
Harmonisation of Criminal Law

Measures on terrorism, organised crime and illicit drug trafficking

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Structure

- > *EU institutional/policy issues*
 - > *TEU post-Amsterdam*
 - > *Vienna Action Plan*
 - > *Tampere European Council*
 - > *OC 'Millennium' Strategy*
 - > *Mutual Recognition Plan*
- > *harmonisation of criminal law*
 - > *harmonisation: concept and terminology*
 - > *scope and degree of approximation*
 - > *goals of approximation*
 - > *potential added value approximation*
- > *conclusion*

TEU - Post-Amsterdam (1)

- › *aims remaining 3rd pillar*
 - › *aim: to 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/judicial co-operation and preventing/combating racism/xenophobia*
 - › *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*
- › *to be achieved through*
 - › *closer police cooperation (Articles 30 and 32)*
 - › *closer judicial cooperation (Articles 31 and 32)*
 - › *where necessary, **approximation** of rules on criminal matters in the MS, in accordance with Article 31(e)*

TEU - post-Amsterdam (2)

- › *judicial co-operation (Article 31 TEU)*
 - › *(a) facilitating and accelerating co-operation between competent ministries or equivalent authorities in relation to proceedings and the enforcement of decisions*
 - › *(b) facilitating extradition*
 - › *(c) ensuring compatibility in rules applicable in the Member States, as may be necessary therefore*
 - › *(d) preventing conflicts of jurisdiction*
 - › *(e) 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*

TEU - Post-Amsterdam (3)

- > *legal instruments of the 3rd pillar*
 - > *joint positions*
 - > *framework decisions (new compared to Maastricht)*
 - > *binding upon the Member States as to the result to be achieved, but leaves to the national authorities the choice of form and methods - no direct effect*
 - > *for the purpose of **approximation** of the laws and regulations of the Member States – i.e. in the field of substantive criminal law only (infra)*
 - > *decisions (new compared to Maastricht)*
 - > *no direct effect – binding as well*
 - > *for any purpose excluding approximation of the laws and regulations of the Member States*
 - > *conventions/treaties*

TEU - Post-Amsterdam (4)

- > *right of initiative*
 - > *Member States & Commission*
- > *decision-making*
 - > *still unanimity required*
 - > *JHA Council - Coreper - Committee Article 36 (CATS) - working groups (various)*
- > *role traditional EC institutions*
 - > *Parliament (mandatory consultation)*
 - > *Court of Justice (Member States may accept jurisdiction to give preliminary rulings on the validity /interpretation of (framework) decisions, conventions and implementing measures)*

Vienna Action Plan

- > *December 1998*
- > *Council/Commission action plan*
 - > *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*
 - > *= rejection*
 - > *of unification ideology*
 - > *even of harmonization idea as far as procedural criminal law is concerned*

Tampere European Council

- > *1st European Council dedicated to JHA only*
- > *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*
 - > *mutual recognition (infra) cornerstone judicial cooperation*

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 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; individualized sanctions (principle int'l reoffending); 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

Harmonisation: concept and terminology

- > *harmonisation*
 - > *process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality*
 - > *mechanism by which things can be made to run smoothly and free from conflict, while leaving differences intact and individual preferences intact*
- > *as for EU*
 - > *'approximation' (no harmonisation)*
 - > *ideologically similar/equivalent to mutual recognition*
 - > *= denial unification + preexistence divergencies*

Scope and degree approximation

- > *substantive criminal law*
 - > *terrorism*
 - > *illicit drug trafficking*
 - > *organised crime*
 - > *container concept for virtually unlimited list of other offences*
- > *general principles of criminal law*
- > *procedural criminal law*
- > *national legislation regarding international cooperation in criminal matters*

Substantive criminal law

- > *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, terrorism and illicit drug trafficking*
- > *Tampere – ‘Millennium’ Strategy*
 - > *adoption of instruments with a view to approximate the legislation of Member States, at least for the following offences: financial crime (money laundering, corruption, € counterfeiting, tax fraud), drug trafficking related offences, trafficking in human beings (particularly exploitation of women), sexual exploitation of children, terrorism related offences, high tech crime (computer fraud and offences committed by means of the Internet) and environmental crime*
- > *practice: even much wider effort*

