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Approximation of substantive criminal law in the EU

The way forward

EDITED BY
FRANCESCA GALLI AND ANNE WEYEMBERGH

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Francesca Galli, Anne Weyembergh

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Avenue Paul Héger 26-
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EDITIONS@.ulb.be
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Foreword

This book is the result of the international conference "Approximation of substantive criminal law: the way forward" organised by ECLAN (European Criminal Law Academic Network) and the Institute for European Studies (Université Libre de Bruxelles) on 27-28 April 2012. This event took place in the framework of the project ECLAN II which has been carried out with the financial support of the European Commission (DG Justice), of the Ministry of Justice of the Grand Duchy of Luxembourg and of the Institute for European Studies (Université Libre de Bruxelles). The publication of this volume is funded by the Luxembourg's Ministry of Justice.

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Approximation of substantive criminal law: The new institutional and decision-making framework and new types of interaction between EU actors

Anne Weyembergh (in collaboration with Serge de Biolley)

Introduction

Work on approximating substantive criminal law began within the European Union (EU) under the third pillar of the Maastricht Treaty. Examples of this are the 1995 Convention on the protection of the European Community's financial interests [1], about the 1997 Convention on the fight against corruption [2] or about the different joint actions adopted at the time in the field of participation in a criminal organisation [3], trafficking in human beings [4], racism and xenophobia [5], corruption in the private sector [6], etc.

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[1] Convention of 26 July 1995 on the protection of the ECs' Financial interests, *OJ*, no. C 316, 27 Nov. 1995, p. 49 f. This Convention was supplemented with the following protocols : Protocol of 27 Sept. 1996 (*OJ*, no. C 313, 23 Oct. 1996, p. 2 f.), Protocol of 29 Nov. 1996 (*OJ*, no. C 151, 20 May 1997, p. 1 f.), Protocol of 19 June 1997 (*OJ*, no. C 221, 19 July 1997, p. 2 f.).

[2] Convention of 26 May 1997 on the fight against corruption involving officials of the EC or officials of Member States of the EU (*OJ*, no. C 195, 25 June 1997, p. 2). See also the abovementioned Protocol of 27 Sept. 1996 to the Convention of 26 July 1995 on the protection of the ECs' Financial interests (*OJ*, no. C 313, 23 Oct. 1996, p. 2 f.).

[3] Joint Action of 21 Dec. 1998 on making it a criminal offence to participate in a criminal organisation in the MS of the EU (*OJ*, no. L 351, 29 Dec. 1998, p. 1 f.).

[4] Joint Action of 24 Febr. 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (*OJ*, no. L 63, 4 March 1997, p. 2 f.).

[5] Joint Action of 15 July 1996 concerning action to combat racism and xenophobia (*OJ*, no. L 185, 24 July 1996, p. 5 f.).

[6] Joint Action of 22 Dec. 1998 on corruption in the private sector (*OJ*, no. L 358, 31 Dec. 1998, p. 2 f.).

Work was then pursued under the third pillar of the Amsterdam and Nice Treaties. In this framework and, mainly on the basis of Article 31 e) of the Treaty on the European Union (TEU), there were a growing number of initiatives in the field of approximation of substantive criminal law. More than ten framework decisions were adopted, in the field of terrorism [7], in the field of trafficking in human beings [8], in the field of sexual exploitation of children and child pornography [9], in the field of smuggling of human beings [10], in the field of counterfeiting of euros [11], in the field of fraud and counterfeiting of non-cash payments [12], in the field of corruption [13], in the field of drug trafficking [14], racism and xenophobia [15], cybercrime [16], etc. [17]. Some of these acts were 'second generation' instruments, which simply replaced the previous joint actions.

While assessment of progress in this area has been positive from a quantitative point of view, the results have been mixed from a qualitative point of view. EU work in this area has been criticised for various reasons [18], such as:

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[7] Framework Decision 2002/475/JHA of 13 June 2002 on combatting terrorism (*OJ*, no. L 164, 22 June 2002, p. 2 f.) and Framework Decision 2008/919/JHA of 28 Nov. 2008 amending Framework Decision 2002/475/JHA (*OJ*, no. L 330, 9 Dec. 2008, p. 2 f.)

[8] Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (*OJ*, no. L 203, 1 August 2002, p. 1 f.).

[9] Framework Decision 2004/68/JHA of 22 Dec. 2003 on combating the sexual exploitation of children and child pornography (*OJ*, no. L 13, 20 January 2004, p. 44 f.).

[10] Framework Directive of 28 Nov. 2002 on the strengthening of the penal Framework to prevent the facilitation of unauthorised entry, transit and residence (*OJ*, no. L 328, 5 Dec. 2002, p. 1 f.) (to be read with the directive of 28 Nov. 2002 defining the facilitation of unauthorised entry, transit and residence, *OJ*, no. L 328, 5 Dec. 2002, p. 7 f.).

[11] Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (*OJ*, no. L 149, 14 June 2000) ; Framework Decision 2001/888/JHA of 6 Dec. 2001 amending Framework Decision 2000/383/JHA (*OJ*, no. L 329, 14 Dec. 2001).

[12] Framework Decision 2001/413/JHA of 28 May 2009 combating fraud and counterfeiting of non-cash means of payments (*OJ*, no. L 149, 2 June 2001).

[13] Framework Decision 2003/568/JHA on combating corruption in the private sector (*OJ*, no. L 192, 31 July 2003).

[14] Framework Decision 2004/757/JHA of 25 Oct. 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (*OJ*, no. L 335, 11 Nov. 2004).

[15] Framework Decision 2008/913/JHA on combating certain forms and expression of racism and xenophobia by means of criminal law (*OJ*, no. L 328, 6 Dec. 2008).

[16] Framework Decision 2005/222/JHA of 24 Febr. 2005 on attacks against information systems (*OJ*, no. L 69, 16 March 2005).

[17] See, among others, the two framework decisions annulled by the ECJ (see *infra*, namely Framework Decision 2003/80/JHA of 27 January 2003 on the protection of environment through criminal law and Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal framework for the enforcement of the law against ship-source pollution).

[18] See, for instance, A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles, Editions de l'Université de Bruxelles, 2004; D. Flore, *Droit pénal européen*, Bruxelles, Larcier, 2009, p. 264 f.; A. Klip

– the low level of ambition of most instruments, which were limited to a lowest common denominator approach [19];
– their limited approximating impact – reference can be made here to the well known expressions coined by Daniel Flore, who has spoken about approximation en "*trompe-l'œil*" [20] and approximation "*de façade*" [21];
– the lack of thought behind them;
– the limited place given to general principles of criminal law, such as the legality principle [22].

This contribution is mainly intended to serve as a general introduction to this co-written book. It pursues two aims.

First, it aims to remind readers of the main institutional and decision-making reforms introduced by the Lisbon Treaty in the approximation of substantive criminal law. The main changes which will be referred to concern the legal bases (1), the importance and functions of approximation (2), the decision-making procedure (3), variable geometry (4), the legal tools and their implementation (5).

Second, this contribution aims to give an initial overview of the concrete implementation and impact in practice of these changes.

Since the entry into force of the Lisbon Treaty, various new developments have occurred in the field of the approximation of substantive criminal law. This is the area where the largest number of initiatives (seven) have been introduced.

Two have resulted in the adoption of new directives, namely Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA [23] and Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA [24]. It is interesting to look at both of these EU substantive criminal law directives from an institutional point of view, namely as a sector which is shaped through the relations between the three institutions involved in the legislative

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& H. Vander Wilt (eds.), *Harmonisation and Harmonising Measures in Criminal Law*, Amsterdam, Royal Netherlands Academy of Science, 2002.

[19] For example, according to I. Wattier, the Framework Decision of 22 Dec. 2003 on combating the sexual exploitation of children and child pornography confirms existing divergences and does not really approximate national laws ("La lutte contre l'exploitation sexuelle des enfants et la pédopornographie et la majorité sexuelle. La consécration d'une disparité", *RIDP*, 2006, p. 223 f.).

[20] D. Flore, "Une justice pénale européenne après Amsterdam", *JTDE*, 1999, p. 122 f.

[21] D. Flore, "Droit pénal matériel et Union européenne", *in* G. de Kerchove et A. Weyembergh (eds.), *Quelles réformes pour l'espace pénal européen?*, Bruxelles, Editions de l'Université de Bruxelles, 2003, p. 73.

[22] In this regard, see especially European Criminal Policy Initiative (ECPI), « Manifesto on European Criminal Policy", *ZIS*, 2009, p. 697 f.; see the contribution of M. Kaiafa Gbandi in this book and M. Kaiafa Gbandi, "The importance of core principles of substantive criminal law for a European criminal policy respecting fundamental rights and the rule of law", *EuCLR,* 2011, p. 7 f.

[23] *OJ*, no. L 101, 15 April 2011, p. 1 f.

[24] *OJ*, no. L 335, 17 December 2011, p. 1 f.

process. In this regard, the positions and new interactions between the EU institutions are of special interest.

Besides these two adopted directives, five other directives are still being negotiated. These are a proposal for a directive on attacks against information systems, which is designed to replace Council Framework Decision 2005/222/JHA[25], a proposal for a directive on criminal sanctions for insider dealing and market manipulation (the Market Abuse Directive, MAD)[26], a proposal for a directive on the freezing and confiscation of proceeds of crime in the European Union[27], a proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law[28] and a proposal for a directive on the protection of the euro and other currencies against counterfeiting by criminal law, replacing Council Framework Decision 2000/383/JHA[29]. These will also be taken into consideration in this contribution.

1. Changes in terms of legal bases

As with the whole field of police cooperation and judicial cooperation in criminal matters, approximation of substantive criminal law has been transferred into the Treaty on the Functioning of the EU (TFEU) and has consequently been communautarised. Such a change is of course essential. However, limited approximating EC competences had already been recognised in the criminal field by the European Court of Justice (ECJ) in its two famous cases of 2005 and 2007 *Commission v. Council*[30]. Subsequent to these rulings, some directives containing limited provisions of a criminal nature had already been adopted before the entry into force of the Lisbon Treaty[31].

The new legal bases are more developed than in the third pillar of the TEU. Whereas, under the third pillar, one littera only of Article 31, namely Article 31 e), was directly devoted to the field, one whole Article, namely Article 83 TFEU, is now entirely devoted to the approximation of substantive criminal law. However, as we will see, the change regarding the extent and scope of approximation raises numerous questions.

Article 83 TFEU contains a double legal basis: on the one hand, para. 1, which is the legal basis for approximation in the field of "particularly serious crime with a cross-border dimension" and the "successor" of Article 31 e) TEU (A) and, on the other hand, para. 2 which corresponds more or less to the EC competence in criminal

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[25] COM (2010) 517 final, 30 Sept. 2010.

[26] COM (2011) 654final, 20 Oct. 2011.

[27] COM (2012) 85 final, 12 March 2012.

[28] COM (2012) 363 final, 11 July 2012.

[29] COM (2013) 42 final, 5 Febr. 2013.

[30] ECJ, 13 Sept. 2005, C-176/03, *Commission v. Council* and 23 Oct. 2007, C-440/05, *Commission v. Council*. About these decisions, see especially V. Mitsilegas, *EU Criminal Law*, Oxford, Hart Publishing, 2009, p. 70 f.

[31] Directive 2008/99/EC on the protection of the environment through criminal law, *OJ*, no. L 328, 6 Dec. 2008, p. 28 f.; Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, *OJ*, no. L 280, 27 Oct. 2009, p. 52 f.; and Directive 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ*, no. L 168, 30 June 2009, p. 24 f.

matters as defined by the ECJ in its decisions of 2005 and 2007 *Commission v. Council*, also known as "annex competence" (B). The question is to establish whether other provisions of the TFEU, and especially Article 325, para. 4 TFEU, may also serve as a legal basis for the approximation of criminal law (C).

A. Article 83, para. 1 or the legal basis for approximation in the field of "particularly serious crime with a cross-border dimension"

Para. 1 of Article 83 is itself divided into three indents [32].

The first one specifies the legal tool to be used (*i.e.* directive) and the decision-making procedure to follow (*i.e.* the ordinary legislative procedure). We will come back to both aspects later on. The first indent also expresses other general requirements. Even if the wording is not precisely identical, approximation still only aims at "establishing minimum rules concerning the definition of criminal offences and sanctions" [33]. Besides, it restricts the material scope of approximation to "the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". The second indent of Article 83, para. 1, lists various fields of crime to cover. Such a list is longer than in Article 31 e) TEU. Whereas Article 31 e) only referred to organised crime, terrorism and illicit drug trafficking, the new provision also lists trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime. Considering that Article 31 e) had been interpreted broadly, Article 83, para. 1, is more to be considered as a codification of previous practice. However, such codification is not complete since all fields where approximating work effectively took place are not mentioned. This is especially the case for racism and xenophobia [34]. According to the third indent of Article 83, para. 1, TFEU, the Council may adopt a decision identifying other areas of crime where to carry out approximation but these must meet the condition of being "particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or

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[32] According to Article 83 TFEU: "1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament".

[33] Article 31 e) TEU refers to "(…) establishing minimum rules relating to the constituent elements of criminal acts and to penalties (…)".

[34] H. Satzger, *International and European Criminal Law*, München, C.H. Beck, Hart, Nomos, 2012, p. 74 ; P. Asp, *The substantive criminal law competence of the EU*, Stockholm, Skrifter utgivna av juridiska fakulteten vid Stockholms universitet, no. 79, 2012, p. 92-93.

from a special need to combat them on a common basis" and only through a decision to be adopted unanimously by the Council with the consent of the European Parliament. From the sole existence of this third indent, it follows logically contrary to the opinion of some scholars [35] – that the list of areas of crime contained in the second indent is not a list of examples but an exhaustive list [36]. As a consequence, the explicit extension of the list by the Lisbon Treaty seems to result in the paradoxical effect of reducing the scope of this legal basis by comparison with the scope of Article 31 e) TEU.

Para. 1 of Article 83 raises numerous questions [37].

Among them, there is the question of the exact scope of the general requirements of the first indent and especially the question of the link between these and the second indent: are these requirements considered as being met *per se* by all the areas of crime mentioned in the second indent? Although these areas can be considered as usually particularly serious [38], they are not all necessarily crossborder in nature. However, as it emerges from the wording of Article 83, the crossborder nature of the areas of crime not only results from their nature but also from their "impact or from a special need to combat them on a common basis". Of course the exact meaning of this last expression is not clear. But these alternative sources of the crossborder nature of areas of crime and the structure of the provision – especially the word "these" opening the second indent – plead in favour of the opinion according to which the listed areas of crime are considered as meeting the general requirements of the first indent.

Besides the abovementioned expression "from a special need to combat them on a common basis", other expressions contained in Article 83, para. 1, TFEU are rather vague and consequently create uncertainty. It is particularly the case for "minimum rules" "concerning the definition of criminal offences and sanctions" and "areas of particularly serious crime".

What exactly does "minimum rules" mean? Such a question is relevant both with regard to the definition of criminal offences and sanctions. Firstly, concerning the definition of criminal offences, the mainstream interpretation considers that minimum rules refer to a *minimum of criminalisation* and that EU Member States are therefore allowed to criminalise more. However some authors have tried to counter such an approach and have boldly suggested that minimum rules could also refer to a *minimum of constituent elements*, which would lead to a maximum of criminalisation [39]. Although this would make it possible to circumvent many problems created by the "minimum rules" system and especially its missed or reduced approximating impact

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[35] C.F. Bergström, J. Hettne and A. Södersen, *Lissabonfördraget*, Stockholm, SIEPS, 2008, p. 50, quoted *in* P. Asp, *op. cit.*, p. 81.

[36] See P. Asp, *The substantive criminal law competence of the EU*, *op. cit*., p. 81-82.

[37] About these questions, see especially P. Asp, *The substantive criminal law competence of the EU*, *op. cit.*, p. 15-16 and H. Satzger, *op. cit.*, p. 74 f.

[38] Doubts about this particular seriousness are worded by P. Asp, *op. cit.*, p. 83.

[39] In this respect, see A. Klip, *European Criminal Law*, Antwerp, Intersentia, 2nd ed., 2012, p. 162 and, more explicitly, H. G. Nilsson, "How to combine minimum rules with maximum legal certainty?", *Europättslig tidskrift*, 2011, p. 670 f.

and the general move towards more criminalisation [40], such an audacious interpretation is logically problematic and difficult to justify. In this respect, we fully share P. Asp's opinion [41]. These attempts confirm the need to do a more in-depth evaluation of the general impact of EU legal instruments in the field on internal criminal law [42] and the need to reflect on the sensitive question of how to avoid the problematic impact of the "minimum rules" system. Secondly, there is also a clear need to reflect on the meaning of "minimum rules" as regards sanctions. Although the usual applicable system was to prescribe a minimum level for the maximum penalties (the so-called minimum of maximum system), the last two proposals – *i.e.* the proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law and the proposal for a directive on the protection of the euro and other currencies against counterfeiting by criminal law – also provide for a minimum level for the minimum penalties [43]. Although such a system is compatible with the wording of Article 83, it is nevertheless open to criticism from the point of view of consistency. To our knowledge none of the guiding documents in the field mentioned the introduction of such a system [44] and the reasons given to justify such a new approximating mechanism are not very convincing [45]. Besides, such a mechanism could create problems in some national legal systems [46].

What is the scope of "the definition of criminal offences and sanctions"? Does this expression only cover the definition of constituent elements of crime and sanctions and does it exclude approximation of all other fields of criminal law, such as criminal law jurisdiction? Considering the broader contents of the framework decisions adopted on the basis of Article 31 e) TEU [47], a positive answer to the

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[40] In this respect, see for instance V. Santamaria and A. Weyembergh, "Conclusions" *in The evaluation of European criminal law. The example of the Framework Decision on combating trafficking in human beings*, Brussels, Editions de l'Université de Bruxelles, 2009, p. 379 f.

[41] P. Asp, *op. cit.*, p. 116-121.

[42] In this regard, see A. Weyembergh and S. de Biolley, *Comment évaluer le droit pénal européen ?*, Brussels, Editions de l'Université de Bruxelles, 2006.

[43] See Article 8 of the proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law and Article 5 para. 4 a) of the proposal for a directive on the protection of the euro and other currencies against counterfeiting by criminal law.

[44] See especially the conclusions of the Council of 25 and 26 April 2002, doc. 9141/03; Council document, *Council Conclusions on model provisions, guiding the Council's criminal law délibérations, adopted by the JHA Council on 30 November 2009*; "Towards an EU criminal policy?: Ensuring the effective implementation of EU policies through criminal law", Commission Communication of 20 September 2011, COM (2011) 573 and European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310 (INI)) (see annex to the present book).

[45] See especially the link made with the EAW in the Commission's proposals (COM (2012) 363 final, p. 8 and 14 and COM (2013) 42 final, p. 12.

[46] See, for example, the French legal system.

[47] Framework decisions based on Article 31 e) did contain provisions tackling other aspects of criminal law than only constituent elements and sanctions, such as criminalisation of ancillary offences, jurisdiction, liability of legal persons, etc.

question would amount to a very formal approach. In its Communication of 2011 entitled "Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law", the Commission lists a broader series of measures which can be covered by Article 83 [48]. And all new initiatives contain other rules than those strictly related to the definition of offences and sanctions. But only the proposal for a directive on the protection of the euro and other currencies against counterfeiting by criminal law is based solely on Article 83, para. 1, TFEU. Four others are based on both Articles 83, para. 1 *and* 82, para. 2, TFEU, *i.e.* the two abovementioned newly adopted directives, the proposal for a directive on attacks against information systems and the proposal for a directive on the freezing and confiscation of proceeds of crime in the European Union [49]. However it is important to know how extensive the interpretation of the scope of Article 83, para. 1, can be. Does Article 83 allow, for instance, to cover requirements related to prescription? Such a question is quite topical since the abovementioned proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law contains such requirements. Its Article 12 requires the establishment of a minimum period of prescription as well as a provision on the prescription period for the enforcement of penalties following a final conviction. As we will see later on, this proposal is not based on Article 83 but on Article 325, para. 4, TFEU. However, this choice of legal basis raises important debates and seems to be quite controversial among the Member States of the EU. If such a legal basis is rejected and if Article 83, para. 1, is chosen to replace it, then it is important to know whether this legal basis allows the rules on prescription to be covered. Article 82 relating to criminal procedure cannot be of any help since prescription is not among the fields mentioned by its para. 2. So, in the end, it remains to be seen whether such a provision will survive negotiations in Council and, if yes, on what legal basis.

What are "areas of particularly serious crime"? No definition and no criteria are provided, which would help define the needed threshold that areas of crime must satisfy to allow approximation on the basis of Article 83, para. 1, TFEU. Petty crimes are of course excluded but the rest is still shrouded in uncertainty. This is all the more true as it is not "areas of serious crime" which are mentioned but "areas of *particularly* serious crime" [50].

B. Article 83, para. 2 or the so-called "annex-competence"

Article 83, para. 2, is new in the Treaty. It is a quasi-codification [51] of the case law of the ECJ in its two famous rulings of 2005 and 2007 *Commission v. Council*. It shares numerous common features with the annex-competence as recognised by the ECJ. However, as provided for by Article 83, para. 2, the annex-competence is more circumscribed on some aspects. This is particularly clear when thinking about

[48] Commission Communication of 20 September 2011, COM (2011) 573, p. 9.

[49] COM (2012) 85 final, 12 March 2012.

[50] P. Asp, *op. cit.*, p. 85-86.

[51] P. Asp speaks about a "codification" of the ECJ's case law but considers at the same time that the annex competence of Article 83, para. 2 is not identical with the competence resulting from that case law (*op. cit.*, p. 127).

the existence of the emergency brake provided for in Article 83, para. 3. But, on other aspects, the new legal basis is broader. In its second ruling of 2007, the ECJ had expressly declared that "contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence" [52]. Such a limitation is not of course valid any more under Article 83, para. 2 [53]. Besides, the 2007 *Commission v. Council* decision did not provide a clear answer to the question as to whether the annex competence extended beyond the EU's environmental policy. With Article 83, para. 2, it is of course very clear that it does [54].

Under the condition that "approximation of criminal law proves essential to ensure the effective implementation of a Union policy which has been subject to harmonisation measures", this provision makes it possible to extend or diversify the areas in which approximation is carried out. Considering that it does not require a certain level of harmonisation, it is to be considered that Article 83, para. 2, only requires the existence of harmonisation measures. Such a legal basis potentially opens the way towards a very broad criminal law competence [55]. This was also the view of the *Bundesverfassungsgericht* [German constitutional court], which called for this provision to be interpreted narrowly [56]. Consequently, its insertion in the Treaty and its "accompanying" risks resulted in a kind of beneficial or salutary awareness as to the need to somehow frame the approximation work. It led to the adoption by the Justice and Home Affairs (JHA) Council, by the European Commission and by the European Parliament of guidelines aimed at orienting the EU's work on the approximation of substantive penal law [57]. We will come back to these texts later on in this contribution and elsewhere in this book [58].

As with para. 1, para. 2 of Article 83 raises numerous questions. Under para. 2, approximation is also limited to the establishment of minimum rules concerning the definition of criminal offences and sanctions. The meaning of this wording raises the same questions as under para. 1. As previously underlined, approximation is allowed if criminal law proves essential to ensure the effective implementation of a Union policy. What then is the exact meaning of "essential"? Is such an expression more demanding than the necessity criteria or is it equal to it? Another question is whether

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[52] Para. 70.

[53] D. Flore, *Droit pénal européen*, *op. cit.*, p. 271.

[54] See also, P. Simon, "The criminalisation power of the EU after Lisbon and the principle of democratic legitimacy", *NJECL*, 3, 2012, p. 250.

[55] According to H. Satzger, Article 83, para. 2, is a "blanket clause" (see *op. cit.*, p. 76 f). See also V. Mitsilegas, *op. cit*., p. 112 ; P. Asp, *op. cit*., p. 128-129.

[56] Bundesverfassungsgericht, 2 BVE 2/08, 30 June 2009, para. 361 and 362.

[57] Council document, *Council Conclusions on model provisions, guiding the Council's criminal law deliberations, adopted by the JHA Council on 30 november 2009*; "Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law", Commission Communication of 20 September 2011 COM (2011) 573 and European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310 (INI)) (see annex to the present book).

[58] See especially the contributions by C. De Jong and by J.A.E. Vervaele.

harmonisation measures should preexist before allowing the adoption of measures on the basis of Article 83, para. 2, or whether both harmonisation measures and criminal law measures may be adopted simultaneously [59].

So far, there has been no "abuse" of para. 2: the proposal for a directive on criminal sanctions for insider dealing and market manipulation [60] is the only text based on this legal basis.

C. Article 325, para. 4, TFEU as a legal basis for the approximation of criminal law in the field of fraud affecting the Union's financial interests?

Besides these legal bases in Title V of the third part of the TFEU, the potential of other provisions located elsewhere in the Treaty is an open question. Besides Article 33 TFEU on measures to strengthen customs cooperation [61], it is especially Article 325 TFEU that has attracted attention and especially the question of whether it can be interpreted as containing additional criminal law competence in the field of fraud affecting the Union's financial interests. It is the "successor" of Article 280 TEC [62]. Although some notions it uses, such as "fraud" have a criminal law connotation, it does not explicitly refer to criminal law [63]. The exception which existed in Article 280, para. 4 – "These measures shall not concern the application of national criminal law or the national administration of justice" – has been deleted. In spite of this change, as with its predecessor Article 280, para. 4, TEC [64], Article 325, para. 4, can give

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[59] On both questions, see for instance P. Asp. *op. cit.*, p. 129 f.

[60] COM (2011) 654 final, 20 Oct 2011.

[61] See V. Mitsilegas, *EU Criminal Law, op. cit.*, p. 109; S. Miettinen, *Criminal law and Policy in the EU*, London – New York, Routledge, 2013, p. 52.

[62] According to Article 280 TEC "1. The Community and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.
3. Without prejudice to other provisions of this Treaty, the Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.
4. The Council, acting in accordance with the procedure referred to in Article 189b, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.
5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article".

[63] P. Asp. *op. cit.*, p. 142-143.

[64] Some have considered that, in spite of the exception contained in its para. 4, Article 280 TEC provided the EC with a criminal law competence. In this respect, it is worth reminding

rise to two different interpretations [65]. One is that the deletion of the reservation is interpreted as having removed all impediments to the recognition of an additional basis of criminal law competence. Article 325 is then considered as providing a specific legal basis for EU criminal law competence in the field of combating fraud. This is the opinion defended by the European Commission, which based its proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law [66] on Article 325, para. 4, TFEU [67]. According to the other interpretation as understood by the legal service of the Council, the deletion of the reservation must be read in conjunction with the insertion of Article 83, para. 2, and the very existence of such an annex-competence must be interpreted against an approach viewing Article 325 as an autonomous legal basis in criminal law [68]. It is true that the first approach offers numerous advantages from the point of view of the approximation scope and impact, all of which lead to the abolition or reduction of the restrictions existing in the framework of Article 83 TFEU. In this regard, it is worth mentioning the inapplicability of the emergency brake and of the opt-outs for Denmark, the UK and Ireland, the possibility to use directive and regulations [69], as well as the possibility to go beyond the establishment "of minimum rules concerning the definition of criminal offences and sanctions"... However both opinions are based on convincing arguments [70]. It remains to be seen what will be the outcome of the negotiations of the abovementioned proposal. But, for the time being, it seems that the legal basis selected by the Commission has not gained consensus among the Member States and that it will be most probably rejected by the Council.

