Editorial

The recent initiatives of the European Commission in the area of fraud, corruption and crime victims—an integrated approach in EU criminal justice

Corina Badea · Laviero Buono

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1 Introduction

Reducing the level of fraud and corruption, both within member states and EU institutions, as well as ensuring a high level of protection for crime victims are, by no means, novel issues on EU's criminal justice agenda. On the contrary, they rank amongst the first areas where political and legislative actions were undertaken.

The fragmented competences of the European institutions under the first and third pillar resulted in a fragmented regulatory framework, leading in turn to an uneven transposition and poor results in effective implementation, as shown by regular evaluation reports in these policy fields.

The current issue of the ERA Forum presents the initiatives recently put forward by the European Commission which revamp EU's policies on fraud, corruption and victim protection in an integrated manner, an approach made possible by the entry into force of the Lisbon Treaty.

These developments were followed by the Academy of European Law in a series of high-level debates organised in the first semester of 2011, involving EU officials, legal practitioners and academics from EU member states.

C. Badea, Course Director—Criminal Law (✉) · L. Buono, Head of Section—Criminal Law
Academy of European Law, Metzger Allee 4, 54295 Trier, Germany
e-mail: cbadea@era.int

L. Buono, Head of Section—Criminal Law
e-mail: lbuono@era.int

2 The Commission's initiatives on protecting the licit economy

The fight against corruption and economic crime has resurfaced at the top of the EU's political agenda in the context of the global financial crisis, major concerns being associated with the vulnerability of the financial system and the need to safeguard public funds and resources.

The European Council in the Stockholm programme¹ urged both the Commission and EU member states to take action in their respective fields of competence. The Council invited the Commission to devise a mechanism to measure efforts in the fight against corruption, in particular in the areas of the *acquis* (public procurement, financial control, etc.), to develop a comprehensive anti-corruption policy and to improve the prevention of financial crime.

In its 2011 annual work programme, the European Commission announced a set of *Initiatives on Protecting the Licit Economy*, including:

- a communication on a comprehensive policy against corruption;
- a proposal of a new legal framework on the confiscation and recovery of criminal assets;
- a communication on the anti-fraud strategy.

The preparation of this new set of initiatives was discussed in the fifth annual Forum on combating corruption in the European Union, organised by ERA on 10–11 February 2011 and co-financed by OLAF under the Hercule II Programme, a number of key interventions being developed in the current edition of the ERA Forum.

An interesting perspective was put forward by Wolfgang Hetzer, anti-corruption advisor of the Director General of OLAF, who considers the global financial crisis as a special kind of system failure based on “corruption by incompetence”. The white collar crime arises at the collusion of public and private interests, making it increasingly difficult to distinguish between political parties, governments, businesses, the judiciary, the police, the army and organised crime. Corrupt interrelationships reflect changed corporate and business practices and the key question remains whether criminal law, in its current state, is suited for countering risks such as those revealed by the financial crisis.

As regards the effectiveness of EU action against corruption, participants of the Forum pointed to a series of inter-connected critical aspects:

- the lack of comprehensive, reliable, quantitative and statistical data concerning the extent and risk of corrupt behaviour, which impacts on the conduct of public debates, often distorted by the intensive reporting of sensational individual cases;
- the lack of an accurate empirical inventory given the many and varied definitions of this type of crime;
- an uneven playing field in substantive criminal law, which in turn impacts on the coordination at EU level of criminal investigations against relevant offences;
- a wide range of penalties available which should, irrespective of the different legal systems, be equally effective and deterrent.

¹The Stockholm Programme—An open and secure Europe serving and protecting the citizens, Council document 17024/09, adopted by the European Council on 10/11 December 2009, OJ C 115, 4.5.2010.

Many of these considerations were echoed by the European Commission in its *Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations—An integrated policy to safeguard taxpayers' money*,² presented on 25 May 2011. The Commission concludes that “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”, this state of affairs being generated by a “patchy legal and procedural framework”. The Commission pledges to take a pro-active stance in this area relying on the provisions of the Lisbon Treaty, which allows the EU to reinforce its action in the field of criminal law.

Referring to the poor implementation of the Convention on the protection of EU's financial interests,³ the Commission announces the preparation of a legislative initiative to replace its earlier proposal on the criminal law protection of financial interests.⁴ In addition to strengthening substantive criminal law the Commission announced the conduct of an analysis on ways in which the European structures need to be reinforced to deal with criminal investigative measures. The development of Eurojust, of OLAF and the potential setting-up of a European Public Prosecutor remain items of consideration.

Whilst this Communication essentially prepares the ground for future legislative and institutional developments, for the lack of statistical data and a uniform measurement of anti-corruption policies at EU level, the Commission has provided a response.