Terrorism: state of the art

- > *(semi)exclusion*
 - > *UN/ICAO: unlawful seizure of aircraft, unlawful acts against safety of aircraft, unlawful acts of violence at airports, unlawful acts against safety maritime navigation/fixed platforms Continental Shelf, crimes against internationally protected persons, taking of hostages, physical protection nuclear materials, suppression of terrorist bombings, suppression of financing terrorism, ...*
 - > *CoE: 1977 Convention on the Suppression of Terrorism*
 - > *EU: 1996 Extradition Convention, Europol mandated + ‘centre of excellence’ on terrorism, ‘normal’ approximation process for EU ‘core’ crimes*

Terrorism: FD June 2002 (1)

- > *(threatening to commit) acts constituting ordinary offences under national law*
 - > *which, given their nature or context, may seriously damage a country or an **international organisation***
 - > *and where committed with the aim of*
 - > *seriously intimidating a population, or*
 - > ***unduly** compelling a government or **international organisation** to perform or abstain from performing any act, or*
 - > *seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an **international organisation***

Terrorism: FD June 2002 (2)

- > *civil liberties concerns (inclusive exclusion)*
 - > *no initial reference to 'international organisation' (G8)*
 - > *'unduly' (exclusive inclusive exclusion?)*
 - > *if not justified by international public law or even national law*
 - > *preamble: 'Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision'*
 - > *quid unilateral military intervention (aggression)?*
 - > *state (sponsored) terrorism*

Terrorism: FD June 2002 (3)

- > *ordinary offences under national law*
 - > *attacks upon a person's life which may cause death*
 - > *attacks upon the physical integrity of a person*
 - > *kidnapping or hostage taking*
 - > *causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss*
 - > *could include 'urban violence'*
 - > *possible use against protests & non-violent actions*
 - > *... (list continued)*

Terrorism: FD June 2002 (4)

- > *further net-widening (inclusive exclusion continued)*
 - > *terrorist group related offences*
 - > *i.e. structured organisation of more than 2 persons, established over period of time, acting in concert to commit terrorist offences (added value to 'criminal organisation?')*
 - > *new punishable offences*
 - > *directing a terrorist group*
 - > *participating in (lawful) activities of a terrorist group, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group, including by*
 - > *supplying information or material resources*
 - > *funding its activities in any way*
 - > *terrorist-linked activities (in view of committing T.O.)*
 - > *aggravated theft and extortion/drawing up false documents*

Illicit drug trafficking

- > *state of the art*
 - > *UN*
 - > *treaty acquis (1961, 1971, 1988, TOC)*
 - > *(repressive) model legislation*
 - > *CoE treaty acquis*
 - > *illicit traffic over sea*
 - > *Vienna Convention (1990)*
 - > *EC precursors acquis*
- > *added value*
 - > *criminalization: none*
 - > *only penalty levels ?*

Organised crime

- > *not: crime type*
- > *= container concept*
 - > *financial crime (money laundering, corruption, counterfeiting €/non-cash means of payment, tax fraud)*
 - > *trafficking in human beings (in particular women)*
 - > *sexual exploitation of children and child pornography*
 - > *high tech crime (computer fraud and offences via Internet)*
 - > *environmental crime*
 - > *racism and xenophobia*
- > *added value ?*
- > *legitimacy*
- > *a contrario: draft EU Constitution*

General principles of criminal law

- > *not foreseen in TEU as area for FD use*
- > *mere result of policy making*
 - > *'mutual recognition' plan*
 - > *...*
- > *FDs containing provisions on*
 - > *(regional universal) jurisdiction*
 - > *application ratione loci criminal law*
 - > *principle of international reoffending*
 - > *initial draft FD drug trafficking*
 - > *linked with principle of individualisation of sanctions (aspect of mutual recognition)*