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that some experts of the *Corpus Juris* considered that at least parts of the *Corpus Juris* could be adopted on that legal basis (see E. Bacigalupo, *in* M. Delmas-Marty and J.A.E Vervaele, *The implementation of the Corpus Juris in the Member States*, vol. I, Antwerp, Intersentia, 2000, p. 369 f. ; M. Delmas-Marty, *in ibid*., p. 374 f.; D. Spinellis, *in ibid*., p. 383 f.; K. Tiedemann, *in ibid*., p. 385 f). The European Commission shared the same opinion since it chose Article 280 TEC as a legal basis for its proposal for a directive on the criminal law protection of the Community's Financial interests (COM (2001) 272, *OJ*, no. C 240 E, 28 August 2001). Others considered that the existing exception in Article 280, para. 4 excluded any criminal law competence (J. Spencer, *in ibid*., p. 380 f.).

[65] V. Mitsilegas, *op. cit*., p. 109.

[66] COM (2012) 363 final, 11 July 2012. This is also the opinion of scholars such as H. Satzger, *op. cit.*, p. 55-56.

[67] According to Article 325, para. 4, TFEU: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies".

[68] Council legal Service document 15309/12, 22 Oct. 2012, only partially accessible but see para. 12, quoted by P. Asp, *op. cit.*

[69] It is to be noted that if Article 325 TFEU is considered as entailing independent criminal law competence, then the possibility to use regulations opens the way not only to an approximation or harmonisation of criminal law but to a real unified supranational EU criminal law (in this regard, see H. Satzger, *op. cit*., p. 46 f.).

[70] About this whole debate, see especially P. Asp, *op. cit.*, p. 142 f.

2. Changes in terms of importance and functions of approximation

Approximation is first mentioned in the general provisions opening Title V of the third part of the TFEU, more precisely in Article 67, para. 3, as one of the types of measures to ensure a high level of security. This is not new: approximation was also mentioned in the opening provision of ex Title VI TEU – *i.e.* Article 29. And as previously, it is the last kind of measures mentioned. It intervenes after coordination and cooperation measures and after mutual recognition. As previously, it is moreover preceded by the words "*if necessary*", showing the particular sensitivity of the field.

Approximation of criminal laws is then further developed in Chapter IV of Title V. But this chapter is entitled 'judicial cooperation in criminal matters', so that, as previously, approximation does not appear in any title. However, in Chapter IV, approximation is given much more space than in Title VI TEU: Article 83 TFEU is much more developed and longer than the previous Article 31 e) TEU.

As regards the functions of approximation of substantive criminal law, it is to be stressed that, contrary to Article 82, para. 2, TFEU, which subordinates the development of approximation of procedural law to the condition that it is necessary to facilitate mutual recognition and cooperation, Article 83 does *not* impose such a condition.

As a consequence, Article 83, para. 1, does not explicitly consider approximation of substantive criminal law as being only an auxiliary of cooperation and mutual recognition or as an element fostering and strengthening mutual trust [71]. Consequently, it allows the development of approximation independently of any other ongoing EU work and consequently leaves room for its so-called "autonomous functions". Since we already develop on other occasions this difference between auxiliary or ancillary functions, on the one hand, and the autonomous functions of approximation, on the other hand [72], we will not repeat our reflection here. But we would like to point out that approximation's autonomous functions include the development of the so-called "sword function" [73] of EU substantive criminal law which aims at enhancing the fight against crime and at preventing criminals from benefitting directly or indirectly from the existing disparities in substantive criminal law between the EU Member

[71] In its Communication of 20 Sept 2011 "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law", the European Commission explicitly mention such auxiliary function of approximation of substantive criminal law : "Common minimum rules in certain crime areas are also essential to enhance the mutual trust between Member States and the national judiciaries. This high level of trust is indispensable for smooth cooperation among the judiciary in different Member States. The principle of mutual recognition of judicial measures, which is the cornerstone of judicial cooperation in criminal matters, can only work effectively on this basis" (p. 3).

[72] See A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions*, *op. cit.*, and A. Weyembergh, "The Functions of Approximation of penal Legislation within the European Union", *Maastricht Journal of European and Comparative Law*, 2005, p. 149 f.

[73] About the distinction between the sword and the shield functions of criminal law, see J.A.E. Vervaele, "Régulation et répression au sein de l'Etat providence : la fonction "bouclier" et la fonction "épée" du droit pénal en déséquilibre", *Déviance et Société*, 123, 1997.

States[74]. The importance of such an autonomous function already resulted from Article 29 TEU since it mentioned approximation among the measures to ensure a high level of security. Such importance has been confirmed by the abovementioned Article 67, para. 3. As previously, the text of the TFEU does not rule out considering other autonomous functions as well, such as developing and ensuring the exercise of the free movement of persons within the EU, reinforcing the notion of European citizenship and giving citizens a common sense of justice throughout the Union[75]. If it is true that such autonomous functions of approximation are not directly and explicitly mentioned in the Commission's Communication, such a common sense of justice is essential as it greatly contributes to creating a feeling of belonging together to a common area[76]. In this regard, the 'identity fostering effect'[77] of approximated criminal law should also be taken into consideration.

By comparison with the previous Treaty, the biggest novelty of the Treaty of Lisbon regarding the approximation's functions lies in Article 83, para. 2, which develops the auxiliary/ancillary functions of approximation but vis-à-vis EU policies. Its main aim is to ensure effective enforcement of Union policies, to guarantee their "effet utile". As Valsamis Mitsilegas explains, criminal law is treated here again as a means to an end and is evoked to protect a potentially wide range of interests[78]. We will not go further into the details of the functions of approximation on the basis of para. 2 since this is precisely one of the focuses of John Vervaele's contribution to this book.

When reflecting on the functions of the approximation of substantive criminal law, it should of course be borne in mind that, along with the necessity condition provided for by Article 67 TFEU, draft legislative acts aiming at approximating substantive criminal law must satisfy the conditions of subsidiarity and proportionality as prescribed and defined by Article 5 TEU[79]. In this regard, the role of national parliaments has been extended by Protocol no. 2 on the application of the principles

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[74] In its Communication of 20 Sept 2011 "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law", the European Commission explicitly mentions such a function: "In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes" (p. 3).

[75] See *L'espace judiciaire européen, Actes du colloque organisé en Avignon le 16 octobre 1998*, Paris, la Documentation française, 1999, p. 114 ; *contra ibid.*, p. 115.

[76] About the criminal field and this sense of belonging see M. Verdussen, *Contours et enjeux du droit constitutionnel pénal*, Bruxelles, Bruylant, 1995, p. 695. In the field of criminal sanctions see A. Bernardi, "Opportunité de l'harmonisation", *in* M. Delmas-Marty, G. Giudicelli-Delage and E. Lambert-Abdelgawad (eds.), *L'harmonisation des sanctions pénales en Europe*, Paris, Société de legislation comparée, 2003, p. 460.

[77] The 'effet constitutif d'identité' is the expression used by U. Sieber, "Union européenne et droit pénal européen. Proposition pour l'avenir du droit pénal européen", *Revue de science criminelle*, 1993, p. 262.

[78] V. Mitsilegas, *op. cit.*, p. 112.

[79] For a reflection of the principle of subsidiarity in the context of substantive EU criminal law, see P. De Hert and I. Wieczorek, "Testing the principle of subsidiarity in EU criminal Policy", *NJECL*, 3, 2012, p. 394 f.

of subsidiarity and proportionality [80] and such a role is stronger in the criminal law field than in the context of other EU policies [81]. The link between the conditions of necessity and proportionality, on the one hand, and the principle of *ultima ratio,* on the other hand, needs to be underlined [82]. Such a link is especially obvious in the Council conclusions of 30 November 2009 on model provisions guiding the Council's criminal law deliberations [83] and in the 2011 Communication of the Commission "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law" [84].

With regard to the abovementioned conditions, the importance of thorough impact assessments preceding any legislative proposal introduced by the Commission must of course be stressed.

3. Institutional and decision-making changes

Concerning the right of initiative, the sharing of the right of initiative between the Member States and the Commission has been maintained. However, according to Article 76 TFEU, the right of initiative of Member States is subordinated to a threshold of a quarter of the Member States introducing the proposal. It is quite striking to notice that, since the entry into force of the Lisbon Treaty, none of the abovementioned initiatives introduced in the field of approximation of substantive criminal law has been introduced by the Member States. All were introduced by the European Commission, thereby confirming that approximation of criminal laws (both substantive and procedural) has been a clear Commission priority.

It should be noted that all new Commission proposals have gone through an impact assessment [85]. Of course, these *ex ante* evaluations are an excellent idea. However their implementation has come up against a lot of criticism. It is a long, heavy and expensive process whereas its real added value, autonomy and impact remain to be proven.

Regarding the decision-making rules, the move to co-decision was of course a fundamental change introduced by the new Treaty.

The intervention of the European Parliament as a co-legislator represented a huge change for the entire EU area of criminal justice but this was of particular importance in the field of approximation of substantive criminal law since it concerns the definition of offences and of sanctions. This change made it possible to improve the work from the point of view of its democratic legitimacy and from the point of view of the legality principle in its formal dimension. But, after so many years of the Council's monopolistic decision-making role, this new decision-making role for the European

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[80] See especially its Article 6.

[81] See Article 7, para. 2.

[82] About this link, see also S. Miettinen, *Criminal law and Policy in the EU*, *op. cit*., p. 119. See also P. Simon, *op. cit*., p. 253 f. and S. Melander, "Ultima ratio in European Criminal law", *EuCLR*, 3, 2013, p. 45 f.

[83] Under the title *Assessment of the need for criminal provisions.*

[84] See especially para. 2.2.1.

[85] These are available on the following website : http://ec.europa.eu/governance/impact/ia_carried_out/cia_2009_en.htm#jls.

Parliament was a real challenge for all actors concerned, which have had to adapt themselves to the new institutional landscape and the distribution of competences. The European Parliament has had to evolve from a purely consultative role – which was often a role as an opponent – towards a decisive decision-making one. It had to gain experience, impose itself and show its credibility in such a technical field.

The move from unanimity to Qualified Majority Voting (QMV) was also essential. However this change was accompanied by the insertion of the so-called "emergency brake". According to Article 83, para. 3 TFEU, when a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system, the ordinary legislative procedure is suspended and the proposal is referred to the European Council. If, within four months, unanimity is reached, the draft is referred back to the Council and the suspension is lifted. If an agreement is not reached in the European Council, a group of at least nine Member States can establish enhanced cooperation. Such a mechanism can be considered as a compensation for the loss of the veto right that each Member State had under the former third pillar TEU [86]. It can also be viewed as echoing and making concrete the principles expressed in Article 4, para. 2, TEU [87] and particularly in Article 67, para. 1, TFEU [88]. For the time being such a mechanism has not been used. We can really wonder which Member State will first take the responsibility to have recourse to it. For the UK and Ireland, it is of course easier to use their *opt-out*. Such a mechanism is most likely to be used in the field of procedural law [89]. In the field of substantive criminal law, recourse to it seems less probable but is, however, always possible. P. Asp, for instance, gives an example from the Swedish point of view, *i.e.* rules concerning the freedom of press [90]. Approximation of criminal sanctions could also give rise to recourse to such a mechanism. But, so far, although provisions on the approximation of criminal sanctions have evolved [91], they remain, generally speaking, limited [92]. But let us imagine that the provisions approximating the sanctions develop into future initiatives or let us imagine that a crosscutting initiative is presented in the field of sanctions. In those cases, one could easily imagine that the emergency-brake mechanism could be used.

As a consequence of the changes introduced by the Treaty of Lisbon in the field of the approximation of substantive criminal law, and especially as a consequence of the institutional and decision-making reforms, each of the three main intervening

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[86] P. Asp, *op. cit.*, p. 140.

[87] According to Article 4, para. 2, TEU, "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (…)".

[88] According to Article 67, para. 1, "The Union shall constitue an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

[89] See Article 82, para. 3, TFEU.

[90] P. Asp, *op. cit.*, p. 140.

[91] See Directive on trafficking in human beings and the one on sexual exploitation of children.

[92] In this regard, see especially the proposal related to insider dealing and market manipulation.

institutions in the legislative process has felt the need to adopt a general position on EU substantive criminal law. In chronological order, the Council first adopted its "Conclusions on model provisions, guiding the Council's criminal law deliberations", adopted by the JHA Council on 30 November 2009, the Commission then adopted its Communication of 20 September 2011 entitled "Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law" and, finally, the European Parliament adopted its resolution of 22 May 2012 "on an EU approach to criminal law". These three documents are published in the annex of this book and are further examined in other contributions to this book. Although there are differences between each of these institutions' positions, important similarities can also be observed. It is interesting to examine what each institution's purpose was when adopting such a guiding document.

The conclusions of the Council were proposed at the beginning of the Swedish Presidency of the EU at a time when the entry into force of the Lisbon Treaty was becoming more likely even if the Irish referendum had not yet taken place. The conclusions have to be understood as an attempt by the JHA Council to "protect" criminal law both from the Commission, the European Parliament and other formations of the Council. The principles recalled in the conclusions are mainly there to avoid losing control of the development of the legislation. This fear comes from the sharing of legislative powers with the European Parliament stemming from the ordinary legislative procedure (co-decision) as well as the explicit legal basis to adopt criminal law directives in policies other than JHA (namely Article 83, para. 2 TFEU), which could lead to a stronger influence of other formations of the Council. It is interesting to note that the Member States and the Council see themselves as the protectors not only of criminal law but of a reasonable and nuanced version of a "minimal criminal law", based especially on the principle that criminal law should only be used as an *ultima ratio*.

It is precisely because these conclusions are there to limit the use of the new possibilities and framework of the Lisbon Treaty that some Member States were reluctant to adopt them and that the Commission made a declaration [93]. While the Member States supporting the conclusions could argue that no expert in criminal law and no justice minister could oppose the principles mentioned in the conclusions, the other Member States were also entitled to reply that, if the only intention was to

[93] According to the Commission's declaration: "The Commission fully shares the objective to ensure consistency in European Union legislation relating to criminal law. However, the Commission considers the Guidelines and model provisions contained in the Council's Conclusions are premature and restrict the interpretation of Article 83 of the Treaty on the Functioning of the EU (TFEU). By issuing such guidelines and model provisions the Council unilaterally establishes a framework for future legislation to which neither the Commission nor the European Parliament agreed. The Commission therefore declares that these guidelines and model provisions are without prejudice to its right of initiative in accordance with the TFEU. The Commission also declares that it will exercise this right with due care and based on an impact assessment following appropriate consultations" (see Council of 30 Nov.-1 Dec. 2009, doc 16826/09, p. 22).

recall these somehow obvious principles, there was no need to adopt such conclusions which were sending an aggressive signal towards the European Parliament.

The communication of the Commission had been announced early in the mandate of Vice-President Reding but was only released on 20 September 2011. While, in the beginning, it seemed a good idea for the Commission also to explain its vision, enthusiasm was soon replaced by a persistent hesitation. The problem with such an initiative was that it compelled the Commission to explain its interpretation of Article 83, para. 2, which was both tricky and dangerous as it could either lead to disappointment about the lack of ambition of the Commission or criticism from the Member States on the fact that the Commission was going too far. The same goes for the projects of the Commission regarding the "euro crimes" mentioned in Article 83, para. 1. It seemed better to work on a case-by-case basis with concrete proposals in specific fields. But it was impossible for the Commission to completely give up on the communication. The end result focuses on Article 83, para. 2, and is moderate and nuanced. The most striking thing about the communication is its title, which refers to an "EU criminal policy". Such an expression allowed us to expect an ambitious text. However, the real added value or usefulness of its contents is rather difficult to identify. On the basis of its title, one could deduce that, for the Commission, the concept of "criminal policy" is limited to deciding when criminal law needs to be used in a specific sector. While it is an important aspect of a criminal policy, it seems strange to completely leave aside other issues like sanctions and its enforcement.

The European Parliament's resolution of 22 May 2012 was the last of the three documents on EU substantive criminal law that was adopted. Such an initiative seems less based on the feeling of a real need to carry out this horizontal work than on the irritation generated by the unilateral work of the Council and resulting in the abovementioned conclusions. As for the report itself, its quality is certainly due to the expertise and approach of the rapporteur himself. Its contents were not really controversial: it was adopted almost unanimously and apparently without many changes introduced by the other political groups [94].

Besides these three documents, it is also interesting to take a look at the concrete implementation of the Lisbon Treaty and at the consequences of the institutional and decision-making changes it introduces.

For the time being, it is difficult to say something reliable about the consequences of the abovementioned changes on the speed of negotiations and of adoption. The two initatives adopted so far on trafficking and on sexual exploitation of children are not really representative of the new rhythm of the decision-making process since both proposals had already been introduced and discussed before the entry into force of the Lisbon Treaty [95]. After its entry into force, they were re-introduced by the Commission

[94] On this resolution, see the contribution of C. De Jong in this book.

[95] See proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2009) 136 final, 25 March 2009 and proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, COM (2009) 135 final, 25 March 2009.

as proposals for directive [96]. They were adopted in first reading. The Council reached a general approach on two other proposals, namely the one on attacks against information systems [97] and the one on criminal sanctions for insider dealing and market manipulation (the market abuse directive) [98]. The delay in formally adopting the first proposal seems mainly due to the suspension of the decision-making process following the "legal conflict" on the Schengen evaluation mechanism between the European Parliament and Council in June 2012 [99]. The three other ones have been introduced more recently and are still being negotiated within the Council.

As regards the consequences of the abovementioned institutional and decision-making changes in terms of the content of the instruments, some tendencies emerge from the directives on trafficking in human beings and on sexual exploitation of children. However, since these directives are the only ones, which have been adopted so far, we lack the necessary distance to make any thorough conclusion. Besides, when examining each institutions' role, especially the Council or the Parliament's role, one should always keep in mind that it does not necessarily represent the views of each component of the institution. EU substantive criminal law is not a battleground for the redefinition of the powers of the European Parliament in former third pillar issues in the same way as the sector of data processing has been in the last few years. No negotiation of a directive on EU substantive criminal law has led to an institutional drama such as the vote on the EU-US Terrorist Finance Tracking Programme (TFTP) Agreement or on the EU-US Passenger Name Record (PNR) Agreement. Nevertheless, an important part of the content of EU instruments of substantive criminal law is the result of a power game within and between the institutions in the same way as national legislation is the result of a power game between the different players in the national legislative process.

Neither of the two new directives adopted since the entry into force of the Lisbon treaty (the one on trafficking in human beings and the one on sexual exploitation of children) is a straightforward 'Lisbonisation' of the preexisting EU framework decisions. Major changes have been brought in terms of the contents. Since this is not the place to analyse in detail all the changes made [100], we would just like to identify

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[96] Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2010) 95 final, 29 March 2010 and proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, COM (2010) 94 final, 29 March 2010.

[97] The Council reached a general approach on 10 June 2011 (see Council doc. 11566/11).

[98] The Council reached a general approach on 3 December 2012 (see Council doc. 16820/12).

[99] See the declaration of 14 June 2012 by Martin Schulz, European Parliament president, according to which the European Parliament would suspend all cooperation with Member States on five key justice and home affairs files until the legislature was included again in the Schengen decision making.

[100] For an analysis of the new Directive on trafficking in human beings, see especially T. Obokata and B. Payne, "Implementing action against trafficking in human beings under the TFEU: a preliminary analysis", *NJECL*, 3, 2012, p. 298 f. and the contribution of Francesca

some general trends. Besides the multiplication of recitals [101], the texts have gained some precision, at least on some aspects: definitions have been added [102]. In terms of criminalisation, generally speaking the new directives go in the direction of an extension of criminal offences in the field. Whereas such an extension is rather modest in the field of trafficking in human beings [103], such trend is more important in the field of sexual exploitation of children [104]. The approximation of sanctions has developed and, generally speaking, the level of sanctions has raised [105]. In the case of the Directive on sexual offences against children, a wide range of relatively specifically determined penalties have been provided [106]. They are no longer based on the model bands for penalties which were provided for in the 2002 Council's conclusions [107]. In both directives, the kinds of sanctions have also somewhat diversified and, in the case of individuals, they are no longer limited to imprisonment [108]. Concerning jurisdiction, extraterritorial jurisdiction has been strengthened: exercising the active nationality principle has become mandatory [109]. Although the margin for manoeuvre left to the

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Galli to this book. Concerning the new Directive on sexual exploitation of children, see for example P. Beauvais, "Harmonisation des infractions et des peines en matière de délinquance sexuelle sur mineurs Dir. 2011/92/UE du Parlement européen et du Conseil du 13 déc. 2011 relative à la lutte contre les abus sexuels et l'exploitation sexuelle des enfants, ainsi que la pédopornographie et remplaçant la décision-cadre 2004/68/JAI du Conseil", *RTDE*, 2013 p. 877 f.

[101] H. Nowell-Smith, "Behind the scenes in the negotiation of EU criminal justice legislation", *NJECL*, 3, 2012, p. 384.

[102] See for instance the definition of vulnerability in the directive on trafficking in human beings (Article 2, para. 2). However for criticisms of the vagueness of such new definition, see H. Satzger, F. Zimmermann and G. Langheld, "The Directive on preventing and combatting trafficking in human beings and the principles governing European Criminal policy – A critical evaluation", *EuCLR*, 3, 2013, p. 114.

[103] The exploitation purposes have been extended to begging, removal of organs and exploitation of criminal activities (Article 2, para. 3 of the directive).

[104] Compare previous Articles 2 and 3 of the previous Framework Decision and Articles 3 to 6 of the new Directive.

[105] In the field of trafficking of human beings, Article 3, para. 1 of the previous Framework Decision required that offences of Articles 1 and 2 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition and only required a maximum penalty of at least eight years of imprisonment for offences of Article 1 when some aggravating circumstances were met. Article 4, para. 1 and para. 2 of the new directive require that offences referred to in Article 2 are punishable by a maximum penalty of at least five years of imprisonment and by a maximum penalty of at least ten years of imprisonment when some aggravating circumtances are met… In the field of sexual exploitation of children, compare Article 5 of the previous Framework Decision and Articles 3 to 6 of the new directive.

[106] In this regard, see especially S. Miettinen, *op. cit*., p. 139 f.

[107] *Ibid*., p. 143.

[108] See Article 7 on seizure and confiscation of the Directive on Trafficking in human beings and Article 11 of the Directive on sexual exploitation of children. See also Article 10 of the latter related to the disqualifications arising from convictions.

[109] See Article 10, para. 1 of the Directive on trafficking in human beings and Article 17 para 1 of the Directive on sexual exploitation of children.

Member States has been reduced, some provisions still leave them discretionary power but, interestingly, the wording has been adapted [110]. Finally, both new directives follow a holistic approach. They extensively develop the measures on protection and compensation for victims [111] and contain provisions on prevention [112]. Such an evolution is quite positive. Nevertheless it raises the question of the coherence of each of these directives as they contain a very mixed range of provisions. Most correspond to hard law, clearly having an impact on national criminal law. Some do not have an impact on internal criminal law [113]. And some are quite difficult to classify. This is for instance the case of the interesting clause on non-prosecution/non-punishment of victims. According to Article 8 of the Directive on trafficking in human beings and Article 14 of the Directive on sexual exploitation of children, "Member States *shall*, *in accordance with the basic principles of their legal systems* take the necessary measures to ensure that competent authorities are *entitled* not to prosecute or impose penalties (on victims) for their involvement in criminal activities, which they have been compelled to commit as a direct consequence of being subjected to (either any of or some of the offences contained in the provisions of the directives)" [114]. Such provisions do not amount to real decriminalisation clauses, which are in any case not permitted under the existing legal bases. They can however been considered as a sort of "substitute", but as a "poor substitute" since their language is rather weak [115]: Member States must take the necessary measures but it is in accordance with the basic principles of their legal systems and it aims only at entitling authorities not to prosecute, which seems to leave Member States considerable margin for manoeuvre [116]. It remains to be seen how such clauses will be implemented, especially in the Member States where prosecutions are submitted to the so-called 'legality principle'.

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[110] In the field of trafficking of human beings, compare Article 6, para. 1 and 2 of the previous Framework Decision with Article 10, para. 1 and 2. In the field of sexual exploitation of children, compare Article 8, para. 1 and 2 of the previous Framework Decision with Article 17, para. 1 and 2 of the new Directive.

[111] Articles 11 to 17 of the Directive on trafficking in human beings and Articles 14 to 20 of the Directive on sexual exploitation of children.

[112] Article 18 of the Directive on trafficking in human beings and Article 23 of the Directive on sexual exploitation of children.

[113] See especially the provisions related to prevention which deal for example with education, training, awareness-raising campaigns, etc. (Article 18 of the Directive on trafficking in human beings and Articles 22-23 of the Directive on sexual exploitation of children). In this regard, it should anyway be underlined that the EU is explicitly deprived from the power to harmonise legislation in the field of crime prevention (Article 84 TFEU).

[114] See also 14th recital of the preamble of Directive on trafficking in human beings and 24th of Directive on sexual exploitation of children.

[115] Compare with Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005: "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so".

[116] T. Obokata and B. Payne, *op. cit*., p. 310 f. and the English case-law they quote.

The abovementioned general trends were already present in the Commission's proposals. It is true, for instance, for the extension of criminalisation and for the increase in the levels of sanctions. If the extension of criminalisation can be explained by the considerable influence exercised by the other international and/or European conventions [117], the increase in the level of penalties cannot be explained on that basis and was not clearly justified by the Commission. Far from countering such a trend towards more severity in the definition of offences and of sanctions, the European Parliament went in the same direction, pushing, for instance in the case of trafficking in human beings, for the criminalisation of other behaviours, not even covered by the Commission's initial proposal – *i.e.* criminalisation of the users [118]. Such a situation where the Commission and particularly the European Parliament require increased severity, on the one hand, and where the Council tempers such an approach, on the other hand, is rather striking. The rather "repressive" approach shown by the European Parliament is linked with its deep focus on victims and raises various questions. One of them is whether such a position is consistent with the various principles enshrined in its abovementioned resolution on an EU approach to criminal law. But, of course, this resolution is dated after the adoption of both directives, namely from 22 May 2012. It is also true that trafficking in human beings and sexual exploitation of children are very specific sectors, so that it does not mean that the Parliament will always be more repressive than the Council [119]. Besides, it should not lead us to conclude that Member States were countering a more repressive approach as such, their main concern being rather to protect their internal law as much as possible.

4. Development of variable geometry

Variable geometry has been considerably reinforced by the Treaty of Lisbon and by the protocols complementing it. In this regard, specific mention is to be made of the *opt-outs* for the UK, Ireland and Denmark, respectively organised by Protocol no. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice and Protocol no. 22 on the position of Denmark. These *opt-outs* apply to the instruments adopted on the basis of Title V of Part III of the TFEU. The question arose as to whether the *opt-outs* apply or not to the measures adopted on the basis of Article 83, para. 2 of the TFEU. Both opinions could be defended. The location of Article 83, para. 3, pleads for the application of *opt-outs* but the fact that this Article explicitly provides that "such directives shall be adopted by the same ordinary or

[117] In the field of trafficking in human beings, see especially the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Council of Europe Convention of 16 May 2005 on Action against Trafficking in Human Beings (Warsaw Convention), CETS no. 197. In the field of sexual exploitation of children, see Council of Europe Convention of 25 October 2007 on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), *CETS* no. 201.

