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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

REVIEW OF COUNCIL OF EUROPE CONVENTIONS IN CRIMINAL MATTERS WITHIN THE DIRECT RESPONSIBILITY OF THE CDPC

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1. EUROPEAN CONVENTION ON THE PUNISHMENT OF ROAD TRAFFIC OFFENCES (ETS NO. 52)

The European Convention on the Punishment of Road Traffic Offences was opened for signature by Council of Europe member states on 30 November 1964. Fifty years later, there is no denying the fact that it has been ratified by only 5 states: Cyprus, Denmark, France, Romania and Sweden. All these states have made reservations. It is therefore perfectly legitimate to question the relevance of this international instrument. The Council of Europe began taking an interest in road traffic and the related offences as it had become aware of an increase in this area and it therefore focused on co-operation issues between states on this subject. However, fifty years later, the initiatives taken to regulate this aspect of criminal law have not always proved successful.

On 25 October 2011, the European Union passed Directive 2011/82/EU facilitating the cross-border exchange of information on road safety related traffic offences, thereby hoping to put an end to the situation in which, as far as motorists were concerned, "abroad" was an area where the law did not apply. To this end, the Directive establishes a system of information exchange between the EU member states on road safety-related offences. While this Directive received considerable media coverage, its actual legal existence has been short lived. The deadline for transposing the Directive into domestic law was 7 November 2013. The Court of Justice of the European Union, in a judgment of 6 May 2014, decided to annul this Directive, considering that the legal basis chosen was inappropriate. While the Commission anticipated basing its jurisdiction on Article 91.1.c of the TFEU (legal basis for transport safety), the member states and parliament based their adoption of the text on the Union's competence in the field of police co-operation (Article 87.2 of the TFEU). The Court of Justice held that it was not a matter of police co-operation. Nonetheless, it decided to maintain the effects of the Directive for one year from the date of the decision (i.e. until 6 May 2015). If one looks at the offences laid down in the European Directive, it will be seen that they are very similar to those in the Council of Europe convention, with a few exceptions. The EU opted to include offences relating to the use of mobile phones and other technological devices, making it more up-to-date.

However, the European Union is not the only institution to have drawn up its own rules of jurisdiction, and especially its own rules of co-operation. Within Europe there is a mass of agreements, occasionally contradictory. For example, when one looks at the reservations to the Council of Europe convention made by Denmark, it will be seen that it intends to apply other provisions vis-à-vis Sweden, Norway, Finland and Iceland, i.e. the member states of the Nordic Council. The latter co-operate closely in the field of road traffic. Similarly, there are already bilateral agreements for traffic offences between France, Luxembourg, Switzerland and Belgium.

Furthermore, looking at the reservations made to the Convention, one sees that many states have decided not to apply Section III. This provides that the penalty shall be enforced in the state of residence of the person who has committed the offence. It is surprising that this was the approach adopted: when a road offence is committed, it is the public order of the state in which it takes place that has been compromised, and it would therefore be logical for any compensation (monetary moreover) to be arranged in that state. Although private law is not standardised at international level and states continue to make their own arrangements, it would seem that the various international

instruments have opted for the state in which the offence is committed as the criterion for application of the law. The Rome II Regulation, the aim of which is to regulate all non-contractual questions between signatory states (it is a Community Regulation), also opts for application of the penalty in the country in which the offence is committed. Article 3 of the Hague Convention on the Law Applicable to Traffic Accidents of 4 May 1971 also stipulates that the applicable law shall be the law of the state where the accident occurred. In addition, while the European Directive of 25 October 2011 does not stipulate the law that should be applied or the court that has jurisdiction, it is nevertheless understood that the EU has opted to assign jurisdiction to the state in which the offence was committed.

There is one very surprising provision in the Council of Europe convention, which is the one not requiring the translation of co-operation documents. Clearly, one cannot impose a requirement for a translation into all the languages used in the Council of Europe, but it could have been useful to ask states to provide, if not a translation in the language of the country concerned, a copy of the document in English or French (the two official languages of the Council of Europe). Moreover, it can be seen in the reservations made by member states that they would like a translation of these documents in English and/or French. The European Union requires its member states to send the letter notifying the person who has committed a road traffic offence in a language that is most likely to be understood by that person. In this way it upholds the obligations imposed by Article 6 of the European Convention on Human Rights (right to a fair trial + *Marzhol v. Switzerland* decision of 6 March 2012: information on the reasons for arrest in a language the person concerned understands).