Procedural criminal law

- > *not foreseen in TEU – mere result of policy making*
 - > *OC 'Millennium' Strategy'*
 - > *mutual recognition principle (Tampere)*
- > *through framework decisions mainly*
- > *issues*
 - > *joint investigation teams*
 - > *freezing of assets and evidence*
 - > *reversal burden of proof for confiscation of assets*
 - > *confiscation as autonomous sanction*
 - > *position victim in criminal procedure*
 - > *protection of/collaboration with criminal witnesses*
 - > *special police/investigation techniques*
 - > *procedural safeguards defendant*

National legislation int'l cooperation

- › *not foreseen in TEU as area for FD use*
- › *mere result of policy making*
- › *issues*
 - › *European arrest warrant*
 - › *even stating that treaty acquis will no longer apply*
 - › *FD joint investigation teams*
 - › *alternative for entry into force Article 13 MLAC*
 - › *freezing evidence and property*
 - › *recognition monetary sanctions*
 - › *...*

Scope and degree: subconclusion

- › *framework decision only to be used for approximation in 3 areas of substantive criminal law*
- › *not for approximation of*
 - › *substantive criminal law in other areas*
 - › *general principles of criminal law*
 - › *procedural criminal law*
 - › *legislation regarding int'l cooperation criminal matters*
- › *quid traditional hierarchy of legal norms*
- › *convention required in cases where (F)D is used*
- › *general trend to avoid recourse to conventions*
- › *freedom, security & justice reinforced when EU doesn't see the point in observing fundamental rules democratic decision-making?*

Goals of approximation

- > *proper gap analysis usually lacking*
- > *specific goal not specified per crime time*
- > *proclaimed added value often dubious*
 - > *especially where MS are already bound by substantial non-EU (treaty) acquis*
- > *often goal in itself*
 - > *resulting from ideological choice, rather than*
 - > *to serve actual needs/solve identified problems*
- > *true/original goal seemingly irrelevant*
 - > *approximation to be pursued only to the extent that mutual recognition would not be feasible without a certain degree of approximation*
 - > *facilitation of mutual recognition as prevailing EU option*

Potential added value approximation (1)

- > *as regards constituent elements of criminal acts*
 - > *avoid safe havens or loopholes for EU 'core crimes'*
 - > *while respecting subsidiarity*
 - > *facilitate int'l cooperation requiring double criminality*
 - > *condition fulfilled following approximation*
 - > *result: no need to lift double criminality requirement*
 - > *as – illogically – in European arrest warrant (!)*
 - > *announcing even further approximation (?)*
 - > *bring coherence in definition EU priority crimes*
 - > *within mandate Europol, Eurojust ... (not the case)*
 - > *arrest warrant crimes (not the case)*

Potential added value approximation (2)

- > *as regards penalties*
 - > *ensure 'formal' legal equity for EU citizen*
 - > *by bringing penalties closer to one another (approximation)*
 - > *however, in current practice*
 - > *only minima for the maximum penalty*
 - > *only potentially harsher punishment*
 - > *where individual MS retain right to be even more strict*
 - > *why not*
 - > *maximum for the maximum*
 - > *or even: lex mitior (as embedded in CoE treaty acquis)*
 - > *overly strong focus on 'formal' penalty levels*
 - > *quid prosecution and sentencing policy?*
 - > *quid broader, integrated criminal policy?*

Conclusion

- > *fundamentals criminal law undermined*
 - > *Magna Carta*
 - > *legality*
 - > *disrespect EU treaties and hierarchy of norms*
 - > *proportionality*
 - > *overly strong belief in potential of repression*
 - > *subsidiarity*
 - > *not only 'where necessary'*
 - > *added value in many cases extremely limited/dubious*
 - > *gap analysis lacking*
 - > *as if were approximation sports*
 - > *Trias politica doctrine (Montesquieu)*
 - > *prohibition of executive criminalization*
 - > *misuse JHA Council binding FDs*

Questions and discussion