The Commission established an EU Anti-corruption reporting mechanism for periodic assessment—the so called “*EU Anti-corruption Report*”, which will be published every two years starting with 2013. The instrument is explained in depth by Raluca Stăfănuț, anti-corruption policy officer in the Commission. Essentially it will be a tool for the periodical assessment of the situation in the EU as regards the fight against corruption, to identify trends and best practices, to make tailor-made recommendations and to provide support to member states, civil society and other stakeholders.

Considering the overlap between several regional and international anti-corruption regimes—EU, CoE, OECD and UN—all these organisations generating a set of specific legal instruments and monitoring mechanisms,⁵ the EU Anti-corruption Report is a highly necessary starting point for providing a common conceptual basis which in turn can lead to a more focused public debate and action.

Complementary to this monitoring and supporting exercise, the Commission prepares further action in key *acquis* areas, as outlined in its Communication on Fighting

²Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the 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' money, COM (2011) 293.

³Convention of 26 July 1995 on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 49) and its additional protocols.

⁴COM(2001)272 as amended by COM(2002)577.

⁵For a detailed in-depth comparative analysis, see Punishing Corruption in the Public and Private Sector: the Legal Framework of the European Union in the International Scene and the Greek Legal Order, M. Kaifa-Gbandi, European Journal of Crime, Criminal Law and Criminal Justice 18 (2010), 139–183.

Corruption in the EU,⁶ released on 6 June 2011. From the legislative point of view, two developments announced by this Communication should be pointed out.

First, the potential replacement of *Framework Decision 2003/568/JHA on combating corruption in the private sector* with a Directive. The latest evaluation report, released in June 2011, notes that despite some progress, the transposition itself is still not satisfactory. The European Commission states that “due to lack of comparable statistics and figures on cases of corruption in the private sector, it was not possible to assess the practical impact of the transposition of the provisions of this Framework Decision”. Insights on the practical challenges of a criminal investigation into private sector corruption are provided by Andreas Harz, a German magistrate with a longstanding experience in the field.

The second development is the preparation of new EU legislation on confiscation and asset recovery, an “*Achilles heel*” in the fight against cross-border economic crime in the EU. The Commission notes that four implementation reports⁷ have shown that there are still delays in the efforts by many member states to adopt measures regarding confiscation of the proceeds of crime. Consequently, a revised legal framework will be proposed in 2011 to ensure that courts in Member States are able to effectively confiscate criminal and criminally tainted assets and to fully recover the corresponding values, including in cases involving corruption.

Considering that specific EU legislation on private sector corruption and confiscation has existed for a long time, complementing the regional and international conventions, the poor implementation level is not encouraging. It remains to be seen how far the impetus provided by the Commission will receive the endorsement of member states in the Council and lead to the adoption of full fledged new EU law instruments.

Another aspect of anti-corruption which might require a legislative intervention is the protection of whistle-blowers. An interesting input on this topic is provided by Filippo Spiezia, Deputy National Member of the Italian Desk at Eurojust. After a general presentation on Eurojust involvement in corruption cases, he presents a comprehensive overview on the state of play of the EU Member States legislation regarding the protection of whistle-blowers. The author emphasizes that although significant progress has been made by some EU countries, the whistleblowing legislation is really fragmented and weakly enforced. He underlines that it would be important to have common legal standards in the Member States, because it may stimulate the disclosure of information, both in the public and private sector. More disclosure would

⁶Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on fighting corruption in the EU, COM (2011) 308.

⁷Report from the Commission to the European Parliament and to the Council based on Article 8 of the Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to crime (COM(2011) 176 final); Report from the Commission to the European Parliament and the Council based on Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (COM(2010) 428); Report from the Commission pursuant to Article 6 of the Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime related proceeds, instrumentalities and property (COM(2007) 805 final); Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (COM(2008) 885 final).

help uncover corruption which, by definition, is a crime that lacks the usual starting point of a criminal investigation, the claim from the victim, as the corrupt players are linked by the bond of silence. The existence of a common legal approach would also lead to better cooperation and assistance in cross-border cases, a new directive to approximate legislation on the protection of whistle-blowers being a welcome and useful development.

In addition to the measures addressed to member states, the Commission has also adopted a strategic document aimed at improving the prevention and fight against fraud within its own services, the new Commission Anti-Fraud Strategy.⁸ Presented in the contribution of Martin Příborský, legal and policy officer in OLAF, its objective is to provide a coherent framework for the prevention and fight against fraud affecting European Union financial interests. The Strategy is endorsed by an action plan⁹ with 51 actions for different Commission services to be implemented at the latest by 2014.