Conclusion

Given that only five states have ratified the Convention in 50 years, it is doubtful that there will be any new ratifications, since the last one was made in 1998 and the other four in 1972. EU legislation is fairly well developed; however, not all Council of Europe member states are members of the EU. Taking all this into account, should this convention be amended/modernised/updated? Should additional protocols be drawn up? Bearing in mind that road safety is an important issue today, would an update of the Convention give rise to more ratifications by the various Council of Europe member states?

2. EUROPEAN CONVENTION ON THE COMPENSATION OF VICTIMS OF VIOLENT CRIMES (CETS NO. 116)

The European Convention on the compensation of victims of violent crimes was opened for signature by Council of Europe member States on 24 November 1983 and entered into force on 1 February 1988. It places the States Parties under obligation to compensate the victims of intentional violent crimes resulting in severe bodily injury or death. This obligation relates only to offences committed on the territory of the State concerned, irrespective of the victim's nationality. It has been ratified by 25 Council of Europe member States, and ratifications are pending by a further eight States having signed it. Indeed, signatures and ratifications have taken place at a fairly steady rate, latterly with one ratification and one signature in 2010.

While the Convention has delivered a fairly satisfactory performance in terms of ratifications and signatures, a number of shortcomings have nonetheless been observed. Given that, prior to the drafting of the Council of Europe Convention, an initiative on the part of the European communities or the Council of Europe were both options to be considered, the European Union ultimately noted shortcomings in the European Convention on the compensation of victims of violent crimes, and the Commission presented a proposal for a Council Directive on compensation to crime victims on 16 October 2002. In that document, the Commission expressly stated that the Council of Europe Convention did not include any concrete measures to facilitate access to state compensation in cross-border situations. Directive 2004/80/EC[1] of 29 April 2004 relating to compensation to crime victims was duly adopted by the European Union.

Comparison of these two international texts reveals that each of them presents certain shortcomings:

- They both exclude legal persons from their scope and do not cater for the possibility of the State making up a financial shortfall on the part of such a corporate entity. Yet this is a valid issue. The scenario of a corporate body intentionally causing bodily harm to an individual cannot be ruled out. A classic example would be a company deliberately releasing toxic waste into the environment which presents a serious risk to people's health;
- While both texts set out to focus solely on compensation for intentional "violent" crimes, neither of them defines what is meant by "violent". While this allows the implementing authorities room for manoeuvre, it may also be a stumbling block for legal certainty: there is a risk that victims or their beneficiaries will be told that the crime was not "violent" enough. The European Union's proposal for a directive suggested an article defining the terms used in the directive but this provision was not taken on board in the final version of the text.

Even so, the European Union Directive lays down certain rules that are lacking in the Council of Europe Convention:

[1] http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32004L0080&rid=1

- Whereas the Convention does not establish any language requirements, the Directive stipulates that information transmitted between the authorities of Member States shall be expressed in the official languages, one of the languages of the Member State of the authority to which the information is sent, which corresponds to one of the languages of the Community institutions, or another language of the Community institutions that the Member State has indicated it can accept. Similar recommendations on language issues can be found in the reservations made by the member States in respect of the Council of Europe Convention, which shows that this is a crucial question;
- The use of the term "crime" by the European Union opens up a broader spectrum of offences, which is not limited merely to violent crimes. This makes more people eligible for state compensation while nevertheless limiting the instrument's scope to bodily injury;
- Whereas the procedure for exchanging information is described in meticulous detail in the European Directive, the Council of Europe Convention is intended to be more general and less specific, which may make the desired application of the instrument more complex.

Conclusion

Although this Convention has been signed and ratified by numerous countries, the European Union texts reveal its shortcomings. This raises the following question: should this Convention not be updated? Over thirty years have gone by since it was drafted, and developments in means of communication as well as the methods used by criminals suggest that some adjustments could be made.

3. EUROPEAN CONVENTION ON OFFENSES RELATING TO CULTURAL PROPERTY (CETS NO. 119)

I. Introduction:

The Convention on Offences relating to Cultural Property was opened for signature by Council of Europe member States in Delphi on 23 June 1985, but has never entered into force. Only six States have signed it, and none have ratified it.