[118] Such concerns appear, however, in the provisions related to prevention: see Article 8, para. 1 and 4, of the Directive on trafficking in human beings.

[119] Think for instance about a proposal for a directive on infringements to intellectual property on the internet: in such a case would the Parliament go as far as the Commission and the Member States?

special legislative procedure as was followed for the adoption of the harmonisation measures in question" could constitute an argument for their non-application… But this question was soon resolved by the first initiative based on Article 83, para. 2, namely the proposal for a directive on insider dealing and market manipulation in favour of the first opinion, namely of the application of the *opt-outs*. And this position does not seem to create specific discussion.

These *opt-outs* are problematic and likely to create severe distortions and/or imbalances which appear clearly when we think about the accessory functions of the approximation of substantive criminal law. On the one hand, if approximation is developed on the basis of Article 83, para. 1 TFEU as a necessary complement to mutual recognition, how can we legitimise mutual recognition with Member States which are not bound by the approximating instruments? On the other hand, if approximating instruments are adopted on the basis of Article 83, para. 2 and are presented as being essential to ensure the effective implementation of a Union Policy, how is it possible to justify that, contrary to the basic instruments developing the concerned policy, they do not bind all Member States [120].

The abovementioned *opt-outs* do not apply to the instruments adopted outside Title V. Consequently, one of the major advantages of the Commission's choice of basing its proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law on Article 83, para. 2 was precisely to avoid the application of such variable geometry. However, as explained earlier, such a legal basis will most probably not be accepted by the Council.

	UK	IE
Trafficking in human beings	Opted in after adoption	Opted in before adoption
Sexual exploitation of children	Opted in before adoption	Opted in before adoption
Attacks against information systems	Opted in before adoption	Opted in before adoption
Insider dealing and market manipulation	Did not opt in before adoption	Opted in before adoption
Freezing and confiscation	Did not opt in before adoption	Did not opt in before adoption
Protection of the Euro	Did not opt in before adoption	Opted in before adoption

Concerning the concrete impact of such *opt-outs,* it is to be noted that Denmark is out of the first six proposals for a directive on substantive criminal law based on Title V. Since none of them are Schengen-related, Denmark is not allowed to opt in [121]. But it continues to be bound by the old framework decisions in the field. Ireland opted in to five of the first six proposals for directives on substantive criminal law based on Title V. The only initiative to which it has not so far opted in is the proposal on freezing and confiscation. But it can still opt in after its adoption of course. So far, the UK has made less extensive use of its right to opt in than Ireland: it only opted in to half of the first six proposals for directives on substantive criminal law based on Title V, namely to the directives on trafficking in human beings and on sexual exploitation

[120] D. Flore, *Droit pénal européen, op. cit*., p. 271.

[121] See Article 4 of Protocol no. 22.

of children and to the proposal for a directive on attacks against information systems. It can still opt in to the three other proposals after they have been adopted.

5. Changes in terms of legal tools and their implementation

Since the entry into force of the Lisbon Treaty, substantive criminal law must be approximated through directives, at least when achieved under Title V of Part III of the TFEU. We will not come back here to the question of whether Article 325, para. 4 may serve as a legal basis for such approximation and allow or not for the adoption of directives and regulations in the field.

According to Article 288 TFEU, EU directives are binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the choice of form and methods to the national authorities. Directives are the privileged instrument of approximation of legislation and need in principle the adoption of internal transposition measures. The difference with the previous framework decisions is that, according to the *Van Duyn* case law of the CJ, on the basis of the need for effectiveness ("effet utile"), a directive may have a direct effect [122]. However, such direct effect is subordinated to several conditions and important limits. The provisions must be sufficiently precise, unconditional and not contingent on any discretionary implementing measures [123]. The direct effect is limited to a vertical ascending direct effect, which means that private individuals may only invoke it against a Member State, which either failed to implement the directive within the prescribed period or implemented it incorrectly. Directives may not be given direct effect to the detriment of individuals. They are deprived of any vertical descending direct effect, from the Member State, and its authorities against individuals [124] and of any horizontal direct effect (between private individuals) [125]. Considering that the rules related to substantive criminal law mostly pursue "repressive objectives" rather than "protection aims" it is generally considered that such direct effect will not benefit the directives for the approximation of substantive criminal law. This is true for provisions, which aim at fixing minimum standards related to the definition of offences and sanctions [126]. However, as we have previously underlined, the two first adopted directives follow a holistic approach and also contain "protective provisions". If such provisions are sufficiently precise, unconditional and not contingent on any discretionary implementing measures, they can benefit from direct effect.

The new directives aiming at approximating substantive criminal law will definitely benefit from other consequences of the communautarisation achieved by the Lisbon Treaty, among which is the application of basic EC principles, such

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[122] CJ, 4 Dec. 1974, case 41/74, *Van Duyn*, see especially para. 12.

[123] See for instance CJ, 19 January 1982, *Becker v. Finanzamt Münster-Innenstadt*, case 8/81, para. 25, etc.

[124] See for example CJ, 5 April 1979, case C-148/78, *Ratti,* para. 22 or CJ, 8 Oct. 1987, case 80/86, *Kolpinghuis Nijmegen*, para. 7 f.

[125] See for example CJ, 26 February 1986, *Marshall I*, case C-152/84, para. 48.

[126] In this regard, see especially P. Asp, *op. cit*., p. 104 f. and S. Miettinen, *op. cit.,* p. 222 f.

as the primacy principle [127] and the full set of the ECJ competences [128], including infringement actions which is of course a quite efficient tool to convince reluctant Member States to implement the EU law as it should be implemented. The full set of the ECJ competences also includes the application of the "normal" preliminary ruling competence, independently of any individual declaration of acceptation by each Member State. Such extension of the ECJ jurisdiction was immediately applicable to the new instruments, *i.e.* those adopted after the entry into force of the Treaty of Lisbon. It will also soon be extended to the "old" instruments, namely the ones adopted before the entry into force of the Lisbon Treaty, after the transitional period of five years, namely from 30 November 2014 onward. The pre-existing framework decisions approximating substantive criminal law, which have not yet been replaced by new directives, will consequently be submitted to such an extension. However, if we take a look at the existing case law of the ECJ, with the exception of the two cases *Commission v. Council* related to conflicts of legal bases between the third and first pillars, it is worth noticing that no case has been directly linked to an instrument of substantive approximation [129]. Attempts have been made but they were unsuccessful. Let us recall, for instance, the preliminary questions concerning the validity and interpretation of the Framework Decision of 13 June 2002 on combatting terrorism, which both the NGO *la Ligue des droits de l'Homme* and the Belgian *Conseil des Ministres* suggested the Belgian Constitutional Court refer to the ECJ in the context of the annulment request introduced by the first one against the relevant implementing internal law [130]. In its ruling dated 13 July 2005, the Constitutional Court rejected the recourse and refused to refer preliminary questions to the Court of Justice, declaring that it was not necessary to do so [131].

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[127] This principle was decided by the CJ in its famous decision dated 15 July 1964 in the case *Costa c. ENEL* (case 6/64) and was recalled in Declaration no. 17 to the Lisbon Treaty, which states that "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law". According to this case-law principle, EC law takes precedence over any rule of domestic law of the MS, including principles of national constitutional nature (CJ, *Internationale Handelsgesellschaft*, case 11/70, 17 December 1970).

[128] Concerning the control by the ECJ after the Treaty of Lisbon, see especially V. Ricci and A. Weyembergh, "Le traité de Lisbonne et le contrôle juridictionnel sur le droit pénal européen", *in* A. Weyembergh and S. Braum (eds.), *Quel contrôle juridictionnel pour l'espace pénal européen?*, Bruxelles, Editions de l'Université de Bruxelles, 2009, p. 227 f.

[129] On the contrary, the case-law of the ECJ in the field of approximation of criminal procedure was much more developed: see the seven rulings on the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings (*OJ*, no. L 82, 22 March 2001): ECJ, 16 June 2005, *Pupino*, C-105/03; 28 June 2007, *Giovanni dell'Orto*, C-467/05; 9 Oct. 2008, *Katz*, C-404/07; 15 Sept. 2010, *Gueye and Sameron Sanchez*, C-483/09 and C-1/10; 21 October 2010, *Eredics and Sapi,* C-205/09; 21 Dec. 2011, *M.X.*, C-507/10; 12 July 2012, *Giovanardi et al.*, C-79/11.

[130] See Belgian Constitutional Court, Ruling no. 125/2005, 13 July 2005, para. A.8.2. and A.9.

[131] *Ibid*. para. B. 8.

Last but not least, the importance of Article 70 TFEU concerning objective and impartial evaluation is worth underlining. It is, however, regrettable that the approximation of criminal laws is not explicitly mentioned. Evaluation is particularly necessary in the field of approximation of substantive criminal law since, as previously mentioned, the Lisbon Treaty can be interpreted as limiting EU substantive criminal law rules to directives, which need to be implemented by the Member States [132].

Conclusion

As shown by the previous developments, the approximation of substantive criminal law in the EU is "at a crossroads". This is of course due to the importance of the changes introduced by the Lisbon Treaty but also to the adoption of the three abovementioned documents respectively adopted by the Council, by the Commission and by the European Parliament, which have been qualified by some authors as "European criminal Policy documents" [133].

This contribution aimed at introducing the following articles. Many aspects mentioned will consequently be developed further. We will also come back on some of the main issues in the conclusion of the book, where we will develop some reflections on the way forward.

[132] About evaluation, see Gisèle Vernimmen's contribution to this book.

[133] P. De Hert and I. Wieczorek, *op. cit.*, p. 394.

Part I

Transversal approach

The European Parliament Resolution of 22 May 2012 on a EU approach to criminal law

Dr. Cornelis de Jong [1]

Shortly after I took up my responsibilities as a Member of the European Parliament (EP), and, in particular, as a member of the Civil Liberties Committee, I submitted a request for an own initiative report on an EU approach to (substantive) criminal law. It took some time for my request to be formally approved by the European Parliament but it is with great pleasure that I can now present this report to ECLAN. I am particularly grateful to those members of the network who contributed directly to my report – John Spencer and André Klip – who provided me with extremely valuable information both during the hearing in the EP and in our informal talks.

I am not ashamed to say that my report was influenced by academics. I was inspired in particular by the Manifesto on European Criminal Policy, which the European Criminal Law initiative adopted in 2009 [2]. By following principles developed by academics, I was able to avoid the status of the report becoming a partisan issue. It was adopted in the Civil Liberties Committee by 49 votes in favour, four against and no abstentions [3]. In the plenary, 537 MEPs voted in favour, 38 against and there were 57 abstentions [4]. Of the political groups, only Europe on Freedom and Democracy (EFD) voted against it, wrongly assuming that this report was designed to transfer more powers to the EU in the field of criminal law.

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[1] Since 2009, Cornelis (Dennis) de Jong is Member of the European Parliament, representing the Dutch Socialist Party.

[2] See: https://sites.google.com/site/eucrimpol/manifest/manifesto.

[3] See Report on a EU Approach to Criminal Law (2010/2310 (INI)), doc. A7-0144/2012, 24 April 2012.

[4] See European Parliament Resolution of 22 May 2012 on a EU Approach to Criminal Law (2010/2310 (INI)) (P7_TA-PROV(2012)0208) (see annex to the present book).

1. Background to the report

The European Union is facing a crisis of legitimacy. In 2005, the European Constitution was voted down both in France and in the Netherlands. Nevertheless, a similar Treaty was drafted, called the Lisbon Treaty, and was ratified without additional referenda in these two countries. One of the features of the Lisbon Treaty was to abolish the right of Member States to wield a veto in the field of criminal law. Although one can understand the reasons behind this move (*i.e.* a more efficient decision-making process), it is a huge step for Member States to give up part of their sovereignty in such a sensitive area. It illustrates the gap between European policymakers and the European public. Had we asked the public for their opinion, the majority would probably have rejected the criminal law provisions of the Treaty. However, we did not do that and we are therefore now engaged in lawmaking in this area without knowing for certain whether we are actually acting in accordance with the wishes of the electorate.

In a way, this is nothing new. For example, when the Schengen Agreement was concluded, the public was told that this would greatly facilitate travel within Europe as they would no longer have to show their passports at the borders when travelling within the European Union. However, no-one was told then that lifting the internal border controls would lead to common asylum and immigration policies and indeed would lead to an '*espace judiciaire*' that would also include European lawmaking in the area of criminal law. Thus, we engaged in a very important project without being fully backed by the European public. It is no wonder then that many of them were shocked when faced with the European Constitution with its provisions on an Area of Freedom, Security and Justice. I do not want to argue that lifting the internal border controls was the wrong step to take but those politically responsible for this step should have informed the public of the far-reaching consequences of this move. Building support for European integration means first and foremost taking Europeans seriously and respecting their opinions. Integration cannot be achieved by the back door as this will backfire on politics and on the European integration project as a whole.

The provisions of the Lisbon Treaty providing for an EU competence in criminal law can be found in particular in Article 83, para. 1 and 2 of the Treaty on the Functioning of the European Union (TFEU). Other provisions are relevant as well though: Article 86, for example, refers to the possibility of establishing a European Public Prosecutor's Office.

It is important to note that the Treaty provides for the possibility of lawmaking but it does not force the European Union to do so. However, in practice the EU always engages in lawmaking once a competence for it to do so has been created. On the one hand, the European Commission often sees lawmaking as an end in itself. Although these days impact assessments are required for the Commission to propose new legislation, in practice there is always an argument to be found in order to make use of newly created competences. On the other hand, national politicians also use European harmonisation measures to solve national problems. For example, in 1996, Belgium was in turmoil because of the failing national justice system in the famous Dutroux case. It did not take the Belgian Minister of Justice long to take a 'European initiative'

calling for a harmonised approach concerning the offence of sexual exploitation of children. Although many of his colleagues were not convinced of the cross-border nature of this offence, a so-called joint action on sexual exploitation of children was adopted in 1997.

Against this background, I considered that, now that the Lisbon Treaty has not only done away with the veto power of Member States in the field of criminal law but also created co-legislative rights for the European Parliament, we should at least create a framework for lawmaking in this field. Such a framework should clarify that the European Union would confine itself to passing legislation in those cases where there is concrete evidence showing that national legislation is not sufficient. It should also contain a number of criteria for ensuring high quality lawmaking, thus promoting coherence whilst moving away from the often fragmented nature of the European legislative process. In this way, we can hopefully remove to some extent the reasons for the feeling of mistrust concerning the developments in the field of criminal law by the European Union that has prevailed among Europeans ever since the adoption of the Lisbon Treaty.

A final consideration in favour of this initiative was that other European institutions had taken similar initiatives. In November 2009, the Council adopted its own conclusions[5] and, in September 2011, the Commission submitted a communication on this subject[6].

2. Results

The first part of the report recalls the important principles of subsidiarity and proportionality. In particular, it refers to the fact that, despite the abolishment of the veto power of individual Member States, Article 83, para. 3 of the Treaty does contain an emergency brake procedure whenever a Member State feels that the proposed legislation would affect fundamental aspects of its criminal justice system. This shows that the authors of the Treaty were well aware of the sensitivities involved and therefore created this special escape clause, thus enhancing the effectiveness of the subsidiarity principle.

Concerning the principle of proportionality, the report sets out that, by definition, criminal law measures restrict certain human rights and fundamental freedoms. Of course, it does so on good grounds but not without carefully weighing up the different interests. Apart from general and internationally recognised principles of human rights law, national traditions also played an important part in each Member State in describing the extent to which criminal sanctions may limit human rights and fundamental freedoms.

On this basis, the second part of the report contains the following criteria for new European legislation in the field of criminal law:

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[5] Council document 16798/09 of 27 November 2009 (see annex to the present book).

[6] Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final (see annex to the present book).

"Emphasises that in this respect it is not sufficient to refer to abstract notions or to symbolic effects, but that the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that:

– the criminal provisions focus on conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals;
– there are no other, less intrusive measures available for addressing such conduct,
– the crime involved is of a particularly serious nature with a cross-border dimension or has a direct negative impact on the effective implementation of a Union policy in an area which has been subject to harmonisation measures,
– there is a need to combat the criminal offence concerned on a common basis, *i.e*. that there is added practical value in a common EU approach, taking into account, *inter alia*, how widespread and frequent the offence is in the Member States, and
– in conformity with Article 49(3) of the EU Charter on Fundamental Rights, the severity of the proposed sanctions is not disproportionate to the criminal offence".

It should be noted that, as per these conclusions, it is not sufficient for the Commission to argue that 'in general' there is a need for a legislative text. It should ground its case on concrete factual evidence. Moreover, it should do so for all criteria mentioned. It is not sufficient for the Commission to argue that only one or a few of the criteria have been met.

Most of these principles can also be found in the Council's conclusions of 30 November 2009. Interestingly, the Commission distanced itself from these conclusions at the time. This reflected the general desire of the European Commission to protect its full right of initiative without interference from the Council. Also, the Commission might have felt embarrassed by the fact that the Council adopted these conclusions on the eve of the entry into force of the Lisbon Treaty, thus excluding the European Parliament, which would have been entitled to the right of co-decision the day after.

It may well be that the Commission also carried substantive objections against the criteria that were to be found in the Council conclusions. In its own communication, the Commission pays heed to the principle of subsidiarity but only mentions the following, far more general and broader criteria:

– internal market considerations, *i.e.* the importance of legislation for freedom of movement and for the trust of consumers;
– avoiding crime shopping which may occur on the basis of differing national criminal law provisions;
– mutual recognition requires mutual trust, which in turn requires harmonisation;
– effective implementation of a Union policy.

On the basis of my report, the European Parliament has now clearly rejected such broad criteria and, together with the Council, is sticking to a much more stringent subsidiarity test.

The third part of the report contains references to quality principles that are well-known to all academics, and which I shall therefore not explain in any detail:

– *ultima ratio*;
– *lex certa*;
– *nulla poena sine culpa*;

– *non bis in idem*;
– presumption of innocence.

In general, these principles are not controversial. But the proof of the pudding is in the eating and hence procedures have to be developed in order to check if proposed new legislation indeed meets with each of these criteria. I must add that the principles of '*non bis in idem*' and 'presumption of innocence' seem to be primarily related to procedural rights and I have not therefore included them in my draft report. When colleagues proposed to add them, I did not of course object, as they are general principles of criminal law, although it remains to be seen whether they can be effectively applied to draft legislation.

3. Way forward

The final part of the report contains a number of procedural paragraphs. Its primary objective is to make sure that the conclusions contained in the report do not become dead letters but remain alive. Thus, the report calls for an interinstitutional agreement. This is not uncontroversial and the Commission has already indicated that it does not see the need for a formal arrangement. However, the EP will have to take initiatives, at least to explore the possibilities for such an arrangement, especially as the Council seems interested in it too.

Secondly, in some cases the report seeks to look beyond the façade of the institutions. How does the decision-making, in the preparatory phase too, work in practice? For example, do the justice and home affairs ministers decide on *all* proposals with criminal law provisions? Does the Commission see to it that all proposals with criminal law provisions are checked by one Commissioner or at least by one service? A centralised approach is essential for the development of a coherent and high quality system of criminal law provisions. In the Netherlands, for example, all criminal law legislation is checked by the legislative directorate of the Ministry of Security and Justice. A similar check needs to be introduced at European level as well.

This also holds true for the European Parliament. The Civil Liberties Committee does not take the lead in all criminal law proposals. Other committees may take charge because of the particular subject matter but may lack criminal law expertise. In order to make sure that there is a horizontal check on quality and coherence, the report suggests an enhanced role for the legal service as well as a supporting office for MEPs to help them draft their legislative amendments.

I would like an in-depth discussion and an agreement among all three institutions to make sure that there is a coherent and high quality approach in all phases of the legislative process. The Commission could usefully show how it includes the subsidiarity and necessity/proportionality tests in its impact assessments as well as how it applies its fundamental rights checklist. The Council could give us more information on its Working Party on Substantive Criminal Law and how it helps to ensure coherence and high quality. And the European Parliament will have to take the necessary implementing decisions in order to enhance the role of the legal service so that MEPs understand all the legal implications and can submit last-minute amendments (if the coherence or quality of a criminal law is found to be insufficient) before the final vote on a piece of criminal legislation is taken.

4. Conclusion

The report adopted by the European Parliament can provide a solid basis for lawmaking in the field of criminal law. It can help prevent unnecessary European legislation being passed, for example, in respect of sensitive areas such as abortion or euthanasia. It also sets high quality benchmarks and provides for some institutional arrangements to ensure these.

However, the report does not take a purely negative approach towards European lawmaking in this field. There are many cross-border crimes that need an EU approach. This holds true, for example, for trafficking in human beings but also for corruption and financial crimes. I am convinced that Europe has to act in the field of criminal law too but that, if it does, it should do so carefully and not in a fragmented way.

I am confident that, if we succeed in securing an interinstitutional agreement following this report, we can rest assured that we will end up with a coherent and high quality set of EU criminal law provisions.

Harmonised Union policies and the harmonisation of substantive criminal law

John A.E. Vervaele

1. European integration and criminal law – the history of its development [1]

It is no secret that the founding fathers of the European Communities overlooked the importance of the enforcement of Community law at least to a certain extent. This has meant that the enforcement of the common agricultural and fisheries policy, the Community customs code, European financial services regulations, EU subsidy fraud rules, European environmental policy and European rules on corporate law have been entirely left to the autonomy and discretion of the Member States.

The European Commission soon became aware of the enforcement gap in the EC Treaties. An attempt was made in 1976 to supplement the EC Treaties with two protocols concerning EC fraud and corruption by EC officials. However, neither protocol gained the political approval of the Council of Ministers (Council) [2]. In the period 1975-1990, the Commission was therefore forced to explore the political and legal boundaries of the EC Treaties instead. The Commission, supported by the European Parliament, was already then of the opinion that there was a considerable enforcement deficit on the part of the Member States when it came to compliance with EC policies. The Commission therefore submitted various concrete legislative proposals to the Council with the aim of obliging Member States to use both (punitive) administrative

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[1] For a more detailed analysis, see J.A.E. Vervaele, "The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration", *in* P. Demaert, I. Govaere and D. Hanf (eds.), *30 Years of European Legal Studies at the College of Europe*, Liber Professorum, Brussels, Oxford, Peter Lang, 2005, p. 277; N. Haekkerup, *Controls & Sanctions in the EU Law*, Copenhagen, Djoef Publishing, 2001.

[2] J.A.E. Vervaele, *Fraud against the Community. The need for European fraud legislation*, 1992, p. 85 f.

law and criminal law in the enforcement of Community law. The Council approved many of the Commission's proposals, obliging the Member States to impose punitive administrative sanctions, especially in the area of the common agricultural policy. The regulations in question provide for fines, forfeiture of financial guarantees, exclusion from subsidy schemes, professional disqualification, etc. This harmonisation was not just limited to reparatory sanctions but also expressly concerned punitive sanctions and thus fell under the obligations, at least for the they, of Article 6 of the European Convention of Human Rights [3]. Member States were obliged to provide rules for these sanctions and apply them. Of course, Member States were also free to impose these sanctions entirely or partly via criminal law enforcement, instead of solely or partly using administrative regulation, if this was in conformity with the requirements for enforcement as established by the European Court of Justice (ECJ). The growing influence of EU law on the law of punitive sanctions was not well received by all the Member States. Some Member States considered the European Community to be applying the EC Treaties quite extensively or that it had even imposed obligations that did not have a proper legal basis. In 1990, Germany felt that the limit had been reached. Two regulations on agriculture provided it with the perfect pretext to bring an action for annulment before the Court. The regulations not only prescribed restitution (with a surcharge) of subsidies that had been unjustifiably obtained, but also punitive exclusion from subsidy schemes. Germany was of the opinion that the European Community did not have the power to prescribe punitive sanctions. What was remarkable in this case was that none of the other Member States intervened to support Germany in its contentions. Germany received a rude awakening when, in 1992, the Court ruled that the European Community was competent to adopt the measures, including the punitive sanctions, in its judgement in case C-240/90 [4]. This landmark judgement finally cleared up the controversy surrounding the European Communities' power to harmonise administrative (punitive) sanctions.

With regard to criminal law enforcement, it is mainly thanks to the ECJ that the autonomy of the Member States to enforce Community law has been somewhat limited. Member States were bound by the Court's interpretation of Article 10 EC Treaty (the duty of co-operation or loyalty principle). The Court had established that the Member States had a duty to enforce Community law whereby they have to provide for procedures and penalties that were effective, proportionate and dissuasive and that offer a degree of protection that was analogous to that offered

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[3] I refer to the Engel-criteria of the European Court of Human Rights (see Eur. Court HR, 8 June 1976, *Engel and Others v. the Netherlands*, Series A, no. 22).

[4] ECJ, 27 October 1992, Judgement C-240/90, *Germany v. Council and Commission*, *ECR*, p. I-5383. For a detailed analysis of the EC harmonization of administrative enforcement, see J.A.E. Vervaele, "Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?", in J.A.E. Vervaele (ed.) *Administrative Law Application and Enforcement of Community Law in The Netherlands*, Deventer and Boston, Kluwer, 1994, p. 161; J. Schwarze, "Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht", *EuZW*, 2003, p. 261 f.; M. Poelemans, *La sanction dans l'ordre juridique communautaire*, Brussels, Bruylant, 2004.

in the enforcement of provisions of national law of a similar nature and importance (the assimilation principle). It was not only incumbent on the national legislation to fulfil these requirements. They also had to be put into practice in the course of enforcement [5]. From the case law of the ECJ, it is abundantly clear that criminal (procedural) law belongs to the sphere of competence of the Member States but that Community law may impose requirements as to the fulfilment and interpretation of this competence within the framework of the enforcement of Community law. Criminal law must not just be put to one side when the rules to be enforced turn out to be contrary to Community law (negative interpretation). Community law also unmistakably establishes requirements which national criminal law enforcement has to fulfil if it is invested with the aim of compliance with Community law (positive integration). This duty to enforce in accordance with certain requirements also applies to criminal law if the Member States decide that this is the tool they will use to enforce Community law [6]. This includes, for example, shaping policy as to when to dismiss a case or indictment and the exercising of prosecutorial discretion in cases that are relevant from a Community law perspective and where the interests of the EC must also be taken into account [7]. An airtight separation between the criminal law policy of the Member States and that of the EC has never existed. Both *de iure* and *de facto*, the process of indirect EC harmonisation of national criminal law (mainly concerning the definition of the offences) has been going on for decades. The Community legal order and integration also include the criminal (procedural) law of the Member States as a result of which Member State autonomy is restricted. The European integration model is not compatible with a restriction of criminal law to national confines such that it would remain out of reach of any Community law influence whatsoever. The key question is, however, whether the EC's competence to harmonise reaches so far as to enable the EC to directly oblige Member States to criminalise violations of Community rules. Was the EC competent to impose requirements as to the nature and severity of the criminal penalties? Did this possible competence also extend to the scope of application, *rationae materiae*, *rationae personae* and *rationi loci*, to procedural aspects, to the modalities of application (statute of limitation, dismissal, or dismissing charges, etc.)? There is plenty of debate in the literature about these questions. The majority of criminal law authors [8] in Europe denied that the EC had any power, however minor, to directly harmonise criminal law.