3 Minimum standards for the protection of crime victims in the EU

On 9–10th June, ERA hosted a high-level debate on the new Victims' Rights Package, published by the European Commission in May 2011. The package contains:

- a proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime¹⁰
- a proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters¹¹
- Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions “Strengthening victims’ rights in the EU”.¹²

The Commission made full use of all the possibilities it has following the entry into force of the Lisbon Treaty, proposing a comprehensive set of measures, both in the area of criminal law (where the right of initiative is still shared with member states¹³) and in the area of civil law. Thus, the package completes the initiative put forward in 2010 by 12 member states on the European Protection Order (EPO), which had entered into an uncertain legal terrain, as in many member states protection measures are of a civil nature and the right of legislative initiative of member states is limited

⁸Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors on the Commission Anti-fraud Strategy of 24 June 2011, COM (2011) 376.

⁹Commission internal action plan for the implementation of the Commission Anti-Fraud Strategy of 24 June 2011 SEC (2011) 787.

¹⁰COM(2011) 275.

¹¹COM(2011) 276.

¹²COM(2011) 274.

¹³Under the ordinary legislative procedure (art. 289 TFEU), the initiative belongs to the European Commission, but member states retain initiative in the area of judicial and police cooperation in criminal matters, in certain conditions (art. 76 TFEU).

to criminal law. Thus, the EPO remained confined to mutual recognition in criminal matters, and the Commission draft regulation on mutual recognition of protection measures in civil matters.

The main legislative proposal—the directive on minimum standards on the rights, support and protection of victims of crime—shall replace the 2001 Framework Decision on the standing of victims in criminal proceedings.¹⁴ Its adoption follows an ample public consultation carried out by the European Commission.¹⁵

The ERA conference debated these legislative developments bringing together the points of view of the different stakeholders—Commission officials, victims associations, defence lawyers and magistrates, as well as experienced academics and researchers. The keynote speech was delivered by the EU Justice Commissioner Viviane Reding,¹⁶ who emphasised that meeting the victims' needs means providing them with the same non-discriminatory minimum level of rights, services and access to justice, everywhere in the European Union. This is a long term task that the Commission has started to fulfil, as the EU now has a clear legal mandate to act in favour of victims in the Lisbon Treaty. According to the Commission's assessments, victims' needs are generally not met in the national judicial systems and the level of victims' rights differs widely from country to country. The 2011 package is a first step to be followed up in 2012 by a second package of measures to ensure a sustained effort in strengthening the rights of the victims of crime.

As it was pointed out by participants, there are several aspects in which the Directive constitutes a significant step forward. On one hand, in terms of legal content, it aims to strike a balance between the different interests at stake—of the State, the accused and the victim—notwithstanding the very different role of victims across the EU's legal systems. On the other hand, it has a very strong focus on providing victims safeguards that enable them to exercise their rights and have their particular situation acknowledged—information rights and the right to understand and to be understood, the right to access victim support services, the right to safeguards in the context of mediation and other restorative justice services, the right to protection during questioning in criminal investigations, the right of protection of vulnerable victims including children during criminal proceedings. An important part of the Directive is devoted to the training of practitioners, which in turn is an essential measure both for the effective exercise of rights but also for the change of culture and mentality that needs to occur in order to improve the treatment of victims across the EU and achieve minimum common standards. Professor Schünemann dwells in depth on the content of the Directive in his contribution to the present edition.

It should also be stressed that the conference took place on the eve of the adoption of the Victims Roadmap,¹⁷ an initiative of the Hungarian Presidency which bal-

¹⁴Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

¹⁵http://ec.europa.eu/justice/news/consulting_public/news_consulting_0053_en.htm.

¹⁶Viviane Reding, Putting Victims first—Better protection and support for victims of crime, 9 June 2011, available at http://ec.europa.eu/commission_2010-2014/reding/multimedia/speeches/index_en.htm.

¹⁷Resolution of the Council on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings adopted at the 3096th JUSTICE and HOME AFFAIRS Council meeting, Luxembourg, 9 and 10 June 2011.

ances EU's agenda and the Roadmap for strengthening the rights of accused and suspected persons. The Roadmap contains five measures and sets out the principles which should be followed by the EU legislator, providing an important political impetus for the adoption of the necessary legal instruments.

4 Concluding remarks

A fresh impetus on the fight against fraud and corruption in the EU has been provided by the initiatives of the European Commission on protecting the licit economy. Although streamlining anti-corruption compliance and monitoring through the EU Anti-corruption Report is a necessary step forward it is not sufficient. As regards EU law the situation is still to be significantly improved. The EU has the stronger tools, compared to other international organisations which have created anti-corruption regimes, in order to make its member states develop a common legal approach to corruption. The adoption of full-fledged EU law instruments on confiscation and asset recovery and on criminal law protection of EU's financial interests remains a key test, yet to be passed by EU member states.

The integrated approach taken by the Commission in combining both legislative (criminal and civil) and non-legislative measures (training of practitioners, support for stakeholders) to improve the situation of crime victims, as well as the Council's prioritisation of victims in parallel with the accused, with two Roadmaps being pursued, show an EU legislator at full steam in the initiation phase. It remains to be seen if momentum will be kept up throughout the full legislative process.

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