The main aim of the convention is to combat illicit trafficking in cultural property through criminal law and to promote co-operation between States. It thus serves as a complement to the European Convention on Mutual Assistance in Criminal Matters (ECMA) and the European Convention on Extradition (ECEx). A further aim is to protect European cultural heritage and to raise public awareness of the damage caused by illicit trafficking in cultural property.

According to some statistics, illicit trafficking in cultural property is the third most common form of trafficking after arms and drug trafficking. This estimate should be treated with caution, however, as accurate figures in this area are very difficult to come by.[2] Still, as recent developments illustrate, illicit trafficking in cultural property is a significant phenomenon. Switzerland, for example, returned a number of archaeological objects to Italy in March 2014,[3] and in July 2014 Germany returned a few thousand artefacts to Greece.[4]

The importance of illicit trafficking in cultural property, whether because of its scale or because of a growing awareness of the need to protect cultural heritage, can be seen in the number of international and regional conventions, with many organisations now seeking to curb the traffic in cultural property. On 14 November 1970, UNESCO adopted a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which, with 127 States Parties, is probably the most important convention in this area.

Similarly, Unidroit adopted a Convention on Stolen or Illegally Exported Cultural Objects on 24 June 1995. The aim of this instrument is to supplement the 1970 UNESCO Convention, by focusing more specifically on civil law aspects. As will be seen below, the rules on bona fide acquisition are a key issue in combating the illicit traffic in cultural property.

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[2] This is partly because clandestinely excavated objects are not inventoried before they appear on the market with the result that it is difficult to assess the scale of this traffic, owing to lack of awareness of the unlawful acts. At the same time, most States keep statistics on the types of offences committed and not the type of property affected by the offence, making it difficult to determine which of the offences recorded specifically related to cultural property. See: www.interpol.com.

[3] For further information: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=52210 (consulted on 26 August 2014).

[4] For further information: http://www.ekathimerini.com/4dcgi/_w_articles_wsite1_1_08/07/2014_541191 (consulted on 26 August 2014) and https://plone.unige.ch/art-adr/news-actualite/over-10-600-artifacts-looted-in-wwii-returned-to-greece (consulted on 26 August 2014).

At the same time, the United Nations Office on Drugs and Crime (UNODC) is currently framing guidelines on "Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking".[5]

At European level, there is a Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State dated 15 March 1993[6] and a Council Regulation of 9 December 1992 on the export of cultural objects (Council Regulation No. 3911/92). The Directive concerns the export of cultural objects within EU Member States whereas the Regulation deals with the export of cultural objects outside the European Union.

When discussing illicit trafficking in cultural property, it is important to bear in mind that countries are split between "exporting" States which tend to favour tougher laws on trafficking and "importing" States which, on the contrary, wish to protect the art market and prefer flexible laws in this area.

In the light of the above, it is worth looking at the reasons preventing States from ratifying the Council of Europe Convention on Offences relating to Cultural Property.

II. Illicit trafficking in cultural property:

It is important firstly to consider briefly what illicit trafficking in cultural property involves. Usually what is meant by the term "illicit trafficking in cultural property" is the following:[7]

- the illicit export of cultural property
- illicit excavations
- criminal offences relating to cultural property

a) Illicit export:

Cultural property is deemed to have been illicitly exported if is removed from a country's national territory (whether by its legitimate owner or otherwise), in breach of national legislation on the protection of cultural heritage. Such legislation generally comes under the heading of public law. Whenever a State requests the return of cultural property that has been illicitly exported from its territory therefore (i.e. in breach of the national legislation prohibiting the export of the property or making such export subject to authorisation) and imported into the territory of another State, the implication is that the requested State recognises the public law legislation of the requesting State. Recognising and enforcing another State's public law is often problematic, however. As a result, illicitly exported property is seldom returned to the State of origin solely on the ground that there has been a breach of the latter's national legislation, owing to a failure to recognise foreign public law. International co-operation in cases of illicit export of cultural property (which, furthermore, has not been the subject of a criminal offence) very often remains a dead letter therefore.

[5] https://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-mandate.html (consulted on 26 August 2014).

[6] This directive was revised in May 2014.