The Commission and the European Parliament have, for decades, been attempting to convince the Council to impose a Community obligation on Member States to

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[5] See ECJ, 21 September 1989, Judgement 68/88, *Commission v. Greece*, *ECR*, p. 2965 and the Commission Communication as a result of this case, *OJ*, no. C 147, 16 June 1990, p. 3.

[6] ECJ, 21 September 1989, Judgement 68/88, *Commission v. Greece* and ECJ, 16 June 1998, Judgement C-226/97, *Lemmens*, *ECR*, p. 195.

[7] ECJ, 9 December 1997, Judgement C-265/95, *Commission v. France*, *ECR*, p. I-6959.

[8] The minority position among criminal lawyers was argued, *inter alia*, by G. Grasso, K. Tiedemann, M. Delmas-Marty, J. Vogel and J. Vervaele who all defended a limited functional competence. For an interesting discussion between proponents and opponents, see *ZStrW*, 2004, p. 332 and B. Schünemann (ed.) *Alternativentwurf Europäische Strafverfolgung*, Köln, Carl Heymanns, 2004.

criminally enforce EC policy. The legislative proposals to this end, for example in the fields of money laundering and insider dealing, were functional in their approach and only provided for limited harmonisation. By and large, these proposals obliged Member States to criminalise certain intentional acts and thus provide for a criminal penalty and, in the case of serious offences, a prison sentence. The proposals did not contain any concrete provisions as to the substance of these penalties and prison sentences. However, even this limited harmonisation approach has never been able to win the Council over. The Council, as usual, approved the proposals but only after amending them in such a way that the obligations were stripped of their criminal law packaging. Any and all references to the criminal law nature of the obligations were systematically deleted. Criminal law prohibitory or mandatory provisions were changed into prohibitory or mandatory provisions of an administrative nature.

Obligations to impose criminal sanctions were replaced by simple sanctions. The systematic political neutralisation of the Commission's criminal law harmonisation proposals could be indicative of a staunch unity on the part of the Member States in the Council. Nevertheless, the Member States were internally divided on this question to such an extent that, in 1990, the ministers of justice assigned a Council working group consisting of public servants to the task of subjecting the relationship between Community law and criminal law to fundamental discussion [9]. The government experts agreed that Community law can set requirements for national criminal law but could not agree on an unequivocal position concerning the direct criminal law harmonisation competence of the EC. The small majority of Member States that were in favour of such a competence nevertheless wished for certain conditions to apply. Such harmonisation could only be the criminal law tailpiece of a Community law policy, *i.e.* it could not be criminal law harmonisation as such. This harmonisation should, furthermore, leave intact a number of principles or guarantees that were considered by (some of) the Member States to be essential for their own criminal (procedural) law. The red lines that they did not want crossed at that time with regard to functional harmonisation were as follows: prosecutorial discretion, criminal liability of legal persons, minimum penalties, sentencing discretion. The report of the divided working group therefore did not result in a political breakthrough. A fundamental political difference of opinion started to develop [10]. During the intergovernmental conference organised to pave the way for the Maastricht Treaty, Dutch attempts to integrate aspects of criminal justice, including the power of direct harmonisation, into EC law were doomed to failure. The Luxemburg compromise, known as the three pillar structure, organised criminal law co-operation and harmonisation into a separate semi-intergovernmental pillar which entered into force as part of the Maastricht Treaty in 1993. With the entry into force

[9] For the report of the *ad hoc* working group see J.A.E. Vervaele, *Fraud against the European Community*, p. 313.

[10] For example, the Member States were prepared to criminalize money laundering, based on obligations deriving from the international law made by the UN and Council of Europe, but not by the EC. See intergovernmental declaration to Directive 91/308/CEE of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, *OJ*, no. L 66, 20 June 1991, p. 77.

of the Treaty of Amsterdam in 1999, the third pillar shed its semi-intergovernmental character and thereby became a fully-fledged EU policy area.

2. Criminal law harmonisation in the EU: from political stalemate to the ECJ ruling in case C-176/03 on Criminal Enforcement of Environmental Protection

Structuring the third pillar to include the direct legislative competence of the EU in the field of co-operation in criminal matters and criminal law harmonisation [11] has not led to a full resolution of the issue. In fact, the reverse has happened. After all, the third pillar was a supplementary power that cannot undermine or interfere with the array of EC powers. Both Article 2 EU and Article 47 EU, in conjunction with Article 29 TEU, were clear on this. Whether or not this power exists does not depend on whether, prior to the EU Treaty's entry into force, any regulation or directive was ever created that imposes a duty to harmonise criminal law. Neither lack of use of power nor the entry into force of the EU Treaty leads to the demise of this power. It is not political will that determines legal competence, at least not without amending the Treaty. Nevertheless, the third criminal law pillar has been defined by many as being exclusive, *i.e.* excluding any criminal law competence within the first pillar.

It was my belief that it was clear from the outset that the political division of the legal regime between the first and the third pillar would culminate in an institutional battle of competence concerning the position of criminal law within the EU. In the case of many of the legislative initiatives during the period 1993-2005, the Commission came to diametrically oppose the Council. Both have been involved in institutional legislative skirmishes concerning the harmonisation of criminal law. There is no point in repeating every single initiative and counter-initiative here where the EC and the Member States raised the issue in the Council. Altogether, three types of legislative conflict can be distinguished. The first type may be described as 'warding off'. The Commission submitted proposals for the harmonisation of criminal law enforcement of Community law, which the Council subsequently rejected. At best, the proposal was neutralised and stripped of its criminal law packaging. Here, the Council applied an old legislative tactic that was used in the period before the entry into force of the Treaty on the European Union. The Commission proposal for a regulation on official feed and food controls [12] (2003) is an excellent example. The Commission emphasised the need to provide for a functional harmonisation of criminal law enforcement supplementing the existing harmonisation of administrative law enforcement. The Commission claimed that a basic list of offences – committed intentionally or through serious negligence – which could threaten feed and food safety and therefore public health, and for which the Member States must provide criminal sanctions, should be drawn up. The list should not be limited to offences related to actual placing on the market, but include all offences which may eventually lead to the placing on the market of unsafe feed or food. For this list of serious offences, the Member

[11] I refer to the Engel-criteria of the European Court of Human Rights (*Engel and Others v. the Netherlands*).

[12] COM (2003) 52 final, 5 February 2003.

States should provide for minimum criminal standards according to Article 55. The fact that serious infringements of food safety might threaten public health has been conclusively proven by the various food scandals in numerous European countries which, in some cases, for example, the rapeseed oil poisoning case in Spain, have resulted in many people dying. Nevertheless, the Member States did not submit a proposal for a framework decision but rather stripped the Commission proposal of its criminal law wrappings in the Council.

The second type of legislative conflict may be described as 'hijacking', whereby the content of a proposal for a regulation or directive is copied into a proposal for a framework decision or *vice versa*. The competing proposals concerning the criminal law enforcement of environmental policy is an excellent illustration [13]. In a number of cases, this approach has led to a stalemate whereas in others it has led to the adoption of framework decisions contrary to the opinion of the Commission and the European Parliament.

The third type may be termed '*cohabitation force*', whereby two proposals are elaborated alongside each other and in harmony with each other. The substantive provisions and, as the case may be, provisions concerning administrative harmonisation are included in a directive or a regulation while the criminal law harmonisation aspects are incorporated into a framework decision. A good example of what is known as 'a double text' approach is Directive 2002/90, coupled with Framework Decision 2002/946, concerning illegal immigration [14]. Another good example relates to environmental pollution from ships, where both proposals [15] were drafted by the Commission [16]. Article 6 of the proposal for a directive includes the obligation to provide for criminal penalties regarding the illegal discharge of pollutants as defined in the Marpol International Convention for the prevention of pollution from ships, including cases of serious infringements and custodial sentences, also for natural persons. The proposal for a framework decision directly refers to Article 6 of the directive and further defines the forms of criminal sanctions. The proposal for a framework decision further includes provisions concerning joint investigation teams,

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[13] Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (*OJ*, no. L 29, 5 February 2003, p. 55) which was annulled by the Court of Justice and the proposal for a Directive on the Protection of the Environment through Criminal Law, COM (2001) 139, 13 March 2001 as amended by COM (2002) 544, 30 September 2002.

[14] Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, *OJ*, no. L 328, 5 December 2002, p. 17, and Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, *OJ*, no. L 328, 5 December 2002, p. 1.

[15] Directive 2005/35/EC of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, *OJ*, no. L 255, 30 September 2005, p. 11 and Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, *OJ*, no. L 255, 30 September 2005, p. 164.

[16] Often, this involves interinstitutional co-operation between the Directorate General responsible for the specific subject and the Directorate General for the third pillar.

judicial mutual legal assistance, etc. Here too, the criminal law provisions in the proposal for a directive proved ultimately unpalatable to the Council. In the approved directive, all references to criminal law obligations were eliminated.

In the proposals concerning migration and pollution at sea, the Commission has had to accept its defeat but it has not yet given up. The Commission proposed a proposal for a directive *and* a framework decision concerning criminal measures to combat intellectual property infringements of 12 July 2005 [17]. This proposal was the continuation of Directive 2004/48 concerning the enforcement of intellectual property rights [18], which obliged the Member States to provide for private law and administrative law measures and to implement the obligations following on from the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) which makes criminal enforcement mandatory. In the proposal for a directive, the Commission clearly claimed a direct power to impose criminal law harmonisation, but, in doing so, restricted itself to the obligation for the Member States to criminalise intentional offences, to provide for certain methods of criminal participation and to impose criminal penalties, including custodial sentences. The further determination of the sanctions (level, etc.), the question of jurisdiction and some aspects of criminal procedure, such as the initiation of criminal proceedings independently of a complaint, were all regulated under the framework decision.

This further analysis brings to light several issues. There was no coherent European criminal law policy present where all or any actors were involved. The Member States were not primarily concerned with the enforcement of Community policy but with the fight against terrorism, organised crime, etc. The fact that the obligation for Member States to achieve criminal law harmonisation was not imposed through a directive or a regulation is not an unbiased conclusion. Framework decisions required unanimity. Directives and regulations were usually adopted by means of co-decision and qualified majority. Furthermore, as opposed to framework decisions, regulations as well as unconditional and clear provisions of directives have direct effects. In the first pillar, the Commission also has many more aces up its sleeve to oblige the Member States to comply with the harmonisation of criminal law. The Commission may initiate infringement proceedings against a Member State. The Member States may be held financially responsible for non-compliance by means of enforcement duties and the Member States can even be fined for failing to comply with ECJ rulings. The Community approach therefore has many advantages, both in terms of legitimacy and efficiency.

The political stalemate could only be broken by a ruling on the principle from the court. The Commission has therefore succeeded in provoking such a ruling by raising objections under Article 35(6) EU against the legality of the framework decision approved by the Council on 2003 on the criminal enforcement of environmental law [19].

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[17] Proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and the proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences, COM (2005) 276 final, 12 July 2005.

[18] Directive 2004/48/EC of 29 April 2004, *OJ*, no. L 157, 2 June 2004, p. 45.

[19] That the Commission did not start proceedings before the Court in the matter of EC fraud may be explained by legal reasons. At the time of the approval of the 1995 PIF Convention

With this decision, the Council set aside a proposal submitted by the Commission for a directive on the criminal enforcement of environmental law of 2001 with similar substance [20]. On 2005, the court delivered its long-awaited judgement in case C-176/03. This judgement is a second landmark ruling concerning the enforcement of Community law as the court recognised the competence of the EC to harmonise the enforcement by criminal law of Community law. No less than eleven Member States intervened in the proceedings. Ten Member States [21] supported the position of the Council. The Netherlands was the only Member State to argue in favour of a combined criminal harmonisation competence under EC law:

> "(…) provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned (see C-240/90 *Germany v Commission* [1992] *ECR* I-5383). That could be the case if the enforcement of a harmonizing rule based, for example, on Article 175 EC gave rise to a need for criminal penalties" [22].

The ECJ first of all underlines that the third pillar cannot undermine the competences of the first, as Article 47 TEU provides that nothing in the Treaty of the EU can affect the EC Treaty. Concerning the criminal law competence in the first pillar, the ECJ accepts a criminal annex-competence, functional to the substantive policy, for ensuring effective enforcement:

> "47. a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, case 203/80 *Casati* [1981] *ECR* 2595, para. 27, and case C-226/97 *Lemmens*[1998] *ECR* I-3711, para. 19).
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> 48. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious

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under the Maastricht third pillar, approval of a criminal law harmonization directive would only have been possible on the basis of Article 209A. This provision did not, however, constitute a legal basis for harmonization. This was only introduced by Article 280 of the Amsterdam Treaty on European Union. On that basis, the Commission in 2001 submitted a proposal for a directive on criminal law harmonization without questioning the legal validity of the Conventions. The proposal for a directive was provoked, however, by the slow ratification procedures and incomplete ratifications of the PIF protocols.

[20] In defence of the Community approach see F. Comte, "Criminal environmental law and Community Competence", *European Environmental Law Review*, 12, 2003, p. 147. Argued from the contrary standpoint: Y. Buruma and J. Somsen "Een Strafwetgever te Brussel inzake milieubescherming", *NJB*, 2001, p. 795 f. and I.M. Koopmans "Europa en de handhaving van het milieurecht: een pijler te ver?", *NTER*, 2004, p. 127 f. For a balanced position, see C. Backes *et al.* (eds.), *Lex Dura, Sed Lex. Opstellen over de handhaving van omgevingsrecht*, Deventer, Kluwer, 2005, p. 159.

[21] Denmark, Germany, Greece, Spain, France, Ireland, Portugal, Finland, Sweden, and the United Kingdom.

[22] From consideration 36 in the Court's judgement in case C-176/03. ECJ, 13 September 2005, Judgement C-176/03, *Commission of the European Communities v. Council of the European Union*, *ECR*, p. I-7879.

environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

49. It should also be added that in this instance, although Articles 1 to 7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive.

50. The Council does not dispute that the acts listed in Article 2 of the framework decision include infringements of a considerable number of Community measures, which were listed in the annex to the proposed directive. Moreover, it is apparent from the first three recitals to the framework decision that the Council took the view that criminal penalties were essential for combating serious offences against the environment.

51. It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.

52. That finding is not called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law".

3. The Commission's view on the harmonisation of criminal enforcement of EU policies after case C-176/03: a first blueprint for a criminal law policy?

In November 2005, the Commission submitted a communication[23] to the EP and the Council concerning the implications of the ECJ judgement in case C-176/03. The Commission started off by analysing the contents and scope of the ECJ decision. Article 47 TEU provides that EC law has priority over Title VI EU, *i.e.* the first pillar prevails over the third. The ECJ further held that Article 75 EU constitutes a proper legal basis for the matters regulated in Articles 1-7 of the Framework Decision. The Commission subtly pointed out that Articles 1-7 are criminal law provisions dealing with the definition of offences, the principle of the obligation to impose criminal penalties, the level of penalties, accompanying penalties and the rules on participation and instigation. The ECJ went further than the Advocate General in his Opinion by not only accepting that the EC may oblige the Member States to enforce measures by means of criminal law but may also lay down in detail what the arrangements should be. The Commission then turned to the scope of the ECJ judgement. The Commission highlighted the fact that the judgement does not mean that the ECJ has thereby recognised criminal enforcement as an area of Community policy. Criminal enforcement is merely the tailpiece of a substantive policy area.

[23] COM (2005) 583 final, 23 November 2005.

However, the Commission did find that the ECJ judgement might impact all policy areas of negative integration (the four freedoms) and positive integration, possibly making criminal law methods necessary to ensure effective enforcement. This test of necessity must be defined functionally on an area-by-area basis. For some policy areas no criminal enforcement is required, but for others it is. The necessity test also determines the nature of the criminal measures to be taken. The ECJ did not impose any restrictions there. Here too, the approach was functional. The Commission did not elaborate further, but we may conclude that the Commission obviously wished to leave the door open, where necessary, for harmonisation of aspects of the general part of criminal law or of criminal procedural law. The Commission further indicated its preference for horizontal measures where possible, *i.e.* transcending specific policy areas. Here we might think of horizontal criminal measures for the agricultural sector and the structural funds in connection with fighting EC fraud or terrorism or organised crime. The Commission also believed that the judgement puts an end to the double text approach, *i.e.* adopting directives and regulations for substantive policy and its administrative enforcement in addition to framework decisions for the criminal enforcement of that same policy. From now on, all this can be laid down in one single directive or regulation.

In the second part of the communication, the Commission discussed the consequences of the judgement more specifically. The Commission first of all indicated that criminal law provisions concerning police and judicial co-operation, including measures on the mutual recognition of judicial decisions and measures based on the principle of availability, fall within the area of competence of the third pillar. This is also true for the harmonisation *per se* of the general part of criminal law or criminal procedural law in the framework of co-operation and mutual recognition. The criminal harmonisation of policy areas that are not part of the EC Treaty but that are nevertheless necessary for the objectives of the EUs' area of freedom, security and justice are placed within the third pillar. An interesting point is that, in this second part, the Commission further defined the conditions for criminal harmonisation using Community competence under the heading 'Consistency of the Union's criminal law policy'. The Commission clearly indicated that criminal harmonisation under EC competence is only possible if there is a clear need to make the policy in question effective. Furthermore, the requirements of the principles of subsidiarity and proportionality have to be met. This means that there is a strict obligation to provide grounds and reasons. The harmonisation may concern the definition of offences, the criminal penalties, but also what is called 'other criminal-law measures appropriate to the area concerned'. It is clear that the Commission, from the start, does not wish to pin itself down to merely the harmonisation of definitions of offences and criminal penalties. The Commission continued by stating that: "The criminal-law measures adopted at sectoral level on a Community basis must respect the overall consistency of the Union's system of criminal law, whether adopted on the basis of the first or the third pillar, to ensure that criminal provisions do not become fragmented and ill-matched". Both the Commission, on the one hand, and the Council and the EP, on the other, must take care to ensure that there is this consistency and also prevent Member

States or the persons concerned from being required to comply with conflicting obligations.

4. The judgement in case C-176/03: reception in the Member States and in the JHA Council

Despite the unanimous opinions of the various legal services of the EU institutions, including that of the Council itself, the ECJ judgement was greeted with amazement and disbelief by many governments. It is hardly surprising that the ECJ decision was not embraced by the Member States given their numerous interventions in the proceedings in favour of the Council. However, the governments mainly focused their criticism on the communication of the Commission and reflected this at the JHA Council. In Denmark, the Minister of Justice wasted no time informing the Danish parliament of the judgement and submitting a reservation [24]. The Danish Ministry of Justice maintained the view that no legal basis for the judgement could be found in the EC Treaty, even though it expressed awareness that the ECJ judgement was not limited to environmental law. In France, the initiative came from parliament itself. On 25 January 2006, the European Affairs Commission of the French *Assemblée Nationale* [National Assembly or lower house of the French parliament] informed the Speaker of the *Assemblée* [25]. The Commission was of the opinion that the ECJ had acted beyond its competence and demonstrated a certain *fédéralisme judiciaire* [judicial federalism]. The Commission also stated that it is high time to end the *gouvernement des juges* [rule by judges] and restore power to the entities to whom it belongs, namely the governments of the Member States. The Commission therefore proposed applying the bridging provision of Article 42 EU, thereby building an emergency brake procedure into the European Council [26]. The European Affairs Commission was not very pleased with the European Commission's communication in response to the judgement either. It rejected what it considered 'its excessive interpretation'. According to the Commission, it is impossible to conclude from this judgement that there is a Community competence for criminal harmonisation in all common policy areas of the EC and the four freedoms of the internal market. Instead, the ECJ limited this power to essential, cross-sector and fundamental objectives.

The European Commission had, meanwhile, published a new proposal for a directive on the environment through criminal law, replacing the annulled framework decision [27] and the proposal for a directive of 2001 [28]. In this area, there is a legal vacuum

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[24] Memorandum of 13 October 2005, available at http://www.euo.dk/upload/application/pdf/a16a3e79/2005_sv21.pdf.

[25] Assemblée Nationale, Rapport d'information sur les conséquences de l'arrêt de la Cour de Justice du 13 septembre 2005 sur les competences pénales de la Communauté européenne, no. 2829, 25 January 2006, available at http://www.assemblee-nationale.fr/12/europe/rap-info/i2829.asp.

[26] This refers to the emergency brake procedure provided for in the proposal for a European Constitutional Treaty in case of criminal law harmonization which poses a threat to essential interests of a Member State.

[27] Framework Decision 2003/80/JHA.

[28] COM (2001) 139 final, 13 March 2001.

to be filled. Despite the cautious strategy mentioned above, the Commission submitted a varied set of proposals with criminal law substance, most of which were related to the further implementation and execution of international law instruments, including criminal law enforcement obligations. The Commission submitted an amended proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights [29]. This proposal was related to the WTO Agreement on Trade-Related Aspects of Intellectual Property (the TRIPS Agreement) which was approved by means of Council Decision 94/800/EC [30]. The criminal law substance of the proposal was in accordance with that of the proposal for the environmental directive to a large extent. It is interesting to note that, in other proposals, such as the one for a new regulation on the Community customs code [31], which is one of the most harmonised areas of EC law, the Commission did not include any criminal offences or criminal sanctions at all in Article 22 on penalties, even though recital 12 of the regulation underlines the need for dissuasive sanctioning. The same can be said of the draft regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas [32]. Article 29 of the Presidency proposal [33] seems to go beyond the Commission proposal [34]. However, both stop short of imposing criminal sanctions for the misuse of data. The least that can be said is that it is not very clear from the proposals when and by which criteria the Commission does in fact opt for criminal law obligations. A blueprint for criminal legislative policy can certainly not be said to have been acting as a guide at this stage.

5. The second ruling of the ECJ in case C-440/05 on criminal enforcement of ship source pollution: the reintroduction of the double text approach

Framework Decision 2005/667 deals with maritime transport issues (and its environmental effects) and contains very specific rules on the harmonisation of criminal sanctions. Both the Member States and the European Court of Justice (ECJ) considered this case to be a new landmark case. In the proceedings before the Grand Chamber of the Court of Justice, no less than nineteen Member States intervened, all in support of the Council of Ministers [35].

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[29] COM (2006) 186 final, 28 April 2006.

[30] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), *OJ*, no. L 336, 23 December 1994, p. 1.

[31] COM (2005) 608, 30 November 2005.

[32] COM (2004) 835, 28 December 2004.

[33] Article 29 of the Presidency Proposal: "Member States shall take the necessary measures to ensure that any misuse of data entered in the VIS is punishable by penalties, including administrative and/or criminal penalties in accordance with national law, that are effective, proportionate and dissuasive".

[34] Article 29 of the Commission Proposal: "The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation relating to data protection and shall take all measures necessary to ensure that they are implemented (...)".

[35] The following countries were granted leave to intervene: Portugal, Belgium, Finland, France, Slovakia, Malta, Hungary, Denmark, Sweden, Ireland, Czechia, Greece, Estonia,

In his opinion in case C-440/05, Advocate General Mazäk stressed that, contrary to the view expressed by certain governments, Article 47 TEU establishes the primacy of Community action and law under the EC Treaty over activities undertaken on the basis of Title V or Title VI of the EU Treaty [36] and that is does not make a difference if the Community, at the time of the adoption of the framework decision, had already or had not yet adopted legislation with regard to the matters covered [37]. Second, he pointed out that, if the ECJ were to find that, for one reason or another, there was no such competence under the policy on transport, this finding would not, strictly speaking, be the end of the story. There can be alternatives for the legal basis in the EC Treaty. The AG did, however, reject the argument of the Member States that EC criminal competence should be limited to the environment or to substantial matters with a horizontal approach in the EC Treaty. His approach was mainly that criminal law competence should be a corollary to the general principle of effectiveness of Community law (*effet utile* principle). For this reason, he accepted that Article 80(2) EC indeed provides the legal basis for the criminal law enforcement of ship-source pollution, instead of Article 31 (1)(e) and Article 34(2)(b) EU, and he proposed that the Court should annul Framework Decision 2005/667/JHA. However, he also agreed with the opinion of AG *Ruiz-Jarabo Colomer* in the C-176/03 case: "the Community legislature is entitled to constrain the Member States to impose criminal penalties and to prescribe that they be effective, proportionate and dissuasive, but beyond that, it is not empowered to specify the penalties to be imposed" [38]. He believed that this could otherwise lead to fragmentation and compromise the coherence of national penal systems and that Member States are, as a rule, better equipped than the Community to translate the concept of effective, proportionate and dissuasive criminal penalties into their respective legal systems and societal context. The ECJ first followed the same reasoning as in case C-176/03. It considered it to be its task to ensure that acts which, according to the Council, fall within the scope of Title VI do not encroach upon the powers conferred on the Community by the EC Treaty. The ECJ emphasised that the common transport policy is one of the foundations of the Community and that the Council, under Article 80(2) EC, may decide whether, to what extent, and by what procedure appropriate provisions may be laid down for sea transport. Since Article 80(2) EC contains no explicit limitations, the Community legislature has broad legislative powers under Article 80(2) EC and is competent to take measures to improve transport safety. Moreover, environmental protection forms part of the common transport policy.

Concretely, the ECJ took a careful look at the objectives and substance of Framework Decision 2005/667. Its main purpose is to enhance maritime safety and improve the protection of the maritime environment. The Council took the view that criminal penalties were necessary to ensure compliance with the Community rules on maritime safety. The ECJ came to a double conclusion. Articles 2, 3, and 5 of

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United Kingdom, Latvia, Lithuania, The Netherlands, Austria, and Poland.

[36] Para. 53 of the opinion.

[37] Para. 57 of the opinion.

[38] Para. 103 of the opinion.

the framework decision must be regarded as being essentially aimed at improving maritime safety as well as environmental protection and could have been justifiably adopted on the basis of Article (80)2. This means that the definition of the offences (*actus reus* and *mens rea*), liability issues, the prescription of the obligation to provide for criminal sanctions for natural persons and the obligation to provide for criminal or administrative sanctions for legal persons must be dealt with under EC law. However, the ECJ came to the conclusion that the type and level of criminal penalties to be applied does not fall within the Community's sphere of competence. The Community legislator may not adopt provisions such as Articles 4 and 6 of the Framework Decision. This last point comes as quite a surprise. Many EC instruments do in fact contain concrete penalty provisions, including on the type and level and the liability of legal persons and including the prescription of administrative or criminal sanctions, defined as administrative penalties or prescribed as administrative *or* criminal penalties. Member States remain free to choose between administrative or criminal sanctions when defining the type and level of sanctions. Nevertheless, the ECJ considered the prescription of the type and level of administrative *or* criminal sanctions as being a third-pillar competence.

