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Editorial

After its first year, EuCLR issue no. 1 of 2012 invites its readers to look back on 2011; it is also a good moment to address coming developments with regard to European integration. Three topics shall be mentioned:

1. The accession of the EU to the ECHR

With the finalisation of the Accession Agreement, a long, protracted and complex procedure has come to a positive ending: The Membership Treaty between the EU and the ECHR has been finalised. On the one hand, the primary law based on the Treaty of Lisbon (article 6 § 2 TEU), and on the other hand Protocol No. 14 to the ECHR (article 59 § 2 ECHR) adopted by the COE have enabled the EU to become a Member of the ECHR.

It should be noted that this is far more than a formal commitment to the standards of human rights contained in the Convention: The Union has made itself subject to the judicial competence of the ECHR. Every single citizen who considers himself affected by a legal act of the Union is – after exhausting the national remedies – entitled to lodge an individual application to the ECHR. In addition to this, the "co-respondent mechanism" envisaged in the Accession Agreement could even place the EU in the position of the defendant, if the application was originally directed exclusively against a Member State; this is the case when the criticized national behaviour is based on a legal act of the Union.

2. Mutual recognition

How to protect procedural rights? After the Union adopted the principle of mutual recognition as its method of choice for judicial cooperation in its primary law, in 2010, seven Member States had already launched an Initiative for a Directive regarding the European Investigation Order in criminal matters (EIO), which is supposed to replace almost the entirety of legal cooperation in evidentiary matters.

This development is, however, alarming as – in contrast e. g. to an arrest warrant – gathering evidence in criminal procedure is a dynamic process, largely determining the outcome of the trial. In every Member State, detailed sets of rules are in place for gathering evidence as well as for assessing evidence during trial, and

making it part of the judgment. Evidence collected in accordance with the rules of the executing State is necessarily alien to the procedure of the issuing State; vice versa, it is difficult to find the parameters according to which the executing state should acknowledge an investigative decision that is fruit of the issuing state's system. No satisfactory solution has yet been found regarding how to handle the large variety of systems for evidence gathering and assessment. The compromise currently being discussed (Council doc 18918/11), which partly recalls the text of the original initiative, but also adds a number of promising amendments, reveals this dispute.

The cross-border transfer of judicial decisions on the basis of mutual recognition jeopardises the procedural rights of those concerned. Accordingly, in 2012, the next steps on the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295/3) need to be taken: a directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, as well as a directive on the right to information in criminal proceedings have been initiated.

The present volume especially focuses on these procedural issues: Not only the critical analysis by Jodie Blackstock on "Procedural Safeguards in the European Union", but also the two discussions on the European Arrest Warrant (by Gaetano De Amicis and by Daniel Mansell), the essential essay on mutual recognition (by Anže Erbežnik) and the "Judicial review of EU acts affecting criminal proceedings" by Pascal Schonard are all about jeopardising, and about efforts to protect fundamental rights in transnational criminal proceedings.

3. Data retention – a new approach?

For 2012, a solution for the disputed data retention Directive needs to be found. The national implementation laws which have been enacted so far have not only been criticized: In some Member States, for example Germany, Romania and the Czech Republic, these implementation laws were even nullified by the constitutional courts, whilst in other Member states**,** constitutional complaints are still pending – and the ECHR will also have to deal with data retention (application No. 77066/11 v. Germany). Altogether**,** there is strong opposition against this kind of preventive prosecution.

The Commission became aware of this, and has evaluated the Directive. In its report (COM(2011)225), it sticks to the instrument of data retention in principle, but announces its revision. It seems particularly urgent to question the suggested investigative advantage, and to take into account less invasive approaches of investigation. It would seem that a greater number of issues have been called into question than resolved.

It is our hope that the contributions in EuCLR 2012 could provide first answers.

The Editors