
Developments in Controlling Economic Crime: EU Perspective

Prof. Dr. Gert Vermeulen

Economic Crime in Polish and EU Perspective
Mikolajki, 26 September 2002

Structure

- > principal relevant EU institutional/policy steps
 - > TEU post-Amsterdam
 - > Tampere European Council October 1999
 - > OC 'Millennium' Strategy March 2000
 - > 'Mutual Recognition' Programme November 2000
- > EU economic crime policy
 - > strategy towards private sector
 - > substantive criminal law
 - > procedural criminal law
 - > international co-operation in criminal matters
 - > law enforcement co-operation (police, customs, ...)
 - > judicial co-operation

TEU - Post-Amsterdam

- > remaining 3rd pillar
 - > aim: provide citizens with a high level of safety within an area of freedom, security and justice
 - > by developing common action in the fields of police and judicial co-operation in criminal matters [...]
 - > this by preventing and combating (organized) crime, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud
- > new legal instruments
 - > (framework) decisions (preferred over conventions)

Tampere European Council

- > 1st European Council dedicated exclusively to JHA
- > October 1999
- > principal decisions (selection)
 - > efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors
 - > including sectors relevant in context economic crime
 - > call for full competence Europol money laundering
 - > joint investigation teams (infra)
 - > mutual recognition (infra) cornerstone judicial cooperation
 - > need to establish Eurojust (infra)

OC 'Millennium' Strategy

- > adopted by JHA Council March 2000
- > = EU 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
- > about 40 detailed recommendations in various fields (including economic crime policy) and setting target dates to implement them
- > highly relevant as regards: substantive criminal law, procedural criminal law and international co-operation in criminal matters

'Mutual Recognition' Programme

- > adopted by JHA Council November 2000
- > very ambitious plan
 - > earlier final judgements
 - > ne bis in idem; individualised sanctions; European criminal records database
 - > pre-trial orders
 - > freezing assets & evidence; European arrest warrant; ...
 - > decisions to prosecute
 - > sentencing
 - > fines; fast track surrender procedures; ...
 - > post-sentence follow-up
 - > disqualifications, prohibitions, incapacities
 - > + European register

Strategy towards private sector

- > OC Millennium Strategy
 - > measures in respect of off-shore & on-shore financial centres and fiscal paradises
 - > necessity to address issue of money laundering on the Internet and via electronic money products
 - > requiring, in electronic payment and message systems, that messages sent give details of originator & beneficiary
- > (draft) Fraud Prevention Action Plan
 - > technical payment security
 - > call for introduction chip card technology
 - > joint private-public sector
 - > best practice exchange
 - > training initiatives

Substantive criminal law (1)

- > Article 31, under 2 TEU (judicial co-operation)
 - > progressive adoption minimum rules relating to constituent elements of criminal acts and penalties in the fields of organized crime (= container concept), [...]
- > Tampere European Council
 - > efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on [...] financial, [...] high tech [...] and environmental crime
- > OC Millennium Strategy
 - > approximation for at least: financial crime (money laundering, corruption, € counterfeiting, tax fraud), [...], high tech crime (computer fraud and offences committed by means of the Internet) and environmental crime
 - > autonomous confiscation (regardless presence offender)

Substantive criminal law (2)

- > OC Millennium Strategy (continued)
 - > criminalization laundering crime proceeds as wide as possible
 - > whatever the type of predicate offence is
 - > FD 2001 on money laundering, identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime
 - > pending Danish proposal for FD on confiscation of crime-related proceeds, instrumentalities and property
 - > also where the offender ought to have assumed the property in question was the proceeds of crime
 - > criminalization of negligence instead of intent
 - > confiscation of equivalent value of spouse/cohabitee or legal person under controlling influence person concerned
 - > pending Danish proposal for FD on confiscation of crime-related proceeds, instrumentalities and property

Substantive criminal law (3)

- > impact on general principles
 - > corporate liability
 - > various specific conventions/protocols (e.g. on corruption, money laundering) calling for some sort of corporate liability
 - > OC Millennium Strategy: Commission invited to prepare proposal for instrument with general scope on criminal, civil or administrative liability legal persons
 - > introduction principle of international recidivism?
 - > Mutual Recognition Programme (individualized sanctioning)
 - > territorial application (jurisdiction law)
 - > regional universal jurisdiction (FD € counterfeiting, ...)