This ruling has several consequences. The EC's functional criminal law competence has been confirmed even outside the horizontal field of environmental protection. If the EC policy is an important policy of the EC, then functional competence can be included in its discretionary powers to take all appropriate measures. However, the harmonisation of criminal law continues to be necessary and is the only way to achieve this objective (*i.e.* enforcement of that policy). In other words, in EC law too, criminal law is *ultima ratio* and is necessary for the *effet utile.* The functional criminal law competence has therefore been broadly extended but it is still not clear which EC policies are actually included and which are actually excluded. With regard to the scope of the competence, the ECJ has clearly stipulated that the nature of the criminal sanction can be prescribed under EC law but that the type of criminal sanction and the level of the sanction must be prescribed under EU law. The ECJ judgement does not explicitly deal with other possible EC criminal law-related issues, such as, for instance, jurisdiction and the designation of contact points for transnational cooperation. As Articles 2, 3, and 5 of the Framework Decision must have been justifiably adopted on the basis of Article 80(2), the Framework Decision infringes Article 47 EU and, being indivisible, was annulled in its entirety. As a result, the Commission had to elaborate a new directive for ship-source pollution and on the introduction of penalties for infringements. The directive was adopted in 2009[39]. The European Commission had meanwhile published a new proposal for a directive on the environment through criminal law[40], replacing the annulled Framework Decision[41] and the proposal for a directive of 2001[42]. The new directive on protection of the

[39] Directive 2009/123/EC of 21 October 2009 on ship-source pollution and on the introduction of penalties for infringements, *OJ*, no. L 280, 27 October 2009, p. 52.

[40] COM (2007) 51 final, 9 February 2007.

[41] Framework Decision 2003/80/JHA.

[42] COM (2001) 139 final, 13 March 2001.

environment through criminal law, adopted in 2008 [43], takes into account the ruling of the ECJ in the ship-source pollution case and contains, in Article 5, only an obligation to provide for criminal law protection in this area without stipulating the type and the level of criminal penalties. In fact the directive only repeats the formula of the Greek maize case but applies it to criminal penalties: Member States must provide for effective, proportionate and dissuasive criminal penalties.

6. Intermediate conclusions

Although in case C-240/90 [44] (1991) the ECJ recognised that the EC was competent to prescribe and harmonise the administrative law enforcement of EC policies, including punitive sanctions, it cannot be said that the EC has abused this power over the last twenty years. In fact, the reverse is the case. It is remarkable that, in many areas of Community law, no initiatives whatsoever have been taken in this direction. One might think of, for example, environmental law, tax law, financial services regulation (banking and securities), customs regulation, etc. It is my opinion that the Commission has shown insufficient initiative to give any systematic or consistent shape to the harmonisation of administrative enforcement of EC policies. The Commission has failed to make use of its power to outline an EC enforcement policy from which it can be clearly concluded in which area of policy the harmonisation of administrative enforcement by the Member States would be needed. Often, an *ad hoc* approach was applied by the directorate generals of the Commission.

The ECJ rulings on criminal law competence in the first pillar were landmark decisions on the division of labour within the EU's institutional framework. Their importance was not limited to issues of competence as they had consequences for interactions with the Member States' legal order (Community method versus third pillar method). Thanks to the ruling, the first directives with criminal law substance have been voted on in the EU. However, their impact was limited as the type and level of criminal sanctions had to be defined in a second third pillar instrument. It is astonishing to see that neither the Member States nor the Commission submitted a third pillar proposal or a proposal for a directive under Article 83(2) TFEU, stipulating the type and level of criminal sanctions in the environmental field. As it stands there is less harmonisation of criminal law enforcement of the environment under the actual framework than the one adopted by the annulled Framework Decision as the latter contained extensive obligations concerning criminal law sanctions. The result is that harmonisation in the criminal law field is only aimed at establishing minimum constituent elements in respect of certain criminal offences.

To sum up, we can say that neither the Commission nor the Member States have submitted legislative proposals based on a well-thought enforcement and criminal law policy of harmonised EC policies. In its Tampere Conclusions of 1999, the Council accepted that "efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular

[43] Directive 2008/99 of 19 November 2008 on the protection of the environment through criminal law, *OJ*, no. L 328, 6 December 2008, p. 28.

[44] Case C-240/90, *Germany v. Council and Commission*.

relevance" [45] but the Tampere programme [46] has clearly provided insufficient direction. Even in policy areas of far-reaching integration, such as the internal market, customs union or monetary union, there was no clear enforcement policy. Both in the Council and in the Commission, the approach has been predominantly *ad hoc* and eclectic. What is striking in this context is that the Commission has not submitted any EC proposal for the criminal protection of the euro (which is after all 'hardcore' EC monetary policy) and has gone along with the Council completely in the elaboration of a framework decision [47]. It is also striking that, in some policy areas, the Commission has failed to develop any initiative for the harmonisation of punitive administrative law or criminal law or has only done so sparingly. In this context, one might think of financial services and securities regulations. It is true that the Market Abuse Directive of 2003 [48] obliges Member States to enforce the provisions administratively but no mandatory sanctions have been prescribed. Article 14(2) authorises the Commission to draw up a list of administrative measures and penalties but this list is merely informative. The lack of any well thought out criminal law policy is also reflected in the initiatives for the harmonisation of criminal law. Why, for instance, does the Commission press for the criminal law harmonisation of environmental law and criminal law protection of the financial interests of the EC but fail to do the same in the field of competition or fisheries or the financing of terrorism? Why do the Member States press for the criminal law harmonisation of terrorism, xenophobia and the protection of victims of crime but not for the criminal law harmonisation of serious violations of food safety rules, intellectual property infringements or the financial management of businesses?

7. Council's criminal legislative policy on the eve of the entry into force of the Lisbon Treaty

Both Member States and the Council felt the need to streamline the content of their legislative work in the criminal law field. In 2002 the Council agreed on an approach regarding the approximation of penalties [49]. The Council elaborated a dual approach. In some cases, the Council states, it may be sufficient to stipulate that Member States shall provide that the offences concerned are punishable by effective, proportionate and dissuasive penalties and leave it to each Member State to determine the level and type of the penalties. In other cases, the Council accepted the need to go further and agreed to establish a system of four levels of penalties to be used in legislation:

Level 1: Penalties of a maximum of between one and three years of imprisonment
Level 2: Penalties of between two and five years of imprisonment
Level 3: Penalties of between five and ten years of imprisonment

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[45] Conclusion no. 48.

[46] Most recently updated by COM (2004) 0401 final, 3 June 2004.

[47] Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by means of criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro, *OJ*, no. L 140, 14 June 2000, p. 1.

[48] Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ*, no. L 96, 12 April 2003, p. 1.

[49] Council conclusions on the approach to apply regarding approximation of penalties, Doc. 9141/02, DROIPEN 33, 27 May 2002.

Level 4: Penalties of a maximum of ten years of imprisonment (cases where very serious penalties are required)

In practice, the streamlining of criminal law harmonisation through minimum requirements for the maximum level of the penalties to be provided by national law in respect of specified offences has not been very successful and has not been sufficient to draw up a common approach to criminal law enforcement in EU legislation. This is certainly the reason why, in 2009, the Council adopted conclusions on model provisions [50] guiding the Council's criminal law deliberations**.** The Council's aim was to secure the following advantages: a) guidelines and model provisions would facilitate negotiations by leaving room to focus on the substance of the specific provisions; b) increased coherence would facilitate the transposition of EU provisions in national law and c) legal interpretation would be facilitated when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements. The main aim is, however, that the model provisions should guide future Council work on legislative initiatives that may include criminal provisions.

The Council's model provisions integrate the 2002 conclusions on penalties. Moreover, the model provisions explicitly refer to the Lisbon Treaty: "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, as under Article 83(2) of the Lisbon Treaty, it should follow the practice of setting the minimum level of maximum penalty".

The conclusions on model provisions of 2009 deal with both the need for criminal provisions and the structure of criminal provisions. With regard to the necessity test, the conclusions insist that criminal law enforcement should be introduced only when it is considered essential for the protection of a legal interest, and, as a rule, be used only as a last resort. This double test (essential for the protection of the legal interest and *ultima ratio*/*ultimum remedium*) is made more concrete by insisting on proportionality and subsidiarity. Criminal law provisions should address a clearly defined and delimited conduct (*lex certa*), which cannot be addressed effectively by less severe measures. These criteria are applied in the model provisions to two areas:

– in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, or
– if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

Finally, when defining such a need, a final impact assessment should take into account the expected added value of the criminal provision compared to other enforcement measures, how serious and/or widespread and frequent the harmful conduct is and the impact on existing criminal provisions in EU legislation and on different legal systems with the EU. It is clear that these assessment criteria regarding the need for criminal provisions contain general principles of criminal law and criminal

[50] Draft Council conclusions on model provisions, guiding the Council's criminal law negotiations, doc. 16542/09, DROIPEN 160, 23 November 2009.

policy issues and cover the two substantive areas under Article 83 TFEU, the 'euro-crimes' under Article 83(1) TFEU and the criminal law enforcement of harmonised EU policies (annex-competence) under Article 83(2) TFEU.

The second part of the model provisions deal with the structure of criminal provisions as such. The model provision covers *actus reus*, *mens rea*, inciting/aiding/abetting and attempt, penalties, liability of legal persons and penalties against legal persons. This means that provisions on jurisdiction or on mutual legal assistance or mutual recognition, dealt with in former EU conventions and framework decisions, have not been included in the model provisions.

With regard to the definition of the *actus reus*, the following criteria have been put forward: *lex certa*, foreseeability, conduct that causes actual harm or seriously threatens the right or essential interest to be protected. Abstracted danger to the protected right or interest is only possible if appropriate for the protection of interest of right. Concerning the *mens rea* element, as a general rule EU criminal legislation should only deal with intentionally committed conduct. However, negligence can be included when particularly appropriate for the protection of the interest or right. Strict liability is explicitly excluded. As regards inciting, aiding and abetting, the model provisions impose criminalisation following criminalisation of the main offence. When dealing with attempt, the model rules are relatively cautious. They refer to a necessity and proportionality test and to consideration of the different legal systems under national law.

When it comes to penalties, the model rules provide for two regimes (let us call them models A and B). In some cases it may be sufficient to provide for effective, proportionate and dissuasive criminal penalties and leave it to each Member State to determine the level of the penalties (model A). In other cases there may be a need to go further in the approximation of the levels of penalties (model B). In these cases, the Council conclusions of 2002 on penalties apply. It is striking that the model provisions under model B do not deal with the type of criminal sanctions. When criminal law harmonisation under Article 83(2) TFEU is at stake, it will certainly not be sufficient to limit harmonisation to the deprivation of liberty.

Finally, the model provisions contain extended provisions on the liability of legal persons and penalties against legal persons. They introduce the obligation of ensuring that a legal person can be held liable, under civil law or administrative law, for criminal offences. Attribution of liability is based on the benefit for the legal person and attribution of (vicarious) liability of natural persons to the legal persons. The liability of legal persons shall not exclude the criminal liability of natural persons. Liability of legal persons is prescribed for entities having legal personality except for States or public bodies in the exercise of state authority and for public international organisations. When it comes to penalties against legal persons, the model provisions prescribe a list of different penalties (such as exclusion of public benefits, judicial winding-up, placing under judicial supervision, fines). However, these penalties of a criminal or non-criminal nature must meet the standard of effective, proportionate and dissuasive penalties. It is astonishing that the model provisions contain very detailed provisions on the liability of legal persons but stick to the practice under the

Maastricht and Amsterdam Treaties and avoid the possibility of mandatory criminal liability in some areas of substantive criminal law.

Although the Council's model provisions were adopted one day before the Lisbon Treaty entered into force (30 November 2009) and were aimed at guiding the future work of the Council on legislative initiatives that may include criminal provisions, they are much more of a summary of past performance than a prospective criminal policy document. They do not fully take into account the substantive changes under the Treaty of Lisbon. The Lisbon Treaty provides for a new legal framework for criminal legislation with the aim of preventing and punishing crime in the common area of freedom, security and justice. Not only has the substance of criminal law harmonisation and the applicable rules been changed by the Treaty of Lisbon but so has the objective of harmonisation. Article 3 TEU clearly states that

> "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime"

Prevention and punishment of crime has become, compared to Article 2 of the Amsterdam TEU, an objective that is related to the rights and duties of citizens and not only related to the free movement of persons. Given the wording of Article 82 TFEU, harmonisation of criminal law and criminal procedure is also a necessary tool for strengthening judicial cooperation in criminal matters based on mutual recognition and mutual trust. From this perspective the model provisions of the Council do not guide us as to the content of criminal policy choices. What legal interests deserve criminal protection and to what extent? This is certainly the case for Article 83(2) TFEU, for which no or very little *acquis* had been build up in the past either under the former third pillar or under the first pillar. The criminal law protection directives in the environmental field are the exceptions to the rule. In the light of Article 2 TFEU, which states that, in case of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence, it becomes more and more necessary to understand for which areas and to what extent the EU is willing to exercise its competence. As a mitigating factor we could say that the Council as such has no right of legislative initiative and is thus not very well placed to elaborate legislative policy. On the other hand, the Council's model provisions are a policy document that have been thoroughly discussed and adopted by the Member States in the Council and the Member States have a legislative initiative.

8. A criminal legislative policy under the Lisbon Treaty?

Since the entry into force of the Lisbon Treaty, the European Commission (and its Directorate General (DG) Justice in particular) has taken a proactive stand on the topic. On its website [51], DG Justice spells out three specific competences for criminal law in the TFEU. First, the EU can adopt directives providing for minimum rules regarding the definition (constituent elements and criminal sanctions) of euro offences under Article 83(1) TFEU. Article 83(1) TFEU contains a list of ten serious areas of

[51] See http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm

crime with a crossborder dimension. They include terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Second, the EU can also adopt directives, under Article 83(2) TFEU, providing for minimum rules on the definition of offences and criminal sanctions if they are essential for ensuring the effectiveness of a harmonised EU policy. Third, DG Justice refers to the duty to protect the financial interests of the EU, under Article 310(6), 325, 85 and 86 TFEU, which might include, if necessary, by means of criminal law. This would mean that Article 325 TFEU could be used as a proper legal basis for criminal law protection of the financial interests of the EU. It remains unclear if DG Justice is of the opinion that this competence could also include regulations providing for criminal law provisions instead of directives.

Moreover, the Commission published, in September 2011, a communication entitled 'Towards an EU Criminal Policy : ensuring the effective implementation of EU policies through criminal law'[52], dealing specifically with the EU's competence under Article 83(2) TFEU. The Commission is aware of the fact that, due to the lack of an explicit legal basis in this respect prior to the Lisbon Treaty, only very few measures have been taken for the purpose of strengthening the enforcement of EU policies. Firstly the Commission elaborates on the scope for EU criminal legislation. The Commission underlines that Article 83(2) aims at strengthening mutual trust, ensuring effective enforcement and coherence and consistency in European criminal law itself. Article 83(2) does not list specific offences or areas of crime. For that reason the Commission has drawn up this communication as guidance for the policy choices about whether to use criminal law as an enforcement tool or not, as well as in relation to other enforcement tools such as the administrative one. The Commission also adds Article 235(4) of the TFEU, referring to the protection of the financial interests of the EU:

> "4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies".

The Commission does not make any explicit reference to directives or regulations with a criminal law substance. However, by mentioning Article 235(4) it is considering the possibility to do so.

Second, the Commission deals with the question of which principles should guide EU criminal law legislation. The communication refers to general principles such as subsidiarity and respect for fundamental rights, referring explicitly to the EU Charter of Fundamental Rights and the ECHR, but not referring to Article 6(3) TEU, and thus not referring explicitly to fundamental rights as guaranteed by the ECHR and "as they result from the constitutional traditions common to the Member States". It seems to me impossible to elaborate a criminal policy that would not take into account constitutional traditions common to Member States, and I stress the word 'common'

[52] COM (2011) 573 final, 20 September 2011.

as they are a direct source for the general principles of EU law under Article 6(3) TEU. After the reference to the general principles, the Commission follows the two-step approach of the Council's model provisions. Step 1 is the decision about whether to adopt criminal law measures at all (last resort – *ultima ratio*/*ultimum remedium*). The proposed necessity and proportionality test is written in a negative way (restrain unless necessary and proportional) without taking into account that there might be positive duties under fundamental rights to investigate, prosecute and punish, also under Article 83(2) TFEU. Step 2 deals with the principles guiding the decision on what kind of criminal law measures to adopt. The text refers to the concept of 'minimum rules' and excludes full harmonisation but underlines the need for legal certainty at the same time. The requirements for legal certainty are, however, not the same as for national criminal law legislation as the directive has to be implemented in national law and cannot create or aggravate criminal liability as such. It is surprising that the Commission does not further elaborate on the concept of minimum rules as this formulation was already used in the Amsterdam Treaty. These minimum rules are related to the Treaty objectives, including equivalent protection and common provisions when dealing with crossborder crime or enforcement of EU policies. This means that the concept of minimum rules is functional to the objectives of the Treaty and not an autonomous criterion. Regarding sanctions, the Commission refers both to the type of sanctions and to the level of sanctions (taking into account aggravating or mitigating circumstances) that should be implemented in national law. The choice of sanctions must be evidence-driven and submitted to the necessity and proportionality test. It is interesting that the Commission insists on tailoring the sanctions to the crime, which has consequences for the choice of type of sanctions and consequences for the choice of criminal liability for legal persons. It thus becomes clear that the Commission does not exclude the criminal liability of legal persons and criminal sanctions for legal persons from its competence under Article 83(2) TFEU. Finally, the minimum rules may also include provisions on jurisdiction as well as other aspects that are considered partly essential for the effective application of the legal provision.

Third, the Commission deals with the choice of policy areas where EU criminal law might be needed. The criteria are lack of effective enforcement or significant differences among Member States leading to inconsistent application of EU rules. Still, in that case the Commission will have to assess the specific enforcement problems and the choice of administrative and/or criminal enforcement on a case-by-case basis. However, the Commission has already indicated, in its communication, priority fields for criminal law harmonisation under Article 83(2) TFEU. Three areas are mentioned:

– The financial sector, *e.g.* concerning market manipulation and insider trading [53]
– The fight against fraud affecting the financial interest of the EU
– The protection of the euro against counterfeiting

The Commission also refers to a set of areas (not an exclusive list) in which criminal law enforcement might play a role:

– Illegal economy and financial crime

[53] See Communication on reinforcing sanctioning regimes in the financial sector, COM (2010) 716 final, 8 December 2010.

– Road transport [54]
– Data protection [55]
– Customs rules
– Environmental protection
– Fisheries policy
– Internal market policies (counterfeiting, corruption, public procurement).

The assessment has to take into account a whole set of factors, including the gravity and nature of the breach and the efficiency of the enforcement system. The choice of administrative enforcement and or criminal enforcement is part of this assessment. The list of topics is not exclusive but it is rather surprising that counterfeiting and piracy of products, feed and food safety and corruption are not in the priority list of areas that have already been selected. Criminal law *acquis* for corruption [56] already exists. The Commission had already submitted, in 2005, a proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and a proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences [57]. The Commission had already tried, in 2003 [58], in vain, to have a regulation containing criminal law enforcement obligations adopted in the area of feed and food safety.

At the time of writing, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs is working on a 'Report on an EU approach to Criminal Law' [59]. The Rapporteur Cornelis de Jong published a draft report in February 2012 [60] after a hearing on the topic in December 2011. The final output is expected to be a resolution of the EP on the topic. The draft report contains an explanatory statement and a draft EP resolution. As far as the content is concerned, the draft resolution combines the tests of necessity, subsidiarity and proportionality with the general principles of criminal law (*lex certa*, *nulla poena sine culpa*, *lex mitior*, etc.) and fully corresponds to the 2011 Commission communication. The draft resolution does not contain any reference to the choice of policy areas that should be worthy of criminal law protection. More interesting is the procedural approach. The resolution calls for an interinstitutional agreement on the principles and working methods governing proposals for future substantive criminal law provisions and invites the Commission and the Council to establish an interinstitutional working group in which these institutions and Parliament can draw up such an agreement and discuss

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[54] See Commission Staff Working Paper, SEC (2011) 391, 28 March 2011, accompanying the White Paper, Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144, 28 March 2011.

[55] See the Communication, A comprehensive approach on personal data protection in the European Union, COM (2010) 609, 4 November 2010.

[56] Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *OJ*, no. L 192, 31 July 2003, p. 54.

[57] COM (2005) 276 final, 12 July 2005.

[58] COM (2003) 52 final, 17 November 2003.

[59] Note of the editors: the report has been meanwhile adopted. See Annex to this book.

[60] European Parliament, Report on a EU approach to criminal law, (2010/2310 (INI)), 24 April 2012.

general matters with a view to ensuring coherence in EU criminal law. As things stand, there is a Council Working Party on substantive criminal law (DROIPEN) and a new interservice coordination group on criminal law at the Commission. Furthermore the Commission decided, in February 2012, to set up a formal expert group on EU criminal policy [61]. At the EP there is no formal structure at all.

9. Criminal harmonisation under the Lisbon Treaty in practice

Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims [62] is the first directive to have been adopted under Article 83(1). It contains the usual content as foreseen under the Council's model provisions and includes specific harmonisation of the type and level of sanctions (model B of the Council's model provisions), but goes also beyond it, as it deals with aspects of jurisdiction, seizure and confiscation and some aspects related to investigation and prosecution and of course many aspects of victim protection and victim rights. Directive 2011/92 [63] on combating the sexual abuse and sexual exploitation of children and child pornography follows the same pattern. Meanwhile the Council reached a general agreement [64] on a proposal for a directive on attacks against information systems, replacing Framework Decision 2005/222/JHA. In this directive too, the choice was made to harmonise the type and level of criminal sanctions (model B). However, these directives do not always follow the four types/levels of harmonisation of custodial sanctions as elaborated in the 1992 agreement on criminal sanctions, as incorporated in the Council's model provisions. The influence of the EP as co-legislator has resulted, through amendments for more severe repression, in other levels of sanctions.

The first initiative under Article 83(2) is in one of the three already selected areas in the communication of September 2011, namely in the financial sector and on criminal sanctions for insider dealing and market manipulation. The Commission has used the policy criteria of its communication of September 2011 for its assessment and has even produced, in 2010, a communication on 'Reinforcing sanctioning regimes in the financial service sector' [65] based on comparative research by the three Committees of Supervisors (the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR)) on the equivalence of

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[61] Commission Decision 2012/C 53/05 of 21 February 2012 on setting up the expert group on EU criminal policy, *OJ*, no. C 53, 23 February 2012, p. 9.

[62] Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ*, no. L 101, 15 April 2011, p. 1.

[63] Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *OJ*, no. L 335, 17 December 2011, p. 1

[64] Proposal for a Directive of the European Parliament and of the Council on Attacks against Information Systems, replacing Council Framework Decision 2005/222/JHA, doc. 11566/11, DROIPEN 62, 15 June 2011.

[65] COM (2010) 716 final.

the sanctioning regimes in the financial sector in Member States. The review by the Commission in cooperation with the Committees of Supervisors spells out substantial divergences and weaknesses in national sanctioning regimes:

- Some competent authorities do not have important types of sanctioning powers for certain violations at their disposal
- Levels of administrative pecuniary sanctions vary widely across Member States and are too low in some Member States
- Some competent authorities cannot address administrative sanctions to both natural and legal persons
- Competent authorities do not take into account the same criteria in the application of sanctions
- Divergence exists in the nature (administrative or criminal) of sanctions provided for in national legislation
- The level of application of sanctions varies across Member States.

As a consequence, the Commission considers that a minimum common standard should be set and that this minimum common standard might include criminal sanctions for the most serious violations. The proposed directive on criminal sanctions for insider dealing and market manipulation [66], submitted in October 2011, is part of a legislative double text package, which also includes a proposal for a regulation on insider dealing and market manipulation (market abuse) [67]. In fact the proposed regulation, based on Article 114 TFEU and designed to replace Directive 2003/6/EC [68], is the basic regulatory framework. The proposal for a regulation contains all the definitions, obligations and prohibitions and also regulates the applicable administrative enforcement regime, including administrative sanctions of a non-punitive and punitive nature. This means that the proposed regulation contains very detailed provisions on the definition of the illicit behaviour and on the applicable administrative sanctions, including the type and level of sanctions (such as, for instance. withdrawal of the authorisation to carry out an activity or pecuniary sanctions for legal persons up to 10% of the legal person's total annual turnover in the preceding business year) [69]. The proposed directive is the result of the Commission's assessment on the need, proportionality and subsidiarity of criminal law enforcement in the financial sector. The Commission came to a positive result as far as serious market abuse offences are concerned. The proposed directive is surprising from different angles. Although the proposed regulation and the proposed directive are a regulatory package and contain quite a number of cross-references, the proposed directive only refers to the definitions of financial instruments and inside information in the proposed regulation but, strangely enough, reformulates the definition of insider dealing and market manipulation. These definitions in the proposed directive and regulation are not shaped in the same way. The ones in the proposed directive are written in a more precise style and do not contain further explanations and details.

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[66] COM (2011) 654 final, 20 October 2011.
[67] COM (2011) 651 final, 20 October 2011.
[68] Directive 2003/6/EC.
[69] Article 26 of the proposal.

Second, given the assessment that there is a need for criminal law harmonisation to ensure the effective enforcement of Union policy against market abuse, it is also surprising that the proposed directive is opting for what we have called model A of the Council's model provisions. This means that, in this area, it is sufficient to provide for effective, proportionate and dissuasive criminal penalties and leave it to each Member State to determine the type and level of the penalties. This type of criminal law harmonisation was already possible under the 1st pillar of the Amsterdam Treaty even after the ruling of the European Court of Justice in the ship source pollution case. And this brings me to the third point. The choice of Article 83(2) TFEU as a legal basis is not discussed. There is no consideration as to which Article 83(2) TFEU is more appropriate than a legal basis linked to the relevant policy area (financial services). The consequence of the choice of Article 83(2) TFEU is at least that Denmark is not taking part in the adoption of this directive [70] and that the UK and Ireland have an opt-in but no obligation to become part of and be bound by the directive [71]. In other words under Article 83(2) TFEU, it is possible that criminal enforcement obligations, considered in line with proportionality and subsidiarity and considered necessary for the effective enforcement of a harmonised EU policy, will not be binding in three EU countries, including the EU country with the biggest centre for financial services. In this sense, the proposal is rather a step backward than forward.

The second priority area under Article 83(2) TFEU concerns the protection of the financial interest of the EU. The *acquis* in this field dates back to the Maastricht Treaty, the 1995 regulation on administrative enforcement [72] and the 1995 Convention and two protocols [73] on criminal enforcement. The Commission already submitted, in 2001, a proposal for a directive on the criminal law protection of the Community's financial interest [74] but the proposal was never thoroughly discussed in the Council. This file concerns not only the 'Lisbonisation' of the Maastricht *acquis* but also some substantial new points, such as the broadening of the material scope of the substantive offences, redefinition of the jurisdiction criteria and the possible criminal liability of legal persons. Concerning the criminal law protection of the financial interest of the EU, the Commission published in July 2012 its proposal [75]. The Commission opted for Article 325(4) TFEU as a legal basis, but did not opt for a regulation, but a directive. Article 325(4) TFEU contains a legal basis for necessary measures with a

[70] In accordance with Articles 1 and 2 of Protocol no. 22.

[71] In accordance with Articles 1, 2, 3, and 4 of Protocol no. 21.

[72] Regulation 2988/95 of 18 December 1995 on the protection of the EC's financial interest, *OJ*, no. L 312, 23 December 1995, p. 1.

