams & adoption of additional legal basis within 2 years
 - feasibility study on setting up of database of pending investigations within framework Europol Convention?

Europol's Extended Powers (2)

- **Tampere European Council**
 - joint investigative teams to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism
 - in near future: should be authorised to initiate, conduct or coordinate investigations or create joint teams
- **OC millennium strategy**
 - target date: 31 July 2001 (= 23 months after A'dam)
- **ongoing discussions**
 - joint teams
 - anticipated entry into force Article 13 mutual assistance convention versus revision of Europol Convention
 - revision Convention necessary (two types)
 - right of initiative/coordinating role investigations
 - revision Convention necessary, which is not the prevailing opinion
 - quid role Eurojust (infra)

3. Link between Approximation Criminal Law and Europol's Extended Powers = EU Core Crimes Concept

- process of approximation of substantive criminal law (1)
 - Article 29 TEU: preventing and combating (organized) crime, in particular terrorism, trafficking in persons and offences against children, illicit drug and arms trafficking, corruption and fraud
 - Article 31(2) TEU: progressively adopting measures establishing minimum rules relating to constituent elements of criminal acts and penalties in fields of OC, terrorism and illicit drug trafficking

- process of approximation substantive criminal law (2)
 - Tampere European Council: substantive criminal law approximation efforts to be focused in 1st instance on a 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: approximation 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

- competence *ratione materiae* of Europol

- mandate as contained in Convention: OC - traffic in human beings (extended definition) -connected money laundering activities
- extended mandate: terrorism, counterfeiting of money/means of payment
- political consensus on extension to money laundering in general
- proposal to widen mandate to all crimes connected to crime types within mandate (Portuguese Presidency)
- proposal to technically extend TECS to all crimes listed in annex and to follow normal procedure Article 2 to extend mandate (Belgian Presidency?)
- proposal to simply extend mandate to all crimes listed in annex (Europol?)

- link with competence *ratione materiae* Eurojust

- offences within Europol's (extended) mandate (i.e. including: child pornography, terrorism, counterfeiting of money/means of payment)
- + computer crime, protection of the EC's financial interests, laundering of the proceeds of crime
- connected forms of serious crime

4. Approximation as a Prerequisite for Europol's Extended Powers?

- **substantive criminal law**
 - no need for approximation in addition to existing operational/law enforcement definitions of crimes within Europol mandate
 - Convention: forms of crime within mandate shall be assessed by competent national authorities in accordance with own national law
 - = realistic and sufficient
 - output Europol not dependant on approximation
 - initial texts on mutual recognition: approximation needed to the extent that non-approximation would prevent mutual recognition (no functional link between approximation and Europol powers)
- **procedural criminal law**
 - approximation (moreover lacking a proper legal basis) unrealistic/unnecessary in addition to
 - forum regit actum principle (supra)
 - mutual recognition principle (supra)

5. Conclusion: Actual Prerequisites for Europol's Extended Powers

- **recognition of information lawfully obtained by foreign team members in joint team**
 - provided for in mutual assistance convention
- **participation Eurocops in joint teams**
 - revision Europol Convention
- **coordination investigations**
 - limitation (regional universal) extra-territorial jurisdiction claims (opposite to current trend)
 - improved application ne bis in idem principle
 - Ghent University research project: draft EU convention concerning improved application of the ne bis in idem principle (reinforcing SIC provisions, application to final decisions that prevent prosecution, following penal mediation or granting of immunity to persons co-operating with the judicial system, ...)

- coordination investigations (continued)
 - implementation mutual recognition with regard to
 - pending investigations/ongoing prosecutions in other MS
 - aiming at settlement of conflicting claims of jurisdiction and avoiding multiple prosecutions for the same facts
 - foreseen in Ghent University draft EU convention concerning improved application of the ne bis in idem principle (supra)
 - principal coordinating role to be attributed to Eurojust
 - judicial counterpart for Europol
 - rationale establishment Eurojust: structural measures needed to facilitate coordination of investigations and proceedings covering the territory of several MS by improving/facilitating co-operation between their investigating/prosecuting authorities
 - ask MS to undertake investigation, to prosecute or to allow that another MS may be in a better position to do so
 - ensure that MS' competent authorities are informed reciprocally on interrelated investigations and prosecutions under way
 - must be informed of requests to set up joint investigation team
 - in close co-operation with Europol
 - remaining question: criteria?

Discussion/Questions