Substantive criminal law (4)

- > specific criminal offences
 - > protection FI EU & corruption affecting FI EU or not
 - > 3rd pillar conventions/protocols
 - > pending proposal for directive on criminal-law protection FI Community
 - > FD's € counterfeiting
 - > FD fraud and counterfeiting non-cash means of payment
 - > corruption in private sector
 - > pending Danish proposal for FD
 - > draft Directive insider dealing and market manipulation
 - > draft FD environmental crime
 - > draft FD computer-crime
 - > ...

Procedural criminal law (1)

- > approximation not foreseen in TEU – policy making only
- > OC Millennium Strategy
 - > exclusion from public tender procedures and rejection of applications for subsidies/licences if convicted for/suspected of OC/illicit origin of funding
 - > fiscal fraud (in OC-related cases)
 - > no legal bar on information exchange fiscal authorities and competent LE authorities
 - > treated as any other form of OC
 - > improvement prevention/control VAT/excise fraud
 - > mitigation/reversal burden of proof regarding source of assets
 - > in pending Danish proposal for FD on confiscation of crime-related proceeds, instrumentalities and property

Procedural criminal law (2)

- > Protocol October 2001 to Mutual Assistance Convention
 - > implicit obligation for banks to
 - > disclose account/transaction information (accounts owned/controlled by person, account details, ...)
 - > allow for 'monitoring' (tapping) banking transactions
- > Directive 2001/97 amending Directive 91/308
 - > extension scope *ratione personae* of obligation to report suspicious transactions

Law enforcement co-operation (1)

- > 1997 Action Plan OC
 - > set up multi-disciplinary teams in fight against organised (economic) crime
- > Europol competence extended as to encompass
 - > money laundering, irrespective predicate offence
 - > € counterfeiting, forgery of money and non-cash-means of payment
 - > offences listed in annex to Europol Convention
 - > swindling, fraud, counterfeiting, product piracy, computer crime, corruption, illegal trading, harm to environment, ...
- > enhanced cooperation in protecting financial interests EU between LE authorities/OLAF

Law enforcement co-operation (2)

- > customs
 - > fundamental role in combating smuggling, counterfeiting, fraud and other illicit activities comprising cross-border movements of goods
 - > possibility of posting customs liaisons to Europol
 - > various instruments
 - > Convention of Customs information system
 - > Naples II Convention
 - > 2001 Resolution on a strategy for the Customs Union
- > enhanced information exchange FIU's
 - > among themselves
 - > draft Decision on exchange of data between FIU's
 - > with LE bodies, including Europol

Judicial co-operation (1)

- > mutual assistance (1)
 - > OC Millennium Strategy
 - > mutual recognition and execution of decisions to trace, freeze or seize proceeds of crime
 - > Convention 29 May 2000
 - > joint investigation teams (Europol, Eurojust, OLAF, ...)
 - > controlled deliveries for any extraditable offence
 - > Protocol October 2001 to Convention 29 May 2000
 - > radical abolishment fiscal/bank secrecy exception
 - > possibility to request
 - > information on bank accounts
 - > information on banking transactions
 - > monitoring of banking transactions

Judicial co-operation (2)

- > mutual assistance (2)
 - > reinforcement 1990 CoE Convention
 - > FD 2001 on money laundering, identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime
 - > pending Danish proposal for FD on confiscation of crime-related proceeds, instrumentalities and property
 - > mutual recognition
 - > draft FD freezing of assets and evidence
- > proceedings
 - > mutual recognition
 - > economic impact-based forum choice (Eurojust/EP)

Judicial co-operation (3)