[73] Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, *OJ*, no. C 316, 27 November 1995, p. 47; Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests, *OJ,* no. C 313, 23 October 1996, p. 1; Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, *OJ*, no. C 221, 19 July 1997, p. 11.

[74] COM (2001) 272 final, 23 May 2001.

[75] Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11 July 2012.

view to affording effective and equivalent protection in the Member States and in the EU. The advantage of this option is that it would be binding for all Member States, including Denmark, Ireland and the UK, and that they cannot use the emergency brake procedure of Article 83 TFEU. Concerning the content of the proposal, there are several points to be mentioned. The Commission was rather modest in redefining the concept and reach of PIF-offences. It also refrained from introducing criminal liability of legal persons. However the Commission included in Article 8 the imprisonment thresholds minimum penalties. During the ongoing negotiations Member States are battling against the legal basis and the minimum penalties.

As far as the third priority area is concerned, the criminal protection of the counterfeiting of the single currency, the file concerns the 'Lisbonisation' of the Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro [76]. For the time being, there is no legislative initiative in the pipeline.

Concerning the other areas for which the Commission still has to decide if and to what extent harmonisation of criminal enforcement is necessary (*e.g.* customs policy, illegal economy and financial crime, data protection, etc.) there are no legislative proposals in the pipeline either. The Commission has published a communication on 'A Single Market for intellectual property rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe' [77], dealing also with stepping up the fight against counterfeiting and piracy. However, so far there has been no legislative proposal although the Commission submitted, in 2005, a proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and a proposal for a framework decision to strengthen the criminal law framework to combat intellectual property offences [78]. With regard to corruption, the Commission has published a communication on fighting corruption in the EU [79]. In some of the abovementioned policy areas the Commission has tendered a study, such as the one on sanctions in the field of commercial road transport.

10. Conclusion

The impact of the European integration process on criminal law has been substantial.

The enforcement deficit of EU policies, both in law and in practice, has resulted in EU enforcement obligations, including punitive administrative and criminal law obligations, whose aim has been to achieve effective application of EU policies in the Member States. Since the entry into force of the Amsterdam Treaty and the creation of an area of freedom, security and justice, substantive areas of serious crime (the so-called "euro crimes" such as organised crime, terrorism, trafficking in human

[76] Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *OJ*, no. L 140, 14 June 2000, p. 1.

[77] COM (2011) 287 final, 24 May 2011.

[78] COM (2005) 276 final.

[79] COM (2011) 308 final, 6 June 2011.

beings, cybercrime, etc.) have been harmonised with the aim of strengthening judicial cooperation in criminal matters based on mutual recognition and mutual trust. The overall aim of both approaches is to prevent and punish crime in the area of freedom, security and justice.

Given the shared competence [80] in the field of criminal law, based on shared sovereignty and common goals, between the Member States and the EU, it is logical that both the EU and the Member States should elaborate criminal policies in the area of European criminal law too. But the shared competence also means that both European and national criminal policies must and should have two dimensions, a European and a national one. In fact, European criminal policy has to take account of common traditions in the Member States and the national criminal policies have to take into account the European dimension in the enforcement of their national criminal law. The prevention and punishment of market abuse, the commercialisation of dangerous foodstuffs or of trafficking in human beings, just to give a couple of examples, can only be achieved through the integration of EU and national criminal policies.

This includes the fact that EU criminal policy and national criminal policies should set goals based on the objectives of the EU treaty. What is required to offer EU citizens an area of freedom, security and justice in which free movement of persons is ensured whilst preventing and fighting crime? It is quite clear that we cannot only address serious crossborder crime but that we have to deal with the criminal law enforcement of EU policies, if necessary, as well. What types of legal interests require and deserve criminal law protection? I think that we still can make a distinction between the

- Proper legal interest of the EU (counterfeiting of the single currency, protection of the financial interests of the EU, corruption of EU officials)
- Common legal interests in the area of freedom, security and justice (euro crimes – Article 83(1) TFEU)
- Legal interest linked to harmonised EU policies (annex-competence – Article 83(2) TFEU)

Both EU and national criminal policy documents should deal with these three dimensions.

Criminal policy must be principle-based, combining the tests of necessity (*ultima ratio*), subsidiarity and proportionality and general principles of criminal law. But that is only a part of the story. Criminal policy is of course also about policy. This means that political choices must be made about the interests that deserve and require criminal law protection. This criminal law protection has to be defined in relation to other enforcement regimes, especially punitive administrative enforcement. Criminal policy also includes the elaboration of instruments of integrated enforcement of Community policies, including prevention, administrative enforcement and criminal enforcement. In the light of Article 2 TFEU, which states that, in the case of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence, it becomes more and more necessary to

[80] Article 2 TFEU.

establish for which areas and to what extent the EU is willing to exercise its competence. The minimum rules concerning the definition of criminal offences and sanctions, as defined in Article 83, cannot be read as minimum harmonisation. Once the EU has exercised its competence, Member States lose their competence to decriminalise the relevant conduct or even to substantially change the constituent elements of the offences or of the penalties Moreover, as can be seen from the new directives based on Article 83(1) TFEU, the minimum rules concerning the definition of criminal offences and sanctions also include the related aspects of jurisdiction, judicial cooperation in criminal matters, victim protection etc. From the perspective of common equivalent standards in the area of freedom, security and justice it becomes less and less evident that Member States can claim that this harmonisation should leave a number of principles or guarantees intact that were considered by (some of) the Member States to be essential for their own criminal (procedural) law. Member States have traditionally had red lines in terms of functional harmonisation in the following areas: prosecutorial discretion, the criminal liability of legal persons, minimum penalties and sentencing discretion. Procedurally, the emergency break under Article 83 TFEU can be used for this purpose but this instrument is rather a political *ultima ratio*, although it could have a preventive effect during the negotiations. In my opinion, national red lines can only make sense if they do not obstruct common European goals in the area of freedom, security and justice. Finally criminal policy should not be limited to criminal law legislation, but should also address implementation and application in the Member States (in the books and in practice). This means that the administration of justice in the broad sense (from police authorities through to criminal courts) in the Member States also has to be addressed from the perspective of its effective application with the aim of achieving common European goals.

The prevention and punishment of crime has become an objective that is related to the rights and duties of citizens in the area of freedom, security and justice (Article 3 TEU). Given the wording of Article 82 TFEU, harmonisation of criminal law and criminal procedure is also a necessary tool for strengthening judicial cooperation in criminal matters based on mutual recognition and mutual trust. From this perspective, neither the model provisions of the Council nor the draft resolution of the EP guides us as to the content of criminal policy choices. Which legal interests deserve criminal protection and to what extent? This is certainly the case for Article 83(2), for which no or very little *acquis* has been built up in the past, either under the former third pillar or under the first pillar. The Commission communication of 2011 goes a step further and deals with the policy choices. This is clearly of added value, but it remains unclear on which basis and by what criteria policy areas have been selected or could be selected for criminal law protection. Once it has been decided that a policy area requires criminal law protection it also continues to be unclear what the substance of it should be. Is it limited to substantive criminal law or should it also include related aspects of criminal procedure? Is it limited to imposing effective, proportionate and dissuasive criminal sanctions (model A) or does it include harmonisation of the type and level of sanctions (model B)? The green paper on the approximation, mutual recognition

and enforcement of criminal sanctions in the EU [81] offers an interesting inventory and comparison of Member States' legislation in the annexes but does not, unfortunately, include specific sanctions in terms of financial penalties, disqualifications, confiscations, withdrawal of licences and temporary closure of activities. This means that the specific sanctions for the enforcement of EU policies, which are so important in the area under Article 83(2), have been left out of the inventory and comparison.

Although the European Union is undoubtedly in search of a criminal law policy for the enforcement of EU policies, it is carrying out this search without any inter-institutional coherence. Moreover, the EU has difficulty finding criteria to make consistent choices as to whether criminal law protection is necessary and if so, what the substance of it should be. The Stockholm programme gives us little or no guidance in relation to Article 83(2). The substantial list of topics in the Commission communication of 2011 is quite different from the list of EU policies that was selected in the Klaus Tiedemann study on economic criminal law in the EU [82]. In that study, the selection was: EU labour policy, EU foodstuffs policy, EU competition policy, EU environmental policy, EU policy on corporate bodies and insolvency, EU financial services policy, EU intellectual rights policy (especially patents) and EU policy on commercial embargos.

For the time being, the Member States, which have the right of initiative under Article 83(2), are not helping much either. They are not coming up with proposals and have not elaborated criminal policy visions on Article 83(2) at all. This also means that they are giving no guidance to their national parliaments on the matter either. An exception to the rule is a recent notice [83] from the Dutch Minister of Justice and Security to the Chamber of Deputies in which he explains the position and policy of his department in relation to European criminal law under the Lisbon Treaty. In his notice he repeats all the necessary, subsidiarity and proportionality tests that have been mentioned and adds a test on financial consequences and enforceability. However, when it comes to substantive choices in relation to Article 83(2) he is very brief: I will assess the proposals taking into account the fact that administrative enforcement might be an excellent tool for some policies. In other words, he is not coming up with a list of harmonised EU policies that need equivalent standards of criminal law protection in order to offer citizens an area of liberty, security and justice whilst preventing and punishing crime either.

The EU is in no doubt as to its competence but it still does not know when and how to deal with it: *certus an, incertus quando*.

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[81] COM (2004) 334 final, 30 April 2004.

[82] K. Tiedemann (ed.), *Wirtschaftsstrafrecht in der Europäischen Union*, Berlin, Carl Heymans Verlag, 2002.

[83] http://lecane.com/design/eppodesign/pdf/kst-32317-801.pdf

Approximation of substantive criminal law and the establishment of the European Public Prosecutor's Office

Katalin Ligeti

1. Introduction

The idea of an EPPO was first presented in 1997 by an international expert group entrusted by the European Commission and the European Parliament to improve the protection of the financial interests of the EU[1]. This expert group elaborated the so called *Corpus Juris*, a policy document which proposed a set of harmonised offence descriptions, provisions related to the general part of criminal law as well as procedural rules for setting up a new body within the European Community institutions – the European Public Prosecutor (EPP). The EPP would be responsible for the investigation and prosecution of crimes affecting the EU's financial interests as defined in the *Corpus Juris*. The *Corpus Juris*, thus, identified a list of legitimate interests that may be protected beyond the traditional concept of the nation state and developed a supranational enforcement model for that purpose.

Although the *Corpus Juris* received substantial support from the European Commission and later from the European Parliament, the proposal of the Commission – tabled during negotiations on the Nice Treaty – to include a provision on the establishment of the EPP in the Treaty failed[2]. Instead, Eurojust was given a legal basis in the Treaty[3]. The Commission nevertheless remained convinced that the horizontal cooperation model represented by Eurojust was not sufficient to ensure the

[1] M. Delmas-Marty (ed.), *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*, Paris, Economica, 1997.

[2] See the Communication from the Commission, Additional Commission contribution to the Intergovernmental Conference on institutional reforms. The criminal protection of the Community's financial interests: a European Prosecutor, COM (2000) 608, 29 September 2000.

[3] Article 31 of the Treaty on European Union, Consolidated Version, *OJ*, no. C 325, 24 December 2002, p. 1.

protection of the financial interests of the EU. Therefore, the Commission put forward, in 2001, a Green Paper on the criminal law protection of the financial interests of the Community and the establishment of an EPP[4]. In 2002, the Commission conducted a broad public consultation on the Green Paper and published its results in a follow-up report[5]. Being conscious both of the Member States' conditional support for the EPP[6] and the weaknesses of the Green Paper, the European Council of Laeken decided "to examine the Commission Green Paper on the European Public Prosecutor, taking account of the diversity of legal systems and traditions"[7].

The discussions on the EPP continued in the framework of Working Group X of the European Convention and resulted in the insertion of the EPP into the Constitutional Treaty[8]. Indeed, Article III-274 of the Constitutional Treaty[9] contained a provision on the European Public Prosecutor's Office [EPPO] which was then copied into Article 86 TFEU and extended by a provision on the possibility of introducing the EPPO through enhanced cooperation among at least nine Member States.

Article 86 TFEU belongs to the provisions on an Area of Freedom, Security and Justice [AFSJ] and constitutes one of the provisions that allow the EU to adopt legislation on criminal law. The political struggles leading to the Lisbon Treaty replaced Article 31 TEU with the more precise Articles 82-86 TFEU. This created a complex system of various legal bases allowing for the harmonisation of substantive criminal law (Article 83 TFEU) and procedural criminal law (Article 82 TFEU) as well as for developing European bodies of criminal law enforcement (Articles 84-86 TFEU). Based on Articles 82-86, it is possible to pursue the approximation of substantive criminal law in parallel with or separately to procedural and institutional developments.

It is now certain that the European Commission shall present, in 2013, a proposal for a Council Regulation on the European Public Prosecutor's Office (EPPO)[10]. According to Article 86 TFEU, the proposal must address three types of questions in relation to the EPPO: Firstly, it must regulate the institutional design and status of this new body, *i.e.* structure, appointment, accountability, immunity, etc. Second,

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[4] Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final, 11 December 2001.

[5] Follow-up report on the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final, 19 March 2003, p. 1.

[6] According to the 2003 follow-up report on the Green Paper, the Member States could be divided into three categories: those who support the principle of establishing a EPP, those who are simply sceptical about the usefulness or feasibility of the idea and those who reject the project out of hand. Follow-up report on the Green Paper, *op. cit.*, p. 6.

[7] Conclusions of the Presidency, SN 300/1/01 REV 1, 14-15 December 2001, para. 43.

[8] Treaty establishing a Constitution for Europe, *OJ*, no. C 310, 16 December 2004, p. 1.

[9] *Ibid.*, p. 121.

[10] Vice President Reading recently emphasised that the EPPO is an inevitable building block ensuring growth and stability in the EU. She also reaffirmed to present a proposal for a Council regulation. Speech entitled 'The future legal and institutional framework of combating fraud against the EU's financial interests' held on the occasion of the meeting of Prosecutor Generals and Directors of Public Prosecution of the EU, Brussels, 26 June 2012.

it must provide for the procedural framework in the sense of the procedural rules applicable to the proceedings of the EPPO, including rules on the admissibility of evidence and judicial review. Last but not least, it has to stipulate the material scope of competence of the EPPO. The present paper shall deal only with this last aspect, namely the competence *ratione materiae* of the EPPO [11]. It shall examine in particular whether Article 86 TFEU constitutes a legal basis for the approximation of substantive criminal law in the EU.

2. Which offences is the EPPO in charge of investigating and prosecuting?

Article 86 TFEU offers two possibilities in respect of the material scope of competence of the EPPO. According to para. 1 the EPPO shall be established "[i]n order to combat crimes affecting the financial interests of the Union". It follows from Article 86(2) TFEU that "combating" means "investigating, prosecuting and bringing to judgment, (…) the perpetrators of, and accomplices in, offences against the Union's financial interests". According to para. 4, however, the competence of the EPPO can be extended – by unanimous decision of the Council – "to include serious crimes having a cross-border dimension".

These possibilities result from the negotiations in Working Group X of the European Convention where Member States were divided as to the necessity and added value of an EPPO. Whereas some Member States wanted to reinforce the prosecution mechanism in relation to offences against the financial interests of the Union, others had a preference for a European prosecution service with a scope of action going further than the protection of those interests [12]. Member States had, therefore, rather different visions of what the EPP should be. Those arguing in favour of an EPP investigating and prosecuting offences against the financial interests of the EU saw the EPP as the logical outcome of the debate that started fifteen years ago with *Corpus Juris*. They argued in favour of a specialised service with a clearly defined and narrow remit dedicated to prosecuting offences committed to the detriment of the EU budget. Other Member States saw the EPP rather in the broader context of building an AFSJ and as an institutional culmination of the work previously done in the former Third Pillar. For these Member States the main contribution of the EPPO to developing the AFSJ would be to overcome existing international cooperation mechanisms deemed too slow and burdensome to effectively combat serious forms of cross border criminality such as terrorism, trafficking offences, or organised crime.

The final adopted text of Article 86 TFEU accommodated both visions and established a two-step approach by restricting the primary scope of competence to the protection of the financial interests of the EU, but allowing for its potential extension –

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[11] For institutional and procedural issues, see K. Ligeti and M. Simonato, "The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?", *New Journal of European Criminal Law*, 4/1-2, 2013, p. 7 f.

[12] Accordingly, the Draft prepared by the Convent contained in Article III-175 that the EPP shall be established in order "to combat serious crime having a cross-border dimension, as well as crimes affecting the interests of the Union". See CONV 850/03, 18 July 2003.

in line with the objectives of an AFSJ – to serious cross-border crime [13]. The possibility of this extension is subject to a special procedure. The Council must first consult the Commission and obtain the consent of the European Parliament. Upon consent of the Parliament, the Council may enlarge the material scope of competence of the EPPO by unanimous decision. These limitations may seem to point towards stronger support for the establishment of a European "Financial" Public Prosecutor [14]. This impression is, however, tempered by the fact that the Member States have decided against placing the legal basis for the EPPO in the chapter concerning the EU budget and Article 325 TFEU. Instead, the EPPO shall be a body in the AFSJ and should contribute to achieving its objectives. It follows, therefore, from the policy context of the Lisbon Treaty that Article 86 TFEU embodies essentially a broader vision of the EPPO. This is further underlined by the fact that the two steps provided for in para. 1 and para. 4 of Article 86 TFEU do not need to be subsequent ones [15]. It is possible that the Member States decide by unanimity to establish an EPPO and simultaneously – also by unanimous decision – extend its scope of competence to cover also serious cross-border crime.

The material scope of competence of the future EPPO has not assumed up until now a major role in the debate on establishing the EPPO. This is probably the result of the cautious approach of the European Commission, in particular of OLAF, that took great care to emphasise that the envisaged EPPO should be competent only for the protection of the financial interests of the EU [16]. This was to avoid projecting the image of an omnipotent *supranational parquet* which could further fuel resistance and controversy among Member States. At the same time, the Commission also relied on the consequences of the financial crisis and the climate of 'spending austerity' that draws particular attention to the management of public money in general and the EU budget in particular [17].

Nevertheless some commentators [18] as well as some Member States have already voiced their concerns as to this limited approach. It has been reiterated that it is not sound to limit the competence of the EPPO to the protection of the financial interests of the EU, a phenomenon which touches on the lives of EU citizens only indirectly

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[13] As it has been pointed out by A. Klip, "Towards a General Part of Criminal Law for the European Union", *in* A. Klip (ed.), *Substantive Criminal Law of the European Union*, Antwerp, Maklu, 2011, p. 27, it is the same procedure followed as regarding Europol, which initially was competent for drug offences only and then its competence has been gradually expanded.

[14] L. Kuhl, "The Future of the European Union's Financial Interests – Financial Criminal Law Investigations under the Lead of a European Prosecutor's Office", *Eucrim*, 3-4, 2008, p. 187.

[15] D. Flore, "La perspective d'un procureur européen", *ERA Forum*, 9/2, 2008, p. 233.

[16] This approach was recently reaffirmed by Mr. Giovanni Kessler, General Director of OLAF, during the 10th Conference of Fraud Prosecutors ("Cooperation of a future Public Prosecutor's Office with national prosecution services") on 7-9 November 2012 in Berlin, as well as on the occasion of the conference "Towards the European Public Prosecutor's Office. Institutional and Practical Challenges", held in Trier on 17-18 January 2013.

[17] This aspect has been particularly highlighted, *inter alia*, by Viviane Reding on the occasion of the above-mentioned speech (see footnote no. 10).

[18] D. Flore speaks of "*un champ de compétence paradoxal*", *op. cit.*, p. 237.

compared to *e.g.* general cross-border criminality. In particular the French *Conseil d'Etat* demanded that the scope of competence of the EPPO should be enlarged to cover not only offences against the financial interests of the EU, but also other forms of serious cross-border criminality [19].

Independently from the views of individual Member States, this broader vision of the material scope of competence of the EPPO may be hampered by the reality of enhanced cooperation. It follows from the wording of Article 86(1) and (4) TFEU that setting up the EPPO by enhanced cooperation could automatically render impossible the extension of its material scope of competence. The decision to enlarge the scope of competence of the EPPO must be taken by the (full) Council. Although the Council is free in its negotiations and is not bound by the proposal of the Commission limiting the scope of competence of the EPPO to the protection of the financial interests of the EU, it is unlikely that the Council could amend it. It is hard to imagine the Council disagreeing on the establishment of the EPPO *per se*, on the one hand, and agreeing at the same time to extend the material scope of the EPPO by unanimous decision to cover cross-border crime, on the other.

The question remains whether the nine or more Member States participating in the enhanced cooperation may by their unanimous decision extend the scope of competence of the EPPO. According to Article 329(1) TFEU, those at least nine Member States who wish to proceed by enhanced cooperation have to address a specific request to the Commission. If the Commission – having established whether the criteria for enhanced cooperation are met – submits a proposal to the Council, it is the Council that can grant authorisation to proceed with enhanced cooperation after having obtained the consent of the European Parliament. Once authorisation is granted, the Member States participating in enhanced cooperation may amend the proposal which was the outcome of the prior (unsuccessful) Council negotiations and which formed the basis for their decision to engage in enhanced cooperation. The Treaty does not set firm limits on the content of enhanced cooperation. Article 334 TFEU only requires that the activities undertaken in the context of enhanced cooperation should be consistent with the "policies of the Union". Therefore, if those Member States who wish to establish the EPPO by enhanced cooperation are convinced that its establishment is justified by criminal justice policy interests broader than only the fight against EU fraud, they may go ahead with extending its scope of competence accordingly.

Regardless of whether the EPPO has a limited or extended scope of competence, two issues need further clarification: (i) which are the crimes "affecting" the financial interests of the EU, and (ii) what does it mean, in Article 86 TFEU, that the regulation shall "determine" the material scope of competence of the EPPO?

[19] Conseil d'Etat, *Réflexions sur l'institution d'un parquet européen*, 24 February 2011, p. 58 f.

3. Which crimes fall within the ambit of crimes "affecting" the financial interests of the Union?

The protection of the financial interests of the EU by criminal law has been developed by the EU Commission since the mid-1990s [20]. The most important element of the legislative framework is the 1995 Convention for the protection of the financial interests of the European Communities (PIF Convention) [21] which was subsequently accompanied by two protocols [22]. The PIF Convention contains a definition of EU fraud affecting both expenditure and revenue [23], while the first Protocol provides definitions of active and passive corruption in the public sector [24], and the Second Protocol requires Member States to criminalise money laundering [25]. This framework is complemented by general Union criminal law measures on the fight against certain illegal activities, such as money laundering [26] and corruption [27], which – although not specific to the protection of the Union's financial interests – also contribute to their protection.

This legal framework had two consequences: first, since all instruments were adopted under the former Third Pillar – as either a convention or a framework decision – they had to be transposed by national implementing legislation in the Member States. Due to the large margin of manoeuvre exercised by the Member States when implementing Third Pillar instruments a "patchwork of provisions on crime definitions and criminal sanctions [had] developed across the EU under the current legal framework" [28]. Second, due to the resistance of the Member States to accepting the criminal law competence of the EU, the legal framework on the protection of the financial interests of the EU developed *ad-hoc* rather than in a coherent manner. In

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[20] The *acquis* in this field contains also a comprehensive system on administrative enforcement. See Regulation 2988/95 on the protection of the EC's financial interests, *OJ*, no. L 312, 23 December 1995, p. 1 f.

[21] Convention of 26 July 1995, *OJ*, no. C 316, 27 November 1995, p. 49 f.

[22] First Protocol of 27 September 1996, *OJ*, no. C 313, 23 October 1996, p. 2 f., and Convention of 26 May 1997, *OJ*, no. C 195, 25 June 1997, p. 1 f. Second Protocol of 19 June 1997, *OJ*, no. C 221, 19 July 1997, p. 12 f.

[23] See Article 1 of the Convention on the protection of the European communities' financial interests, *OJ*, no. C 316, 27 November 1995, p. 49 f.

[24] See Articles 2 and 3 of the First Protocol.

[25] See Article 2 of the Second Protocol.

[26] Several legal instruments have been adopted to ensure an effective anti-money laundering and combating terrorist financing framework at the EU level. See the recent Proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM (2013) 45, 5 February 2013.

[27] See the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *OJ*, no. C 195, 25 June 1997, and the Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *OJ*, no. L 192, 31 July 2003, p. 54 f. For an overview of the EU action against corruption, see the Communication of the Commission of 6 June 2011, Fighting the Corruption in the EU, COM (2011) 308, 6 June 2011.

[28] Proposal for a directive on the fight against frauds to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11 July 2012, p. 4.

essence there are definitions only on EU fraud, corruption and money laundering. In contrast, the *Corpus Juris*, which foresaw a comprehensive system for the protection of the financial interests of the EU, also included common criminal law provisions for market rigging as well as for misappropriation of funds, abuse of office, disclosure of secrets pertaining to one's office, when committed by an official of European institutions or a national official managing European funds. Compared to the *Corpus Juris*, the present legal framework is rather limited in scope. The Commission could achieve only a limited criminal law protection of the financial interests of the EU.

Due to the patchy implementation of the present legal framework [29] and due to its limited scope, the Commission presented in July 2012 a Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law (hereafter PIF Directive) [30]. The proposal not only "Lisbonises" the existing *acquis*, but also includes two additional offences not covered by previous third pillar instruments, namely fraud in public procurement or grant procedures and misappropriation [31].

Without assessing the proposed PIF Directive – under discussion in the European Parliament at the time of writing [32] – one may certainly ask to what extent this proposal covers all forms of misconduct in the sense of Article 86(1) TFEU. In other words, does the notion "crimes affecting" in Article 86(1) TFEU allow the Council to include in the scope of competence of the EPPO offences other than those stipulated in the proposed PIF Directive? Should the EPPO also be in charge of, for instance, other offences which are "generally considered to be in some way 'functional' to the realisation of behaviours directly affecting financial interests" [33], such as, for instance, euro counterfeiting, forgery of public documents, market abuse or "favouritism"?

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[29] See the two Reports of the Commission on the Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols, of 2004 (COM (2004) 709 final, 25 October 2004) and 2008 (COM (2008) 77 final, 14 February 2008).

[30] COM (2012) 363 final.

[31] The Commission has reflected on including the other offences mentioned in the *Corpus Juris*, namely a specific offence of abuse of office and the breach of professional secrecy. However, the Commission decided not to include a special offence on abuse of office as "it has been considered a superfluous addition to the offence of misappropriation. Similarly, an offence of breach of professional secrecy has not been included in the proposal as the conduct is already covered under the disciplinary-law measures of the EU Staff Regulations". See L. Kuhl, "The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law", *Eucrim*, 2, 2012, p. 65.

[32] The main discussion point was less the content of the Proposal as such, but the legal basis proposed by the Commission. The Commission intends to use Article 325(4) TFEU that allows for all necessary measures with a view to affording effective and equivalent protection to the EU budget. Conversely, Member States argue that the proposal should be based on Article 83(2) TFEU which is the general legal basis for the approximation of substantive criminal law. The advantage of using Article 325(4) TFEU is that the directive would be binding for all Member States, including Denmark, Ireland and the UK.

[33] R. Sicurella, "Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor's Office", *in* K. Ligeti (ed.), *Toward a Prosecutor for the European Union*, Vol. 1: *A Comparative Analysis*, Oxford, Hart, 2013, p. 885.