[7] See also Marie Boillat, Le trafic illicite de biens culturels et la coopération judiciaire internationale en matière pénale, Etudes en droit de l'art, vol. 22, Genève 2012, p. 197 s.

b) Illicit excavations:

The term “illicit excavations” refers to the unlawful appropriation of property that has been excavated either lawfully or unlawfully. Such excavations generally concern archaeological objects and many States treat the unlawful appropriation of excavated objects as a criminal offence.

c) Criminal offences:

The most common criminal offences as regards illicit trafficking in cultural property are theft, receiving, unlawful appropriation of products of excavations and laundering. Unlike in the case of illicit export, States are favourably disposed towards international co-operation in criminal matters, because the offences in question are, in general, universally recognised as criminal acts.

III. The Convention on Offences relating to Cultural Property:

The Convention on Offences relating to Cultural Property is made up of the basic text and three appendices. It has been drafted in such a way as to impose certain “core” requirements on any States wishing to ratify it and to enable States which wish to go further in the fight against illicit trafficking in cultural property to include additional provisions, whether in terms of how cultural property is defined (Appendix II) or in terms of the types of conduct outlawed (Appendix III).

The basic text of the Convention focuses mainly on the scope, the principles governing co-operation in criminal matters and methods of inter-State co-operation with a view to the restitution of cultural property (execution of letters rogatory, proceedings, competence, etc.).

The real substance of the Convention is defined in the appendices, with Appendix II providing a definition of the cultural property covered by the Convention and Appendix III listing the types of conduct considered criminal offences under the Convention. We will therefore focus our attention on the appendices to the Convention.

Before examining the appendices, it is worth concentrating particularly on article 34 of the Convention on bilateral agreements. Since the aim of the Convention is to promote cooperation among States, article 34 should be drafted positively[8] and not negatively as it is currently drafted.

a) Definition of cultural property (Appendix II to the Convention):

Under Article 1 of the Convention, the definition of cultural property is divided into two parts. The first paragraph constitutes the “core” of the Convention (Art. 1 §1 of the Convention) and States are therefore bound to consider the property listed here as cultural property. They may or may not consider as cultural property the property mentioned in the second paragraph of the Convention (Art. 2 §2 of the Convention).

[8] See for example the wording of the article 3 of the Unidroit Convention from 1995, which also deals with conclusion of bilateral agreements.

Article 1 of the 1970 UNESCO Convention defines the concept of cultural property, a definition that is now widely accepted as standard and which was adopted by Unidroit in the Unidroit Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.

The definition provided in Article 1 of the Convention on Offences relating to Cultural Property is not the same as the commonly used one found in the 1970 UNESCO Convention. It also differs from the definition used in the European Directive (Art.1 of the Directive) which refers to the concept of "national treasure", on which individual States are then free to elaborate according to their domestic law.

In order to facilitate implementation of the Convention on Offences relating to Cultural Property, it might be helpful to adapt the definition of cultural property given in Appendix II to the definition provided in the 1970 UNESCO Convention, insofar as the vast majority of States which have ratified the 1970 Convention also belong to the Council of Europe. That said, some EU countries have admittedly entered a reservation concerning the definition given in the 1970 UNESCO Convention, in order that it should be compatible with their domestic law.[9]

Again in order to make the Convention more effective, it would also be better to have a single definition of cultural property that would apply to all member States rather than allowing them to pick and choose.

b) Criminal offences covered by the Convention

Appendix III to the Convention on Offences relating to Cultural Property lists the different criminal acts outlawed under the Convention. According to the Convention's explanatory report, this appendix is divided into two sections. The first section constitutes the "core" of the Convention, and is mandatory for all States wishing to ratify the instrument (Art. 3 § 1 of the Convention), while the second section contains a list of additional offences which individual States can decide to include or not when ratifying the Convention (Art. 3 § 2 of the Convention). According to Article 3 § 3 of the Convention, States may also add other behaviours that affect cultural property and are not listed in Appendix III to the Convention.

i) The core of the Convention (Appendix III §1)

Under the terms of Article 3 §1 of the Convention, States must recognise at least the following acts as criminal offences (Appendix III §1):

- thefts of cultural property
- appropriating cultural property with violence or menace
- receiving of cultural property where the original offence is listed in §1 and regardless of the place where the latter was committed.