- > extradition
 - > European arrest warrant
 - > mutual recognition – no double criminality required for list of over 30 offences
 - > including: corruption, fraud (affecting FI EU or not), laundering proceeds of crime, € counterfeiting, computer-related crime, environmental crime, swindling, forgery, product piracy, ...
- > sentences (1)
 - > OC Millennium Strategy
 - > mutual recognition and execution of decisions to confiscate proceeds of crime
 - > consider possibility of sharing confiscated assets
 - > reinforcement 1990 CoE Convention (supra)

Judicial co-operation (4)

- > sentences (2)
 - > mutual recognition
 - > draft FD on execution monetary sanctions
 - > pending Danish proposal for FD on execution of confiscation orders (without verification of double criminality for same list of offences as in European arrest warrant)
- > post-sentence measures
 - > mutual recognition disqualifications, ...
 - > Mutual Recognition Programme
 - > pending Danish proposal for Decision on increasing co-operation between EU MS with regard to disqualifications

Judicial co-operation (5)

- > EU institutions (1)
 - > Eurojust: scope *ratione materiae* including
 - > Article 2 Europol offences, computer crime, fraud, corruption, offences affecting FI EU, laundering proceeds of crime, environmental crime
 - > European Prosecutor FI EU ?
 - > Green Paper
 - > European criminal records database? (1)
 - > OC Millennium Strategy
 - > black-lists/single EU database convicts/suspects OC/illicit origin of funding
 - > enhanced exchange/EU register natural persons involved in creation/direction legal persons

Judicial co-operation (6)

- > EU institutions (2)
 - > European criminal records database? (2)
 - > Mutual Recognition Programme
 - > individualized sanctioning
 - > disqualification register natural/legal persons, aimed at facilitating enforcement disqualifications throughout EU
 - > IRCP research project 2001/GRP/024
 - > legal, politico-institutional and practical feasibility of developing an EU criminal records database and disqualification register
 - > possibility of introduction requirement for employees in vulnerable professions in private sector to obtain certificate of non-prior conviction

Conclusion (1)

- > no coherent EU 'economic crime policy' as such
 - > still very much ad hoc decision-making
- > 'mainstream' development of policy to tackle serious, international or organised crime
 - > predominant use of 'container concepts' and rhetorics
 - > often too general to allow well-targeted approaches
 - > for which empirical basis is lacking
 - > and without prior proper gap analysis
- > strong belief in legalism and criminal law potential to solve problems

Conclusion (2)

- > traditional influence 1st pillar
- > through EC regulations/directives
 - > maintained
 - > administrative sanctioning
 - > often perceived as criminal sanctioning
 - > without criminal law guarantees (ECHR, due process, ...)
 - > reinforced
 - > OLAF
 - > insider dealing
 - > growing tension 1st-3rd pillar (environmental crime, protection financial interests EU, EP, ...)

Conclusion (3)

- > growing influence 3rd pillar (1)
 - > policy instruments
 - > predominant use 'binding' legal instruments
 - > substantive criminal law
 - > approximation incriminations and sanctions
 - > trend to derogate from requirement criminal intent
 - > assumed knowledge/negligence being criminalized
 - > derogation from 'nullum crimen sine culpa' principle
 - > procedural criminal law
 - > trend to derogate from
 - > nemo tenetur principle (self-incriminating information obtained in administrative investigation being used in criminal investigations)
 - > presumption of innocence (reversal burden of proof)

Conclusion (4)

- > growing influence 3rd pillar (2)
 - > economic crime within scope *ratione materiae*
 - > Europol, Eurojust, European arrest warrant, FD freezing assets & evidence, mutual assistance (joint teams, controlled deliveries, 'financial/fiscal' Protocol October 2001, ...)
 - > trend to derogate from double criminality principle, even in absence of approximated offences
 - > multidisciplinary investigations and inter-service information sharing (tax-customs-FIUs-police-...)
 - > trend to derogate from finality principle in data protection law

Discussion and questions