To answer this question it should be recalled that Article 325(1) TFEU uses the same expression as Article 86(1) TFEU. According to Article 325(1), "Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union". Therefore, the phrase "affecting the financial interests" in Article 86(1) must be interpreted the same way as for Article 325(1). In this context it is important to recall that the Commission based its proposal for the PIF Directive deliberately on Article 325 TFEU and the proposal also contains a definition of the Union's financial interests [34]. One may, therefore, argue that the EU legislator interpreted the notion of "crimes affecting the financial interests of the Union" in the context of the proposed PIF Directive and the offences stipulated therein must be identical with those for the purposes of Article 86(1).

4. What does it mean, in Article 86 TFEU, that the regulation shall "determine" the material scope of competence of the EPPO?

A further problem derives from the question whether the proposed PIF Directive and its implementing legislation in the Member States would satisfy the requirement in Article 86(1) TFEU that the regulation establishing the EPPO 'determine' the offences for which the EPPO should exercise its powers. Would it be sufficient if the future regulation makes reference to the new PIF Directive and the national implementing provisions, or does Article 86(1) TFEU require that the regulation itself define the offences falling into the remit of the EPPO, thus constituting a legal basis for the harmonisation of substantive criminal law in the EU?

The majority of scholars maintain that Article 86 "may very well be read as referring to rules defining the material competence of the European Public Prosecutor's Office by reference, without providing any actual offence description" [35]. In other words, 'as determined' should be interpreted as 'as referred to'. On this reading Article 86 TFEU deals only with the institutional and the procedural framework. We may, therefore, imagine a situation similar to the European Arrest Warrant Framework Decision, which, in its Article 2, contains a list of offences but not their definitions [36]. In this case, the definitions of offences could be incorporated into the proposed PIF Directive and also into (implementing) national criminal law. The advocates of this viewpoint further point to the fact that the Member States laid down the legal framework for the approximation of substantive criminal law in Article 83 TFEU. The latter only allows for the adoption of directives, only for certain areas of crime and does not provide for elaborating provisions on the general part of criminal law. Furthermore Article

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[34] The Commission decided against using Article 83(2) TFEU as a legal basis. In comparison to Article 83(2) TFEU, Article 325(4) TFEU is not subject to the opt out of Denmark, the UK and Ireland and the so-called emergency brake procedure cannot be invoked either.

[35] P. Asp, *The Substantive Criminal Law Competence of the EU*, Stockholm, Stockholms Universitet, 2012, p. 150.

[36] R. Sicurella, *op. cit.*, p. 894. Also for a "jurisdictional" understanding of the Article 86(2) TFEU, see J. Vogel, "Article 86 TFEU", *in* E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union*, Munich, CH Beck, 2011.

83 TFEU is subject to the emergency brake procedure [37]. In view of these limitations to approximating substantive criminal law on the basis of Article 83 TFEU, the proponents of the above-described position argue that accepting Article 86(2) TFEU as a legal basis for the approximation of substantive criminal law would run counter to the logic of the Treaty. On this view, it was patently the will of the Member States to limit the competence of the EU legislator as to the approximation of substantive criminal law.

Conversely, one may argue that Article 86 TFEU "is not only concerned with criminal procedure but also with substantive law" [38]. In other words, the expression in Article 86(1) TFEU 'as determined by the regulation' should be read 'as defined by the regulation' [39]. Accordingly, Article 86 TFEU requires that the offences for which the EPPO has competence be defined by the regulation.

Indeed, Article 86(2) TFEU does stipulate that the EPPO "shall be responsible for investigating, prosecuting and bringing to judgment (…) the perpetrators of, and accomplices in, offences against the Union's financial interests, *as determined by the regulation provided for in paragraph 1*" [emphasis added]. It may be deduced from this wording that Article 86 TFEU allows the EU legislator to adopt, by regulation, common criminal law provisions for the protection of the EU financial interests directly applicable to EU citizens. Accordingly, Article 86 TFEU grants the EU a genuine competence to adopt common offence definitions, but also to adopt common provisions in relation to the concepts of the general part of criminal law.

This interpretation, however, requires clarification of the difference between Article 325(4) and Article 86(2) TFEU, since both could serve as a legal basis for the approximation of substantive criminal law for the protection of the financial interests by regulation. Some have argued that this would lead to ambiguity as to whether the criminal law provisions for the protection of the financial interests should be adopted in accordance with the ordinary legislative procedure provided for in Article 325(1) TFEU or the special legislative procedure as in Article 86(1) TFEU.

In deciding whether Article 86(2) TFEU is a proper legal basis for the approximation of substantive criminal law the following aspects, going beyond the systematic interpretation of the Treaty, ought to be considered. Plainly – and from the viewpoint of the operational functioning of the EPPO – the EPPO must know exactly for which kinds of criminal behaviour it may exercise its powers in the AFSJ. Furthermore, it must be considered that the EPPO is a single office even if it may be

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[37] Article 83(3) TFEU provides for a suspension of the ordinary legislative procedure, and for the possibility of the enhanced cooperation among at least nine Member States, "[w]here a member of the Council considers that a draft directive (…) would affect fundamental aspects of its criminal justice system".

[38] C. Safferling, *Internationales Strafrecht*, Heidelberg, Springer, 2011, p. 409.

[39] R. Sicurella, *op. cit.*, 2013, p. 894. The Author specifies that "according to this opinion, Article 86 TFEU would represent the legal basis for a limited number of European criminal offences directly applicable to individuals (without passing by the implementation procedures of directives by the domestic legislator), covering all behaviours falling into the category of 'crimes affecting financial interests of the Union'".

established in a decentralised fashion [40]. If the material scope of competence of the EPPO will be defined by referring to the proposed PIF Directive and its implementing legislation in the Member States, it will ultimately mean that the EPPO will have as many definitions of its competence as the number of Member States participating in its establishment. The material scope of competence of the EPPO, therefore, may vary from Member State to Member State. This may cause substantial problems in investigating and prosecuting transnational cases.

Furthermore, it must be borne in mind that the notion "crimes affecting the financial interests of the Union" is an autonomous notion of EU law that has to be interpreted independently and uniformly throughout the EU. EU citizens and economic operators must be able to rely on a uniform application accordingly. Especially if investigations and prosecutions of the EPPO also involve a standard of procedural safeguards and judicial review which is different from national criminal procedure, EU citizens and economic operators have a fundamental right following from the right to a fair trial to know which prosecuting authority (national or European) is in charge of the case. The right to a fair trial requires that in all the stages of the criminal procedure, including pre-trial proceedings, the applicable law be foreseeable.

5. Conclusions

Article 86 TFEU exists as a result of decades of political struggle on the side of the European Commission and, in particular, of OLAF to ensure adequate and equivalent protection for the EU budget in the Member States also by criminal law. Practical experience revealed that the national authorities were not the natural born guardians of these European interests [41]. The idea of the EPPO has been based from the outset on the quest for the centralisation of criminal proceedings (both of prosecution and defence rights) in the area of the protection of the financial interests of the EU. However, Member States have been reluctant to accept the idea of a specialised supranational prosecution system for the protection of the EU budget [42]. As a result, the current legal framework for the protection of the financial interests of the EU is a patchwork of harmonised EU rules on administrative irregularities [43], on the one hand, and national implementing laws of ex-Third Pillar instruments on fraud, corruption and money laundering on the other hand. The respective lack of common offence

[40] See K. Ligeti and M. Simonato, *op. cit.*, p. 16.

[41] See the Report of the Commission: Protection of the European Union's financial interests – Fight against fraud, Annual Report 2011, COM (2012) 408 final, as well as the Follow-up Report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor, COM (2003) 128 final, p. 9.

[42] The reactions expounded during public consultation on the 2001 Green Paper demonstrate the strong resistance of some Member States to the idea of an EPPO, which is perceived as a threat for national sovereignty and legal principles, as well as for fundamental rights and legal certainty. Furthermore, it has been argued that it does not have a real added value and that the insufficient volume of EU fraud does not justify the establishment of a new body.

[43] See in particular Articles 4 and 5 of Regulation no. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *OJ*, no. L 312, 23 December 1995.

definitions has been identified by EU practitioners as a major obstacle to an effective and swift cooperation in investigating and prosecuting these offences [44].

If established, the EPPO must be directly responsible for the investigation and prosecution of crimes falling into its material scope of competence. In other words, the EPPO will be a "supranational body with operative jurisdiction in a common area" [45]. Such operative jurisdiction clearly presupposes the uniform definition of its scope of action.

The proposed PIF Directive does not sufficiently define the scope of action of the EPPO. Since it ultimately requires national implementing legislation, it cannot achieve an equivalent protection throughout the EU. Furthermore, the key aim of the proposed PIF Directive is to improve the efficiency of the prosecution of EU fraud and fraud-related activities by national authorities of the Member States. It is not the aim of the proposed PIF Directive to enable an EPPO to perform its functions [46]. It has been demonstrated above that it would be a paradox to create European powers of investigation and prosecution, but leave it to the national laws of the Members States to define when such powers can be used. Therefore, the EPPO proposal based on Article 86 TFEU can and should define the offences falling into the substantive competence of the EPPO.

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[44] Interviews conducted within the recent EPPO impact assessment study confirm that the prerequisite for the establishment of any kind of EPPO is the harmonisation of substantive laws.

[45] J.A.E. Vervaele, "Quel statut pour le ministère public?", *in Quelles perspectives pour un ministère public européen? Protéger les intérêts financiers et fondamentaux de l'Union*, Paris, Dalloz, 2010, p. 189.

[46] Accordingly, Article 86 TFEU is not mentioned as the special basis for the adoption of the proposed Directive.

Approximation of substantive criminal law provisions in the EU and fundamental principles of criminal law

Maria Kaiafa-Gbandi *

1. The nature of criminal law, the Stockholm Programme and the foundations of a European criminal policy in line with the rule of law

Criminal law is the harshest mechanism that States employ to achieve social control. Criminal sanctions themselves – proscribed and enforced for lack of milder means to address serious violations of basic interests in legally organised societies – constitute breaches of, *inter alia*, the liberty and property of those convicted. This is why any criminal justice system necessarily presupposes a set of principles and constraints to keep any means of state counter-crime activity in check [1]. In that sense, the nature of criminal law is closely linked to the protection of fundamental rights and the rule of law.

On the other hand, it is only reasonable that those very features of criminal law – apposite to the liberal tradition of democratic societies [2] – also constrain a supranational entity such as the European Union (EU). Indeed, fundamental European

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* The text is based on the publication entitled "The importance of core principles of substantive criminal law for a European criminal policy respecting fundamental rights and the rule of law", *EuCLR*, 2011, p. 7 f. It has been enriched with further documentation stemming from recent EU legislative acts and with a new chapter discussing the Commission's Communication on a EU Criminal Policy (COM (2011), 573 final, 20 September 2011) as well as the resolution of the European Parliament on an approach to European Criminal Law (2010/2310 (INI), 22 May 2012).

[1] In a noted passage, von Liszt has described criminal law as an '*unübersteigbare Schranke der Kriminalpolitik*' ("insurmountable blockade for crime policy"). See *Strafrechtliche Aufsätze und Vorträge*, Bd. 2, Berlin, J. Guttentag, Verlagsbuchhandlung, 1905, p. 75, at p. 80.

[2] See especially I. Μανωλεδακης, *Το έννομο αγαθό ως βασικό εργαλείο του ποινικού δικαίου*, *Θεσ/νίκη, Εκδόσεις Σάκκουλα,* 1998, p. 34.

values (Article 2 TEU) constitute cornerstones of the EU and should thus be key features of EU initiatives designed to bind its Member States to adopt criminal law rules [3]. Disassociating criminal law from the protection of fundamental rights or even loosening such an association – albeit for the purpose of tackling transnational crime by means of enhanced judicial cooperation – is liable to emasculate elemental values inherent to democratic societies, which subject the exercise of state authority to the rule of law. Even within international entities, then, no legitimate approach to criminal law can ignore its dual nature as a means of protecting fundamental interests as well as acting as a yardstick for civil liberties [4].

This explains why the institutional environment of the Lisbon Treaty [5], [6] offering a better basis for fundamental rights but also introducing new risks [7], calls for a

[3] See Article 83 TFEU on minimum rules concerning criminal offences and sanctions. Also note the newly-introduced competence of the EU to adopt criminal rules in its own right (*i.e.* without the co-operation of its Member States); on the question of competence for substantive criminal law matters after the Lisbon Treaty see S. Gless, *Internationales Strafrecht*, Basel, Helbing Lichtenhahn Verlag, 2011; B. Hecker, *in* U. Sieber *et al.* (eds.), *Europäisches Strafrecht*, Baden-Baden, Nomos, 2011, p. 252; A. Klip, "Towards a general part of criminal law for the European Union", *in* A. Klip (ed.), *Substantive Criminal Law of the European Union*, Antwerpen, Maklu, 2011, p. 24; H. Satzger, *Internationales und Europäisches Strafrecht*, Baden-Baden, Nomos, 5th ed., 2010, at p. 100-102, at p. 116f.; J. Vogel, "Die Strafgesetzgebungskompetenzen der Europäischen Union nach Articles 83, 86 und 325 AEUV", *in* K. Ambos (ed.), *Europäisches Strafrecht post-Lissabon*, Göttingen, Universitätsverlag Göttingen, 2011, p. 41.

[4] See I. Μανωλεδακης, *Γενική θεωρία του ποινικού δικαίου*, *Αθήνα-Θεσ/νίκη, Εκδόσεις Σάκκουλα,* 2004, p. 29.

[5] See *OJ*, no. C 115, 9 May 2008, p. 1f., "Consolidated version of the Treaty on the European Union and the Treaty on the Functioning of the European Union". Cf. Curia, Press release no. 104/09, The Treaty of Lisbon and The Court of Justice of the European Union, General Secretariat of the Council of the EU, The Lisbon Treaty's impact on the Justice and Home Affairs Council: More Co-decision and new working structure.

[6] On the Treaty of Lisbon's impact on criminal law matters see, *e.g.* K. Ambos (ed.), *Europäisches Strafrecht post-Lissabon*; A. Hinajeros, "The Lisbon Treaty versus standing still: A view from the third pillar", *European Constitutional Law Review*, 2009, p. 99f.; A. Nieto Martin, "An approach to current problems in European Criminal Law", *in* L. Arroyo Zapatero and A. Nieto Martin (eds.), *European Criminal Law: An overview*, p. 43; cf. M. Kaiafa-Gbandi, "Die Entwicklung in Strafsachen", *in* D. Tsatsos (ed.), *Die Unionsgrundordnung-Handbuch zur europäischen Verfassung*, Berlin, Berliner Wissenschafts-verlag, 2010, p. 511, scrutinising the draft EU Constitution which predated the Treaty of Lisbon but never came to fruition.

[7] Important steps have been taken in the direction of shifting the focus towards guaranteeing civil liberties, including: enhancing the role of the European Parliament by extending the co-decision procedure in criminal matters; engaging national parliaments already at the consultation stage preceding the adoption of European legal acts (Protocol no. 1, *OJ*, no. C 115, 9 May 2008, p. 203f.); allowing for the safeguarding of fundamental criminal law principles of Member States through the so-called 'emergency break clause' established under Articles 82, para. 3 and 83, para. 3; recognising fundamental rights (Article 6, para. 1 TEU) and providing for the accession of the Union into the ECHR (Article 6, para. 2 TEU). Although the subject of citizens' rights in criminal cases has been scrutinised by publicists (see, *e.g.*, the conference proceedings of 4. Europäischer Juristentag, *Auf dem Weg zu einem europäischen Strafrecht?*, Sammelband, Wien, 2008, p. 205 and the contributions of H. Satzger, M. Bonn,

reconsideration of the original principles under which the European legislature might develop a balanced counter-crime policy ensuring that criminal law serves both its purposes: protecting fundamental interests and acting as a yardstick for civil liberties. A set of principles is needed to determine when the European legislature may require Member States to employ criminal law rules and under which circumstances it shall define an act criminal and provide for the appropriate sentence. It is also essential to work out how principles found in domestic systems can be transposed into a supranational environment, and – conversely – how EU law may complement domestic law.

Before moving on to this subject, one final remark is in order. The object of substantive criminal law – even in the form of minimum rules prescribed by the EU – is to define criminal acts and provide for sentences. However, this object is hardly served when the elements of crimes conceal considerations pertaining to judicial cooperation in criminal matters as opposed to fundamental substantive principles, which have to be respected in every liberal, democratically legitimised expression of authority in defining crimes and penalties. Besides, the mutual recognition of judgments might better be served by harmonising rules that do not contain precise elements of crimes and would thus allow for flexibility in the respective definitions. For instance, the terms 'corruption' or 'sabotage' connote a whole range of different types of conduct proscribed in each Member State, thus facilitating the work of judicial authorities. However, the use of similar terms – even by a supranational entity – does not satisfy the requirement of '*lex certa*', which ensures foreseeability and protects against abuses by the State. In addition, the principles of proportionality and respect for the coherence of each Member State's domestic criminal law system are better served in the absence of a pre-determined minimum level for the maximum sentence with regard to harmonised criminal rules. In that respect too, mutual recognition appears to conflict with the said principles. A case in point is the European Arrest Warrant as a measure of procedural constraint: by extending its scope of application to offences punishable with a given sentence (see Article 2, para. 1 of the pertinent framework decision) so as to be able to cover serious crimes, the European legislator has in effect led to the imposition of sentences of such a level to all Member States for the sake of facilitating judicial cooperation and in utter disregard for the gravity of each offence.

Restoring substantive criminal law to its true essence is the first step towards reorienting the EU towards protecting the fundamental rights of citizens. What is necessary, in other words, is to make it clear when and under which circumstances the Union may require its Member States to criminalise conduct, even for the purpose of harmonising the legislation of Member States to facilitate transnational judicial cooperation. The foundations of a foreseeable, reasonable and balanced EU counter-crime policy, particularly one that is effectuated by means of criminal repression, can

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P. Asp, M. Kaiafa-Gbandi, H. Fuchs), the need to preserve those rights in actual practice has especially grown after the Treaty of Lisbon. One need only consider the majority principle, to which the harmonisation of criminal rules is now subject; the binding force of these latter rules *vis-à-vis* Member States; the increased competence of the EU in harmonising criminal law where it is deemed a necessary means in order to implement a given European policy (Article 83, para. 2); and also the question of supremacy of EU law.

only be derived from the very principles governing the introduction of substantive criminal law rules at a European level. I shall further refer to these principles, which have been elaborated in the Manifesto on European Criminal Policy [8], by a group of scholars (ECPI) [9] including myself, ultimately highlighting the Commission's stance on this issue, as expressed in its 2011 Communication (COM (573) final) to the European Parliament and the Council, as well as the European Parliament's relevant resolution on an approach to European Criminal Law (2010/2310 (INI)).

2. Fundamental principles of substantive criminal law and the lawmaking function of the EU in the context of the Treaty of Lisbon

A. The requirement of a fundamental interest worthy of protection

The first issue of concern when applying criminal law at a European level, including when it comes to approximating individual Member States' relevant provisions, is the requirement that there is a fundamental interest worthy of protection by means of criminal law.

It would be erroneous to assume that the EU possesses a self-evident, 'intrinsically legitimised' power to intervene in the field of criminal law simply because the Union's primary law recognises such a competence. This is equally true whether the EU is establishing minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension under Article 83, para. 1 TFEU or where the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy under Article 83, para. 2 TFEU.

Even after it has been determined that the Union's competence in the field of criminal law may be exercised in a specific situation [10] – based on a narrow interpretation along the lines followed by the German Federal Constitutional Court in its pertinent judgment concerning the Treaty of Lisbon [11] – its activation would require answering a

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[8] See *ZIS*, 2009, p. 697f., where the Manifesto has been published in seven languages (English, French, German, Greek, Spanish, Italian and Romanian). See respectively also C. Prittwitz, "Lissabon als Chance zur kriminalpolitischen Neubesinnung. Das Manifest zur Europäischen Kriminalpolitik", *in* K. Ambos (ed.), *Europäisches Strafrecht post-Lissabon*, Göttingen, Universitätsverlag Göttingen, 2011, p. 29.

[9] See http://www.crimpol.eu.

[10] The exercise of such competence would require either an empirical affirmation of the cross-border character of a type of crime (based on its particular features and effects) or exceptional empirical circumstances justifying criminal suppression as the only means to ensure the effective implementation of a policy of the Union: see BVerfG 2 BvR 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09, margin no. 359, 361-362.

[11] According to the Federal Constitutional Court of Germany, such a narrow interpretation is called for because criminal law is not a mere tool for the enhancement of judicial cooperation in criminal matters but rather an invasive mechanism of social control which has to be democratically legitimised lest it severely affect fundamental civil liberties. Besides, the inclusion of the emergency break clause (see Articles 82, para. 3 and 83, para. 3 TFEU) also attests – albeit indirectly – to the same conclusion: see BVerfG 2 BvR 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09, margin no. 358. For a favourable appraisal of the above decision – despite the fact that it could have come sooner – see, *e.g.*,

further fundamental question relating to the object of the protection invoked. It would be worth considering that the notion of 'cross-border dimension' may comprise, for example, cybercrime, which is alluded to, *inter alia*, in the Framework Decision on the European Arrest Warrant (see Article 2, para. 2). However, one can only conjecture what would be the precise content of 'cybercrime' that would be worth protecting by means of criminal law. For instance, proscribing the dissemination of ideas via the worldwide web is in some cases liable to lead to the criminalisation of one's thoughts (*Gesinnungsstrafbarkeit*). Is it conceivable for criminal law to do so or to address any problem – no matter how serious – arising in the implementation of a Union policy absent harm of a different quality, *i.e.* simply as a means to ensure a duty of compliance to the law itself? In other words, what would be the positive element that could legitimise the use of criminal law by the European legislator provided that the latter is already within the ambit of competence provided in the treaties?

The Manifesto on European Criminal Policy adopts a straightforward position on this matter: the legislative powers of the EU in relation to criminal law issues should only be exercised in order to protect fundamental interests if: (1) these interests can be derived from the primary legislation of the EU; (2) the Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamentals Rights are not violated; and (3) the activities in question could cause significant damage to society or individuals [12].

Such a position takes into account both the long debate concerning the legitimacy of criminalising conduct in various Member States of the EU and principles of EU law itself. It embraces the common law tradition that has justified criminalisation based on the 'harm principle' [13] as well as the doctrinal proposition that a fundamental legal interest is the necessary prerequisite for criminalisation as accepted in certain civil law jurisdictions [14]. Moreover, the above position also derives from the principle of

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F. Schorkopf, "Das Lissabon-Urteil des BVerfG-Die Verfassungsbeschwerde als geschärftes Instrument der Verteidigung?", *in* K. Ambos (ed.), *Europäisches Strafrecht post-Lissabon*, *op. cit.*, p. 111. Cf. some criticism from an EU law angle in M. Böse, "Die Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon und ihre Bedeutung für die Europäisierung des Strafrechts", *Zeitschrift für internationale Strafrechtsdogmatik* (*ZIS*), 2010, p. 79f.

[12] See *ZIS*, 2009, p. 707f. Cf. Council conclusions on model provisions, guiding the Council's criminal law deliberations (doc. 16542/09, 23 November 2009): although there are guidelines concerning the forms of violations of a 'right' or 'essential interest' under the title 'Structure of criminal provisions', point (5), there seems to be neither a proper delimitation of the concept of 'right' nor any identification of a minimum degree of seriousness of the harm involved, other than criminalising conduct of 'abstract endangerment'.

[13] See A. Von Hirsch, "Der Rechtsgutsbegriff und das 'Harm Principle'", *in* R. Hefendehl, A. Von Hirsch and W. Wohlers (eds.), *Die Rechtsgutstheorie*, Baden-Baden, Nomos, 2003, p. 14, where the author presents other widely accepted grounds for criminalisation of conduct under common law, such as the so-called 'legal paternalism' and 'offence principle' (at p. 21f.).

[14] See, *e.g.*, C. Roxin, "Zur neueren Entwicklung der Rechtsgutsdebatte", *in* F. Herzog *et al.*, *Festschrift für W. Hassemer*, Heidelberg, Müller, 2010, p. 573; I. Μανωλεδακης, *Το έννομο αγαθό ως βασικό εργαλείο του ποινικού δικαίου*, Θεσ/νίκη, Εκδόσεις Σάκκουλα, 1998, and M. Kaiafa-Gbandi, "Ein Blick auf Brennpunkte der Entwicklung der deutschen

proportionality, a cornerstone of EU law [15]. indeed, in the absence of a fundamental interest worthy of protection against socially harmful conduct of a significant degree, no one (including the EU) may be justified in obliging the use of the most suppressive form of social control (*i.e.* penal repression), which could not be deemed either necessary or appropriate [16].

The requirement of a fundamental interest as described above has a dual significance in terms of restraining the European legislator in the definition of offences. First of all, it calls for respect for the same 'threshold of legitimised criminalisation' which binds the legislature of each Member State guaranteeing fundamental civil liberties. Secondly, any attempt to introduce or harmonise criminal law rules should pay due heed to the constitutional traditions of Member States, so that use of the emergency break clause of Article 83, para. 3 TFEU is avoided. In other words, the harmonisation of criminal law at a European level cannot ignore the fact that Member States themselves will ultimately have to implement and enforce the rules adopted, thus importing their constitutional limitations as well as their own understanding concerning the object of protection. Moreover, it is self-evident that the fundamental interests protected by the European legislator can only derive from the primary legislation of the EU, which reflects its structural features, its values, as well as its objectives and limits as a supranational organisation with powers conferred on it by its Member States (see Articles 4, para. 1 and 5, para. 1 TEU).

On this basis, one might applaud, for instance, the EU's decision to adopt a directive on combating trafficking in human beings [17]. As a form of labour or sexual exploitation of human beings either through deception or compulsion, human

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Strafrechtsdogmatik vor der Jahrtausendwende aus der Sicht eines Mitglieds der griechischen Strafrechtswissenschaft", *in* A. Eser, W. Hasemer and B. Burckhardt (eds.), *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende. Rückbesinnung und Ausblick*, München, Beck, 2000, p. 263. It is true, of course, that there is disagreement as to the exact content of the concept of 'fundamental interest'. Some think of them as objects, while others prefer to describe them as interests, functional units or cultural values. Whatever its precise content, as long as the notion of 'fundamental interest' remains attached to the empirical-social reality (at p. 265f.), it will constrain criminalisation in a manner ensuring citizens' rights against state abuse. See though questioning this ability S. Mir Puig, "Der Verhältnismäßigkeitsgrundsatz als Verfassungsgrundlage der materiellen Grenzen des Strafrechts", *in Festschrift für W. Hassemer*, *op. cit.*, p. 521.

[15] See Article 4, para. 5 TEU and Article 49, para. 3 of the Charter of Fundamental Rights. For a presentation of the case law of the ECJ see A. Klip, *European Criminal Law*, Antwerpen, Intersentia, 2009, p. 70, at p. 298-299; cf. Article 5, para. 4 TEU as well as Protocol no. 2 on the application of the principles of proportionality and subsidiarity. For a critical approach to the principle of proportionality – as applied by the ECJ and the ECHR – see P.-A. Albrecht, *Die vergessene Freiheit, Strafrechtsprinzipien in der Europäischen Sicherheitsdebatte*, Berlin, Berliner Wissenschaftsverlag, 2003, p. 83f.