[9] For a comprehensive assessment on this subject, see Marie Cornu, La mise en œuvre de la Convention de l'UNESCO en Europe, Paris 2012 http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Cornu_fr.pdf (consulted on 30 September 2014).

This handful of offences makes up the “core” of the Convention. Theft (Appendix III §1 lit. a) and receiving (Appendix III §1 lit. c) are treated as offences in most jurisdictions, whether they relate to cultural property or not. In principle, therefore, such acts are already part of criminal law in the majority of States.

Appropriating cultural property with violence or the use of threats, on the other hand (Appendix III §1 lit. b) perhaps constitutes a more recent offence whose substance, because of how it is worded at present, is not easy to grasp. The line between this type of conduct and theft with violence, for example, is very thin. The appropriation of property that has been illicitly excavated is usually carried out without either violence or the use of threats.. And the distinction between violence and the use of threats is likewise rather blurred. It is not easy, therefore, to determine to which types of conduct derived from illicit trafficking in cultural property this offence refers. In addition, “appropriating cultural property with violence or menace” is also related to the offence of receiving, because property which the perpetrator has appropriated with violence or menace may be the subject of a further offence, namely “receiving”, under the terms of Appendix III §1. Since “appropriating cultural property with violence or menace” is one of the “core” offences listed in the Convention, it is important that it be defined more clearly.

Moreover, the offence of “Destruction or damaging of cultural property of another person” (appendix III §1 lit. d) could be a principal offence due to the frequent and recent episodes as well as the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, which has been approved unanimously by all the UNESCO member States in 2003.

ii) Illicit export (Appendix III §2):

Recognising the illicit export of cultural property as a criminal offence is not a *sine qua non* for ratifying the Convention (Appendix III § 2 lit. h) as it is not part of the “core”.

The Council of Europe was the first to tackle the problem of illicit export of cultural property by outlawing such acts, the aim being to encourage international co-operation whenever property is illicitly exported from a State’s national territory (even if no criminal offence has been committed).

It would appear, however, that governments are not ready to make illicit export a criminal offence. If we look, for example, at the 1970 UNESCO Convention, it will be observed that, when it comes to implementing this Convention, national attitudes to illicit export can be broadly divided into two groups. Some countries, such as Canada, regard as “illicit” any import carried out in breach of national export legislation. The majority, however, have concluded bilateral agreements with various other States Parties to the 1970 UNESCO Convention, and regard as having been “illicitly exported” only the property referred to in those agreements.

Similarly and in an effort to achieve the best possible consensus, the text of the Unidroit Convention of 1995 has one set of rules for stolen property[10] and another for property that has been illegally exported. Because the Unidroit Convention was a legally binding instrument which placed heavy obligations on the States concerned, it was important that property which had been stolen (and hence the subject of an offence) be treated differently from property that had been illegally exported.

States' reaction to the 1970 UNESCO Convention and the 1995 Unidroit Convention, and the fact that governments are already reluctant to recognise national legislation banning the export of cultural property, suggest it is too early to make illicit export a criminal offence. The mere mention of illicit export of cultural property as a criminal offence might be enough to deter some states from ratifying the Convention therefore.

iii) *Bona fide* acquisition (Appendix III § 2)

Protecting *bona fide* acquirers is a central plank in the fight against illicit trafficking in cultural property. In civil law systems, bona fide acquirers usually enjoy protection, unlike in common law systems where the "*nemo dat quod non habet* "rule applies.

In contrast to the 1970 UNESCO Convention which is not self-executing, the 1995 Unidroit Convention is directly applicable and contains rules whereby persons who acquired stolen property in good faith are not protected. It is mainly because of this lack of protection for *bona fide* acquirers that the Unidroit Convention has proved less popular than the UNESCO one, with States whose laws protect *bona fide* acquirers unwilling to change the rules in cases where the acquisition related to cultural property. As a result, only 36 States, most of them "exporting States", have signed up to the Unidroit Convention.

The acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft (§2 lit. c Appendix III) is not one of the "core" offences listed in the Council of Europe Convention on Offences relating to Cultural Property. States can thus decide whether to include it or not at the time of ratification. It is not clear from reading this offence whether a *bona fide* acquirer, even if guilty of gross negligence, might, in certain circumstances, be protected. Similarly, it could be useful to specify what we mean by "circumstances" surrounding the acquisition[11].

