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Editorial

When this second number of the European Criminal Law Review was on its way to the printers (end of May 2011) the Commission published two communications, one on the protection of the financial interests of the European Union and one on fighting corruption in the EU.[1] Albeit a great deal has happened over the course of the last 20 years, both documents show that we are still at the very beginning of development in this area. In a way, one could say that the communications reflect a view according to which the basic problems of European Criminal Law are approximately the same as they were a couple of decades ago when the third pillar was created or when the discussions on the protection of the financial interests of the EU became topical in the late 80s and at the start of the 90s.

Thus, in the first communication one can find the following text:

"Despite the progress made in the last 15 years, the level of protection for EU financial interests by criminal law still varies considerably across the Union. Criminal investigations into fraud and other crimes against the financial interests of the Union are characterised by a patchy legal and procedural framework: police, prosecutors and judges in the Member States decide on the basis of their own national rules whether and, if so, how they intervene to protect the EU budget. Despite the attempts to provide for minimum standards in this field, the situation has not changed noticeably: The Convention of 1995 on the protection of financial interests of the EU and related acts, which contains provisions on criminal sanctions, – albeit incomplete – was implemented fully by only five Member States."

Similarly the second communication stresses in relation to corruption:

"Over the last decade, **some efforts have been made at international, EU and national level** to reduce corruption. At EU level, the anti-corruption legal framework has developed by the adoption of legislation on corruption in the private sector and the accession of the EU to the United Nations Convention against Corruption…

However, the **implementation of the anti-corruption legal framework remains uneven among EU Member States and unsatisfactory overall**. The EU anti-corruption legislation is not transposed in all Member States. Some countries have not

[1] COM(2011) 293 final (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions On the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' moneyand) COM(2011) 308 final (Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU).

ratified the most important international anti-corruption instruments. More importantly, even where anti-corruption institutions and legislation are in place, its ***enforcement is often insufficient*** in practice…."

The Commission highlights the fact that there are still considerable differences between the substantive criminal laws of the Member States in these important areas. For example, it points to huge differences regarding offences such as "embezzlement" and "abuse of power" between the Member States, it refers to different understandings of the concept of "public official" in relation to corruption offences and deplores the differences as regards criminal liability of heads of businesses and legal persons.

Furthermore, it is noted in the communication that the mechanisms for cooperation between national authorities is used to a limited extent in this area and it is said that the authorities of the Member States are reluctant, for example, to use the rules on freezing and confiscation and that the reluctance might be due to factors such as the complex legal regulation, the risk of lenghty procedures and the risk that the efforts will not produce results worth the effort. In connection with this, it is also stated that there are indications that the authorities of the Member States focus mainly on national cases, (i.e. cases involving the national budget or cases which do not have extensive connections to other Member States). Thus there may be a need to focus both on the legal side (i.e. on the norms governing the cooperation) and on the factual side (i.e. on the behaviour of responsible authorities, their priorities etc.). In relation to corruption, the Comission clearly accentuates that "[a]ction at EU level is … needed to strengthen the political will, in all EU Member States, to vigorously tackle corruption."

In particular, the communication concerning the protection of the Union's financial interests does not only discuss the need to take measures in the field of substantive criminal law and cooperation in criminal matters, but also draws attention to the institutional side of the story: to the role of OLAF and Eurojust and, of course, to the setting up of a European Public Prosecutor in accordance with article 86 of the Treaty on the functioning of the European Union. In this regard, the communication forecasts "a thorough analysis of the way the existing structures need to be reinforced".

In balance, the first communication also emphasizes the need to respect fundamental rights and the commission promises that future initiatives will be subject to "an in-depth assessment of their impact on fundamental rights".

The communication ends with a vision for 2020:

"Our vision for 2020: take the necessary measures, in criminal and administrative law, to minimise criminal activities at the expense of the EU budget

A policy of zero tolerance on fraud against the EU requires putting in place adequate measures so that acts of fraud are prosecuted evenly across the Union. The Union should aim at an effective, proportionate and dissuasive level of protection of its financial interests through speedy criminal procedures and sanctions across the Union, increasing their deterrent effect. To this end, taxpayers' money has to be equivalently protected across the Union by enhanced criminal prosecution, which is not stopped at national borders, and by common minimum criminal law rules, making full use of the opportunities enshrined in the Lisbon Treaty".

There is obviously ample room for different views on the ideas put forward in the communication. Some would certainly argue that the perspective in the communication is instrumental and that the (unrealistic) idea of "zero tolerance" is an idea which does not belong in the area of crime control. However, irrespective of what position one takes, it is quite clear that the communications highlight the need for analysis, discussion and debate in this area. Let us take one simple example. In the communication, the Commission puts forward differences between national substantive criminal laws as a reason for harmonisation. Such a conclusion inevitably brings very basic questions to the table. Without taking a stand on the need for harmonisation in the area of protection of the Union's financial interests, one can, argue, for example that the conclusion presupposes both a certain understanding of the purpose of harmonising criminal law and a – more or less – reasoned opinion on the desirable extent to which existing differences between the national substantive criminal laws shall be removed. The need for discussion and analysis is underlined by the fact that the Commission does not only mention harmonisation of offences but also of rules and concepts belonging to the general part of the criminal law system such as intent, negligence, attempt, instigation and aiding and abetting.

It is our hope that the European Criminal Law Review will provide a suitable vehicle through which underlying thoughts may be developed and discussed; the very idea behind the journal being the need for a common pan-European forum that is also focused on the fundamental aspects of criminal law development and, as such, we warmly welcome your contributions.

The Editors