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[10] It is worth noting that under Art. 3 para. 2 of the Unidroit Convention, any object derived from clandestine excavation is considered stolen, when consistent with the law of the State where the excavation took place.

[11] For example, article 4 par. 4 of the Unidroit Convention describes the circumstances allowing to judge the buyers' good or bad faith: "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances."

Even though the acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft is not among the “core” offences listed in the Convention, this could still pose an impediment to ratification therefore. It might also be advisable to make it clear what is meant by “grossly negligent”. Even in civil law systems, an acquirer will only benefit from *bona fide* protection if they are deemed to have exercised due diligence when acquiring the cultural property.

IV. Conclusions:

To sum up, the Convention on Offences relating to Cultural Property introduces a system for combating illicit trafficking in cultural property through criminal law. It is important that the Council of Europe takes the necessary steps to ensure that this Convention, which responds to a real need to combat this problem, is ratified by a greater number of States.

It is felt that, in order to achieve this, a more readable text is needed. For with its dual definition of cultural property and large number of “optional” offences, the Convention is difficult to implement in practice.

As far as defining cultural property is concerned, it would seem sensible to adopt a definition in line with the one used in the 1970 UNESCO Convention or the European Directive. The disparity between the definitions is hardly conducive to a clear understanding and effective implementation of the Convention.

As regards criminal offences, the “core” of the Convention ought to be clarified, and in particular the offence of “appropriating cultural property with violence or menace”.

In view of States’ attitudes towards illicit export and the acquisition of cultural property in a negligent manner, it makes sense to keep such acts as non-core offences.

That said, the fact that offences are divided into “core” and non-core offences is hardly helpful when it comes to implementing the Convention. Under Article 26, which establishes the reciprocity rule, States have a duty to co-operate only if the cultural property affected by the act in question is defined as cultural property in both States and if both States have elected to include this act in the list of offences.

Other points:

- Might it be helpful to take stock of European Union law (Directive and Regulation)?
- Might it be worth creating a link with the Council of Europe Convention on the Protection of the Archaeological Heritage (Malta Convention)?
- Would it be helpful to make a link to UNODC’s work and, in particular, the Convention against Transnational Organized Crime? The Council of Europe Convention perhaps does not do enough to underline the international dimension of the illicit trafficking of cultural goods.
- Would it be helpful to make a link with the treaties about the protection of heritage in times of war (simply in the preamble) since recent history demonstrates that it is in periods of instability that the most offences listed in appendices III are committed?

4. CONVENTION ON INSIDER TRADING (CETS NO. 130)

PROTOCOL TO THE CONVENTION ON INSIDER TRADING (CETS NO. 133)

The Convention on Insider Trading was signed on 20 April 1989 and came into force on 1 October 1991. Nine Council of Europe member States signed[12], and it was ratified by eight of them[13]. The Protocol on Insider Trading was signed on 11 October 1989 and came into force on 1 October 1991. The signatures and ratifications are the same as for the Convention. Although the Convention came into force very speedily (owing to the small number of ratifications needed for this), its scope remains very limited, all the more so because of its additional Protocol which gives pride of place to Community law where the European Union Member States are concerned, as the Convention is only used to supply Community deficiencies.

True, not long after the signature of the Council of Europe Convention, a Council Directive 89/592/ EEC[14] was adopted on 13 November 1989, concerning co-ordination of regulations on insider dealing. However, this directive displayed two shortcomings that may also be attributed to the Council of Europe Convention:

- The ingredients of the offences had definitions too general for the goal of harmonisation to be deemed genuinely achieved;
- Both instruments did/do not cover market manipulations and, principally, dissemination of misinformation about the market, an offence which no doubt has all the gravity of, and may compound, the offence of insider trading.

The European Union therefore carried out an update of its legislation by adopting Directive 2003/6/EC[15] on insider dealing and market manipulation (market abuse) which it amended with Directive 2008/26/EC[16]. These directives exhibit several contrasts with the text of the Council of Europe Convention:

- They take into account the criminal activity of the perpetrator of the impugned act. Indeed, it is not simply required that the inside information be known as a result of the person's occupational activity; criminal activity is also subsumed;
- They contemplate the case of legal persons, unlike the Council of Europe Convention. At the same time, the directives broaden their scope by covering "any person, other than the persons referred to […] who possesses inside information while that person knows, or ought to have known, that it is inside information". This broadening of scope is crucial in that the business world brings a great quantity of players together.

The European Union moreover, in each of its directives relating to this offence, takes note of the technical developments affecting the business world and does not rule out the possibility of regularly making updates of its legislation. Accordingly, a legislative

[12] Cyprus, Finland, Luxembourg, Norway, Netherlands, Czech Republic, United Kingdom, Slovenia and Sweden
[13] Only Slovenia has not ratified it
[14] http://eur-lex.europa.eu/legal-content/FR/TXT/?qid=1405067567307&uri=CELEX:31989L0592
[15] http://eur-lex.europa.eu/legal-content/FR/TXT/?qid=1405067798864&uri=CELEX:02003L0006-20110104
[16] http://eur-lex.europa.eu/legal-content/FR/TXT/?qid=1405067852590&uri=CELEX:32008L0026

draft was adopted by the European Parliament on 4 February 2014[17] and is intended to accentuate the sanctions against persons manipulating markets and committing insider trading offences.

Conclusion

The European Union directives are thus more complete than the Council of Europe Convention and serve as regular updates. Twenty-five years after its signature, and considering the rapid rate of change in the financial world and the techniques of financial crime, to carry out an update of it would surely be a wise move. Although the European Union Member States are able to apply Community law in their mutual relations, many Council of Europe member countries are not EU members. To guard against any financial haven, it makes sense to maintain a pan-European instrument.

[17] http://www.europarl.europa.eu/news/en/news-room/content/20140203IPR34503/html/Financial-market-manipulators-may-face-at-least-four-years-in-jail

5. CONVENTION ON THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW (ETS NO. 172)

The Convention on the Protection of the Environment through Criminal Law was opened for signature by Council of Europe member states and the non-member states which had contributed to its drafting on 4 November 1998. It has been signed by 14 member states but ratified only by Estonia (in 2002). As three ratifications are required for it to enter into force, the Convention remains thus far dormant. Thought therefore needs to be given to the reasons for this lack of enthusiasm for an issue which is nonetheless fundamental.

There is one school of thought which maintains that for reasons of economic competitiveness, the environment is not a priority for European states.[18] This view holds that European states are reluctant to impose environmental standards on their companies when the same standards are not in force elsewhere, thereby having a distorting effect on competition.

And yet, economic competitiveness alone is not enough to explain this lack of ratifications. Above all, it could be argued that the Convention went too far and too fast, and that in 1998 states were not yet ready to penalise practices which had an adverse effect on the environment. States are often more inclined to prefer civil or administrative sanctions in this area. However, the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 21 June 1993 (ETS No.150)[19] has not been any more successful: it has been signed by nine member states, none of which has ratified it. Accordingly, the above explanation regarding reluctance to criminalise environmental offences is not enough to fully account for this lack of ratifications.

Some authors directly challenge the very nature of environmental law. In their view, it is difficult for a single text to cover all activities which pose a serious threat to the environment.[20] They claim that the vague and general nature of the concepts of damage and environment, along with the subjective nature of the criterion determining the level of seriousness in this field make it difficult to reconcile the creation of such a general offence with the requirements of constitutional and international law.

Furthermore, there are very many international provisions in the field of environment law. There are no fewer than 60 European Union directives and regulations dealing with the various activities which could impact the environment, in particular Directive 1999/31/EC of 26 April 1999 on the landfill of waste and Directive 2000/69/EC of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air. At world level, there have also been UN initiatives, such as the establishment in 1972 of the UN Environment Programme (UNEP), designed to address environmental problems at regional and national level. There are many other international conventions relating to the environment:

- The UN Framework Convention on Climate Change, signed on 9 May 1992;

[18] P. Thieffry, *Le renforcement de la responsabilité environnementale des entreprises: tendances législatives française et européenne divergentes*, Gazette du Palais, June 2004, No. 164, p. 22

[19] http://conventions.coe.int/Treaty/en/Treaties/Html/150.htm

[20] In particular, Jacques-Henri Robert, *La Convention sur la protection de l'environnement par le droit pénal,* Droit de l'environnement, September 1999, No. 7, p. 15

- The Kyoto Protocol signed on 11 December 1997 which entered into force on 16 February 2005;
- The Convention on Biological Diversity, which entered into force on 29 December 1993.

There are many other examples of directives and conventions on the environment, but a common feature of them all is that they do not mention criminal law strictly speaking. The Council of Europe was the first to approach it from this angle, but the European Union quickly followed suit. The Council of the European Union adopted Framework Decision No. 2003/80 of 27 January 2003 on the protection of the environment through criminal law. The Commission, supported by the European Parliament, brought an action for annulment of this framework decision, which was annulled by the Court of Justice of the European Union in its judgment of 13 September 2005. Directive No. 2008/99/EC[21] of the European Parliament and of the Council on the protection of the environment through criminal law was finally adopted on 19 November 2008. This very complete directive requires states to *"provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment"*. There are some substantive differences between this Directive and the Council of Europe Convention:

- While the Council of Europe Convention penalises all types of negligence and leaves it to states to reserve the right to punish only those offences committed as a result of serious negligence, the EU Directive restricts its scope to cases of serious negligence;
- In addition, the EU Directive refers only to cases of "significant" deterioration and excludes from its scope activities having a "negligible" impact. However, the Council of Europe Convention provides no such clarification of the actual impact which environmental offences must have.

These differences tie in with the view expressed above that the Council of Europe went too far and too fast in criminalising environmental offences.

At the same time, one of the advantages of the Council of Europe Convention is that it lays down arrangements for international co-operation, thereby avoiding the presence of "environmental heavens" within Europe. In addition, it provides that groups may participate in proceedings, which is a definite plus at a time when there is an increase in the number of environmental NGOs. Lastly, it requires states to establish jurisdiction, which is not provided for in the Directive.

Conclusion

Given that this Convention has remained dormant for over 15 years, that it has been ratified by only one state and forgotten by its signatories since the entry into force of the EU Directive, what steps could be taken to put this Convention back on centre-stage at European and world level? Should one draft an additional protocol or revise the

[21] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0099

Convention? The environment lies at the heart of everyone's concerns and the Council of Europe's convention approach is an essential complement to the body of EU law.

6. COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (CETS NO.: 210)

Opened for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Union, in Istanbul on 11 May 2011, the Convention entered into force on 1 August 2014. It has 14 ratifications[22] and 22 signatures[23] not followed by ratification.

The Convention establishes a monitoring mechanism ("GREVIO") in order to ensure effective implementation of its provisions by the Parties.

7. COUNCIL OF EUROPE CONVENTION ON THE COUNTERFEITING OF MEDICAL PRODUCTS AND SIMILAR CRIMES INVOLVING THREATS TO PUBLIC HEALTH (CETS NO.: 211)

Opened for signature by the member States of the Council of Europe, the European Union and the non-member States which have participated in its elaboration or enjoy observer status with the Council of Europe, in Moscow, on 28 October 2011, the Convention has not yet entered into force. It establishes a Committee of the Parties to monitor the Convention.

The Convention has been ratified by 4 States[24] and signed by 19 States[25], including 3 non-member States.

8. COUNCIL OF EUROPE CONVENTION AGAINST TRAFFICKING IN HUMAN ORGANS (CETS NO. …)

This Convention has been adopted by the Committee of Ministers on 9 July 2014. It will shortly be opened for signature by the member States. Spain has offered to host the ceremony for the opening for signature which should take place at the end of 2014 / beginning of 2015.

This Convention establishes a Committee of the Parties to monitor the Convention.

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[22] Albania, Andorra, Austria, Bosnia and Herzegovina, Denmark, Spain, France, Italy, Malta, Montenegro, Portugal, Serbia, Sweden and Turkey

[23] Germany, Belgium, Croatia, Finland, Georgia, Greece, Hungary, Iceland, The former Yugoslav Republic of Macedonia, Latvia, Luxembourg, Monaco, Norway, the Netherlands, Poland, Romania, the United-Kingdom, San Marino, Slovakia, Slovenia, Switzerland and Ukraine

[24] Spain, Hungary, Moldova and Ukraine

[25] Germany, Armenia, Austria, Belgium, Cyprus, Denmark, Finland, France, Iceland, Italy, Liechtenstein, Luxembourg, Portugal, Russia, Switzerland, Turkey, Guinea, Israel and Morocco