[16] For a description of the content and elements of the principle of proportionality see, *inter alia*, Σ. Ορφανουδακης, *Η αρχή της αναλογικότητας, Μελέτες Συνταγματικού Δικαίου και Πολιτειολογίας, τευχ. 11,* Αθήνα-Θεσ/νίκη, Εκδόσεις Σάκκουλα, 2003, p. 62.

[17] Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings, *OJ*, no. L 101, 15 April 2011, p. 1.

trafficking constitutes a grave breach of multiple facets of one's liberty and, potentially, other important rights (including bodily integrity or even the right to life), which are explicitly enshrined in the EU's Charter of Fundamental Rights. On the positive side, one should also mention that the EU has stopped short of dictating criminal action against the personal use or possession for personal use of narcotic drugs, confining itself to intervention in the field of illicit drug trafficking alone [18]. This shows a certain degree of consideration towards the constitutional traditions of those Member States that do not punish harm to one-self or condone any form of legal paternalism that would erode an individual's autonomy [19].

Nevertheless, there are further examples demonstrating that the EU has yet to fully comprehend the importance of a requirement to rely on conduct causing significant harm to a fundamental interest when making it compulsory for action to be taken in the field of criminal law. This is clearly illustrated, for example, in the Framework Decision on the fight against organised crime [20], which requires Member States to proscribe a criminal offence either participation in a criminal organisation (Article 2, sec. a) or an agreement with one or more persons to commit certain criminal acts (Article 2, sec. b), modeled on the common law crime of 'conspiracy'. Any potential harm resulting from these acts is indeterminate, and hence there is no discernible legal interest worthy of protection. It is true, of course, that the underlying offences should incur a minimum-maximum penalty of at least four years. However, the Framework Decision provides no information about the nature of these offences. The only hint offered is the purpose of those taking part in a criminal organisation, which should be to obtain, directly or indirectly, a financial or other material benefit. Even that element, however, only relates to the motive behind the act as opposed to a concrete fundamental interest, which is harmed by it. As a result, there are no concrete criteria to assist Member States in deciding what conduct to proscribe other than the Framework Decision's vague objective of fighting organised crime, which is in stark contradiction to the latter's importance in the common area of freedom, security and justice. Such legal uncertainty is liable to allow invasive and exceptional procedural measures designed for organised crime to be applied to other completely unrelated criminal acts. In other words, the lack of a clearly identifiable object of protection might entail and does in fact entail a cumulative negative impact on civil liberties. Another negative example can be found in the recent Directive for combating sexual exploitation of children and child pornography [21]. According to the directive, child pornography also includes material that visually depicts any person *appearing* to be a

[18] Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *OJ*, no. L 335, 11 November 2004, p. 8.

[19] On paternalism generally see K. Χατζηκωστας, Εισαγωγή, σε D. von der Pfordten, G. Ellscheid, U. Neumann and A. Von Hirsch (eds.), *Ο πατερναλισμός στο δίκαιο και στην Ηθική*, Αθήνα, Εκδόσεις Αντ. Σάκκουλα, 2010, p. 19.

[20] Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *OJ*, no. L 300, 11 November 2008, p. 42.

[21] Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children, *OJ*, no. L 335, 17 December 2011, p. 1. For its evaluation see ECPI –

child engaged in real or simulated sexually explicit conduct (Article 2, c, iii). However, any potential harm caused by acts related to such material referred to in the directive is indeterminate and hence in this case the EU does not specify a legal interest worthy of protection seemingly harmed or jeopardised by relevant acts pending criminalisation.

The requirement for there to be a fundamental interest that is harmed in a socially significant way would be particularly useful in determining when the EU would be entitled to use criminal law to implement its policies effectively under Article 83, para. 2 TFEU. In other words, it offers a method of distinguishing between criminal harm (which justifies the imposition of criminal sanctions) and administrative infractions, which are nothing, more than regulatory offences. The Union's failure to draw a clear dividing line between the two is palpable in the Directive on the protection of the environment through criminal law [22], which compels Member States to criminalise conduct that violates mere administrative regulations too [23].

Applying the said requirement in actual practice would mean that any legislative initiative applied by the EU would have to follow the principle of good governance, *i.e.* outline the fundamental interests protected and ascertain that the proscribed conduct causes substantial harm to them. This is the only way for the Union to discharge its duty to set clear obligations for its Member States (as well as provide the rationale behind these obligations) in the context of what has aptly been portrayed as a European Sympoliteia [League of States] [24] founded on transparency and the rule of law. It would also support and benefit Member States themselves in their effort to transpose European legislation into their domestic legal order.

Last but not least, it is worth noting that the requirement of a fundamental interest worthy of protection under criminal law is not posed differently to the EU (as opposed to individual States); indeed, both the EU and its Member States are obliged to establish substantive grounds – based on a concrete object of protection justifying criminal punishment – for resorting to the harshest form of social control in a democratic society [25]. That being said, one can identify certain special parameters surrounding the said requirement, which are particularly relevant to the EU. The first one is the source of the fundamental interests protected by the EU, which is identified

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European Criminal Policy Initiative (Rapporteurs: N. Bitzilekis/E. Symeonidou-Kastanidou), www.crimpol.eu.

[22] Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, *OJ*, no. L 328, 6 December 2008, p. 28.

[23] For instance, Article 3, sec. c of the said directive proscribes the shipment of waste when carried out without prior notification of authorities (Article 2, para. 35, sec. a of Regulation (EC) no. 1013/2006 on shipments of waste) or when such notification was not accompanied by proper documentation (Article 2, para. 35, secs. d and f (iii) of Regulation (EC) no. 1013/2006 on shipments of waste). See Regulation (EC) no. 1013/2006 of 14 June 2006 on shipment of waste, *JO*, no. L 190, 12 July 2006, p. 1.

[24] For the conception of the EU as a European Sympoliteia see Δ. Τσατσος, *Η έννοια της δημοκρατίας στην Ευρωπαϊκή Συμπολιτεία,* Αθήνα, Εκδόσεις ΠΟΛΙΣ, 2007, p. 107.

[25] See R. Hefendel, "European criminal law: how far and no further", *in* B. Schünemann (ed.), *A Programme for European Criminal Justice*, Köln, Carl Heymanns Verlag, 2006, p. 456, affirming that the notion of 'fundamental interest' could artlessly be transposed at a European level as it is not merely a product of national legislation but directly derives from social reality.

with the Union's primary legislation. Besides, the latter has offered the ground for the inclusion of novel protected interests of the EU itself[26]. Another crucial question is whether it is possible for those fundamental interests protected by the EU to be imported into the domestic legal order of each Member State bearing its own legal and especially its own constitutional tradition. In the absence of a genuine possibility for such a transposition, opting for criminal suppression within a given Member State will inevitably run contrary to the rule of law and thus lack legitimacy. Although this latter remark reveals the difficulty of satisfying the requirement under discussion, the regime established under the Treaty of Lisbon might offer a way to overcome such a difficulty by virtue of its provisions governing consultation with national parliaments in the Union's lawmaking function. Understanding and overcoming similar difficulties is of crucial importance as it touches upon the very rationale underlying the legitimacy of resorting to criminal law rules.

B. The ultima ratio *principle*

Due to its particularly invasive nature with respect to citizens' fundamental rights, the application of criminal law must always rely on a 'limiting principle' lest it spirals out of control. Of all principles limiting criminal law, the least ambiguous one is the *ultima ratio* principle[27]. The concise adage "to the exceptional case the ultimate means"[28] denotes both a quantitative and a qualitative element[29] since exceptional cases are limited in number and they concern serious breaches of fundamental interests[30]. Fittingly, it has been said that the *ultima ratio* principle leaves room for criminal law measures in situations resembling a state of necessity, *i.e.* when something needs to be done and there is no other solution to be found by society or the State[31].

From a normative perspective, the *ultima ratio* principle is closely linked to the principle of proportionality, which allows for the adoption of the legal means necessary to achieve a certain goal; and indeed, in the absence of any other solution, the ultimate means would be necessary in that sense[32]. One notable difference is to be observed though: while the principle of proportionality presupposes a goal against which to evaluate whether the means chosen are proportionate ('ultimate means'), the

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[26] As for example protecting citizens' interests by preventing and suppressing corruption within the EU apparatus. For a discussion of European fundamental interests see N. Bitzilekis, M. Kaiafa-Gbandi and Symeonidou-Kastanidou, "Theory of genuine European Legal Interests", *in* B. Schünemann, *A programme for European Criminal Justice*, *op. cit.*, 2006, p. 467; R. Hefendel, *ibid*., p. 214.

[27] Compare with the 'principle of subsidiarity' or even the so-called 'fragmentary character of criminal law': see C. Prittwitz, "Der fragmentarische Charakter des Strafrechts-Gedanken zu Grund und Grenzen gängiger Strafrechtspostulate", *in* H. Koch (ed.), *Herausforderungen an das Recht: Alte Antworten auf neue Fragen?*, Berlin Verlag Arno Spitz, Berlin, 1997, p. 145f.

[28] "Im äußersten Fall das äußerste Mittel": W. Naucke, *Strafrecht, Eine Einführung*, 6. Aufl., Alfred Metzner Verlag, Neuwied-Kriftel-Berlin, 1991, p. 53.

[29] C. Prittwitz, "Der fragmentarische Charakter", *op. cit.*, p. 151.

[30] See W. Naucke, *op. cit.*, p. 53 ('*bei besonderes schwerwiegenden Verletzungen*').

[31] C. Prittwitz, "Der fragmentarische Charakter", *op. cit.*, p. 166 ("*Staat und Gesellschaft sich nicht anders zu helfen wisse*n").

[32] Cf. fn. 16.

ultima ratio principle as portrayed above claims a stake at describing the goal itself (*'to the exceptional case* the ultimate means') [33]. It is thus linked to the justification of punishing conduct by criminal sanctions, a matter discussed in the previous section.

Associating the *ultima ratio* principle with the principle of proportionality also reveals that it is firmly founded in principles of EU law [34]. A Union which places the individual at the heart of its activities – as per the preamble of the Charter of Fundamental Rights – cannot possibly compel its Member States to criminalise conduct that can be addressed through milder means. This is because criminal sanctions are *per se* an infringement of the fundamental rights of citizens due to their socio-ethical implications and the stigmatisation that they bring about [35].

Besides, there are also empirical grounds hinting at an '*ultima ratio*-abiding' criminal law within the EU. The lack of resources to enforce ever-expanding criminal statutes, the weakening of their deterrent force and effectiveness as well as the emasculation of other mechanisms to address social problems [36] are all symptoms that are already in evidence in Member States, which cannot be ignored by the Union when intervening in the field of criminal law.

With particular regard to the activities of the EU – especially after the Treaty of Lisbon, recognising its competence in both, harmonising criminal law rules of Member States and establishing rules of its own [37] – it should be remarked that the application of the *ultima ratio* principle is anything but certain, particularly when it comes to the approximation of criminal law rules in Member States. Although approximation normally implies already existing rules within Member States, it might also entail the adoption of new ones so that certain Member States may fulfill their obligations vis-à-vis the Union. The stricter or broader a criminal rule is, the more pressing the need for justification, through empirical data, that criminalisation was the last resort. In that sense, the Council's allusion to the application of the *ultima ratio* principle 'as a general rule' (declared in relation to the future lawmaking function of the EU in the field of criminal law) [38], albeit notable, cannot be deemed sufficient *per se*.

A case in point is the crime with a cross-border dimension (Article 83, para. 1 TFEU). The mere reference to 'particularly serious' crime in the text of the said article is not sufficient to guarantee respect for the *ultima ratio* principle. Indeed, even in the field of particularly serious crimes (*e.g.* terrorism), one cannot exclude the possibility that there were other – milder – means, which were not used to address the conduct in question. This is demonstrated in Framework Decision 2008/919/JHA on combating terrorism, which extensively opts for the criminalisation of a broad array of acts,

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[33] C. Prittwitz, "Der fragmentarische Charakter", *op. cit.*, p. 158.

[34] Cf. fn 15.

[35] Cf. the Appendix to Recommendation no. R(92)17 of the Council of Europe, which clearly states that custodial sentences should be regarded as a sanction of last resort (B. 5ª). See Recommendation no. R(92)17 of 19 October 1992 concerning consistency in sentencing.

[36] C. Prittwitz, "Der fragmentarische Charakter", *op. cit*., p. 161.

[37] Cf. fn. 3.

[38] See Council doc. 16542/09, 23 November 2009, p. 4, which reads in relevant part: "As a point of departure the European Union should as a general rule adhere to the principle of use of criminal law as a last resort".

including 'recruitment' and 'training' of terrorists through the internet, as opposed to introducing restraints to those administering the respective websites. The said Framework Decision directs Member States to adopt criminal law rules anticipating potential risks to fundamental interests, thus criminalising conduct, which merely generates or supports criminal intent of third persons. In so doing, it contributes to the establishment of a pre-preventative criminal law [39]. Such premature application of criminal rules, devoid of any discernible link to any risk of a fundamental interest [40] – even on an abstract level – runs counter to the *ultima ratio* principle as well as the principle of proportionality as accepted in European law. To the extent that a given act does not pose a significant and clear risk to interests worthy of protection, it is hard to find justification for criminal prosecution of that act and even harder when milder means of addressing the problem were overlooked. A similar argument can be made with regard to the Framework Decision on combating corruption in the private sector [41]. The latter contains no convincing reasons as to why obviously milder means of tackling corruption have been set aside, such as introducing a streamlined procedure for tort claims or adopting broad measures of compliance in the workplace (*inter alia* the 'four eyes' principle, staff rotation, etc.). The recent Directive on sexual exploitation of children and child pornography [42] is also problematic from the same perspective: e.g. criminalising obtaining access to pornographic material via the internet (Article 5, para. 3) does not seem necessary if the Member States are in a position to block access to all the relevant websites. On the other hand, in the proposal for a Directive on attacks against information systems [43], the EU also refrains from the *ultima ratio* principle, as for example, one can deduce from illegal access to information systems (Article 3) where the act is to be criminalised even without an infringement of a security measure.

This need becomes even more pressing when the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has already been subject to harmonisation measures (Article 83, para. 2 TFEU). The recognition of such a competence is in direct conflict with the *ultima ratio* principle as the need for 'effective implementation' – particularly in the field of Union policies – is liable to produce a lack of self-restraint until other measures prove efficient. Still, the unique identity of

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[39] See M. Kaiafa-Gbandi, "Terrorismusbekämpfung in der Europäischen Union und das vor-präventive Strafrecht: Neue Vorgaben für strafbare Taten nach dem Rahmenbeschluss 2008/919/JI", *in Festschrift für W. Hassemer*, *op. cit.*, p. 1165; cf. F. Zimmermann, "Tendenzen der Strafrechtsangleichung in der EU – dargestellt anhand der Bestrebungen zur Bekämpfung von Terrorismus, Rassismus and illegaler Beschäftigung", *ZIS*, 2009, p. 2f.

[40] M. Kaiafa-Gbandi, "Terrorismusbekämpfung", *op. cit.*, p. 1171-1172 and p. 1176-1777.

[41] Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *OJ*, no. L 192, 31 July 2003, p. 54.

[42] Cf. fn. 21.

[43] Proposal for a directive on attacks against information system (COM (2010) 517 final, 30 September 2010). Cf. Draft Report of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament (Rapporteur: M. Hohlmeier) 2010/0273, 24 November 2011.

criminal law cannot allow it to be reduced to a mere tool for the implementation of any policy. In order to use criminal law, as previously noted, an EU policy should be about the protection of fundamental interests and the problems arising during the implementation of such a policy should be no less than seriously harmful acts which cannot be addressed through any other means (as established empirically). It is only by conceiving of the need for a truly exceptional application of criminal rules that the approximation envisaged in Article 83, para. 2 TFEU can properly take place (based on the apt remarks of the German Federal Constitutional Court)[44]. This is why the Directive on the protection of the environment through criminal law[45] has missed its mark since it imposes the criminalisation of regulatory offenses even though administrative sanctions would be equally – if not more – effective to ensure the effective implementation of the Union's policy in this field.

That same logic also applies to those areas where the EU possesses *competence* to adopt criminal rules in its own right, as for instance in the case of fraud affecting the financial interests of the Union under Article 325, para. 4 TFEU.

It becomes clear that, when it comes to the EU, there is consistency in the essence of the fundamental *ultima ratio* principle. This only makes sense since the said principle concerns the use of criminal law as a last resort regardless of the legislator, no matter whether his competence is exclusive or shared (in this case between the Union and its Member States). At the same time, the novel institutional framework introduced in the Treaty of Lisbon calls for even more caution with respect to the application of this principle. The EU has indeed assumed greater responsibility in ensuring that criminal law is used as a last resort due to its competence to impose minimum rules and to provide for the requisite sanctions[46]. Setting minimum standards for criminal suppression in Member States presupposes that the Union has confirmed that these measures are a 'necessary evil', *i.e.* that there was no other way; otherwise, any step it takes will inevitably destabilise the foundations of a proportionality-based criminal law. In other words, the fact that the EU now has the competence to bind its Member States to minimum standards of criminal suppression implies a responsibility to ensure that criminal law shall only be used as a last resort to protect fundamental interests. This would be equally applicable for any sector where the Union is competent to adopt, by itself, criminal rules for protecting fundamental interests of its own.

Unfortunately the practical post-Lisbon reality demonstrates that the EU's legislative proposals present different alternative solutions (called policy options), which are surprisingly identical in all the different proposals of directives introduced following the Lisbon Treaty[47]. This proves that alternative solutions are not based on

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[44] See BVerfG 2 BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30.6.2009, margin no. 361-362; for a doctrinal discussion of the decision see fn. 11.

[45] Directive 2008/99/EC of 19 November 2008; cf. (from a critical standpoint) F. Zimmermann, "Wann ist der Einsatz von Strafrecht auf europäischer Ebene sinnvoll ? – Die neue Richtlinie zum strafrechtlichen Schutz der Umwelt", *ZRP*, 2009, p. 75f.

[46] On the function of 'minimum rules' in substantive criminal law see M. Kaiafa-Gbandi, "Die Entwicklung", *op. cit.*, p. 520-521.

[47] Cf. *e.g.* COM (2010) 517 final, 30 September 2010, p. 5; COM (2010) 94 final, 29 March 2010, p. 5; COM (2010) 95, 29 March 2010, p. 5f. and the evaluation by ECPI, www.

a significant evaluation that would help access the different characteristics and special requirements of every specific field of examined behaviors that call for criminal sanctions to be an *ultima ratio*.

A careful assessment of legislative initiatives adopted by the EU shows that there have been cases in which the EU has managed to effectively discharge its duty to respect the *ultima ratio* principle. One pertinent example is the Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [48]: under Article 9 of the said directive, the obligation to criminalise does not extend to the employment of illegally staying third-country nationals *per se* (*id.*, Article 3, para. 1), but requires an additional aggravating circumstance (*e.g.* continuous or persistent repetition of the act, simultaneous employment of a significant number of illegally staying third-country nationals, illegal employment of a minor, etc.). Another example is the proposal for a Directive on attacks against information systems [49], which obliges Member States to criminalise illegal access to information systems (Article 3), illegal system interference (Article 4) as well as certain forms of illegal data interference (Article 5), all the while excluding insignificant acts to avoid excessive application of criminal sanctions. Although it is dubious whether this is enough to actually forestall excessive criminalisation, it is definitely an important step towards preserving the *ultima ratio* principle.

Full respect for this principle, however, would require a number of other important steps, even in those cases where criminal law does appear to be the last resort. Adopting milder means as a matter of priority, as well as justifying criminal suppression as a last resort based on empirical data are the necessary prerequisites to ensuring genuine respect for the *ultima ratio* principle, coupled with the principle of good governance [50].

C. The principle of legality

The principle of legality (*nullum crimen nulla poena sine lege*) requires that crime must be proscribed under *law* and occupies a central place among the fundamental principles of criminal law as it aspires to keep state power in check with respect to what exactly is punished and how [51]. It is not surprising, then, that it enjoys constitutional status in a number of legal orders. Beyond the description of the object of punishment, the principle is also linked to the legislative process [52]. Specifically, criminal rules are

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crimpol.eu.

[48] Directive 2009/52 of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ*, no. L 168, 30 June 2009, p. 24.

[49] COM (2010) 517 final.

[50] Concerning the use of such data, see the conclusions included in "Assessment of the need for criminal provisions", Council doc. 16542/09, 23 November 2009, point (3).

[51] See *inter ali*a I. Μανωλεδακης, M. Καϊαφα-Γκμπαντι and E. Συμεωνιδου-Καστανιδου, *Ποινικό Δίκαιο-Επιτομή Γενικού Μέρους*, Αθήνα-Θεσ/νίκη, Εκδόσεις Σάκκουλα 7η έκδ., p. 18; P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit*., p. 47-48.

[52] Cf. P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit.*, p. 48-49, associating the principle with substantive criteria as to what may be punished by the State (not any conduct that is

only then legitimised when they are passed by parliament following public debate (*nullum crimen nulla poena sine lege parlamentaria*) [53]. This requirement connotes a public process involving the complete awareness of the potential consequences by the citizenry ('Demos'). It also includes the participation of citizens – represented by their delegates in parliament – *i.e.* the ones who will ultimately suffer the consequences.

In the European context, the principle is enshrined in Article 7, para. 1 ECHR [54], Article 49, para. 1 of the Charter of Fundamental Rights of the EU, and Article 6, para. 3 TEU [55], which goes beyond the fundamental rights guaranteed under the ECHR, requiring respect for the constitutional traditions common to the Member States, which tend to be more elaborate when it comes to legality. This parameter raises an issue that merits our attention. Because the principle of *nullum crimen nulla poena sine lege* constitutes the trigger for a whole array of fundamental rights, the process of European unification cannot be allowed to shrink it to a 'least common denominator' principle found in all Member States. This means that those Member States, which do not attach so much importance to this particular principle, cannot become a role model for the EU [56] lest respect for the constitutional traditions of other members be compromised. In other words, the reference to constitutional traditions common to Member States in Article 6, para. 3 TEU should not be interpreted so as to denote that any given fundamental right should derive from the constitutional traditions of all Member States so as to be recognised on a European level. Rather, it would suffice that the traditions in question be common in some Member States. Here lies the particular significance of Article 6, para. 3 TEU with respect to the principle of *nullum crimen nulla poena sine lege*. By alluding to fundamental rights emanating from constitutional traditions common in Member States, the said provision essentially guarantees a maximum degree of protection of those rights, drawn from a comparative appraisal of the various legal orders. Thus, the constitutional traditions common in

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troublesome or risky may be criminalised; rather, criminal law should target conduct that constitutes denial of the fundamental rights of others, lest it itself become a liability for liberty).

[53] See N. Ανδρουλακης, *Ποινικό δίκαιο- Γενικό Μέρος, Θεωρία του Εγκλήματος*, Αθήνα, Δίκαιο και Οικονομία Π. Ν. Σάκκουλας, 2000, p. 95; cf. I. Μανωλεδακης, *Αρθρο 7 του Συνταγματος*, σε Γ. Κασιματης- Κ.-Γ. Μαυριας (επιμ.), *Ερμηνεία του Συντάγματος*, Αθήνα, Εκδόσεις Αντ. Σάκκουλα, 1999, p. 18-20.

[54] Cf. Recommendation no. R (98) 6 by the Committee of Ministers of the Council of Europe, sec. I. a. 1. Articles 7, para. 1 ECHR and 49, para. 1 of the Charter do not guarantee the principle to its full extent; unlike most Member States, they require criminalisation by law, including customary law. For a critical survey of the case law of the ECHR and the ECJ see S. Braum, *Europäische Strafgesetzlichkeit*, Frankfurt am Main, Vittorio Klostermann, 2003, p. 47-48.

[55] See M. Kaiafa-Gbandi, "The development towards harmonisation within criminal law in the European Union – A citizen's perspective", *European Journal of Crime, Criminal Law and Criminal Justice*, 2001, p. 250f.

[56] These would include, for instance, the United Kingdom and France: P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit*., p. 58. Nonetheless, even common law now recognises the principle (see G. Dannecker, para. 1 Rn 5 and f., 43f., in Leipziger Kommentar StGB, Band I, Einleitung, para. 1-31, 12. Aufl. 2007) with a few exceptions (see G. Dannecker, *op. cit.*, para. 1, Rn 45).

certain Member States are sufficient to engender protection of a fundamental right at a European level [57].

Beyond the association with law enacted by parliament, the substantive content of the principle discussed can be broken down into three separate requirements, addressed to the legislature, the executive, and the judiciary respectively. These are: the *lex certa* requirement, the non-retroactivity requirement, and the prohibition of applying criminal rules by analogy [58]. The first one is exclusively addressed to the legislature, the second concerns all three branches, while the third is exclusively addressed to the judiciary. This explains why this paper – just like the Manifesto on European Criminal Policy – is only concerned with the first two requirements, which are addressed to the European legislator, *i.e.* our main point of reference, as he is the one deciding on European Criminal Policy. Adding to the picture, the main problems arising out of the application of the *nullum crimen nulla poena sine lege* principle at a European level are related to the requirement of law enacted by parliament and the 'clarity' of criminal provisions. On the other hand, the non-retroactivity requirement and the concomitant principle of *lex mitior* do not appear to cause particular problems. Last but not least, the contemporary institutional framework within the EU entrusts Member States with the task of enforcing criminal law and meting out sanctions via their national court system. Hence, the prohibition of applying criminal rules by analogy could not be transposable before bodies of the EU save perhaps for the ECJ when interpreting EU law [59] (*e.g.* in the case of a Directive establishing minimum rules concerning the definition of a crime).

*1. The requirement of law enacted by parliament (*nullum crimen nulla poena sine lege parlamentaria*)*

It has already been emphasised that the principle in question requires the enactment of a criminal law by parliament because the most invasive form of state control should derive its legitimisation from the people as directly as possible. In the EU context, there are admittedly problems regarding this principle due to the Union's democratic deficit [60], which has been reduced but not completely eliminated by the Treaty of Lisbon [61]. In fact, some voices argue that eliminating this democratic

[57] On this issue generally see M. Kaiafa-Gbandi, *Memorandum, in House of Lords-European Union Committee*, 10th Report of Session 2007-08, "The Treaty of Lisbon: an impact assessment", Volume I: Evidence, HL Paper 62-II, E 160.

[58] For a presentation of the constituent elements of the principle see P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit.*, p. 49f.

[59] This field will gain increasing significance under the Treaty of Lisbon, since the ECJ now possesses the competence to give preliminary rulings on the interpretation of Union law in criminal matters as well without prior authorisation by Member States (Articles 19, para. 3, b, TEU and 267 TFEU).

[60] See *inter alia* R.-A. Lorz, "Das Problem des demokratischen Defizits", *in* D. Tsatsos (ed.), *Die Unionsgrundordnung-Handbuch zur europäischen Verfassung*, *op. cit.*, p. 311; for the application of the principle on a European level see *inter alia* U. Sieber, "Die Zukunft des Europäischen Strafrechts", *ZStW*, 2009, at p. 13-14, p. 50f., p. 53f.

[61] On the possibility of an act passing without a majority vote by the European Parliament in the course of ordinary legislative process and its ramifications in the field of criminal law

deficit by attempting to institutionally transform the European Parliament into a 'full-fledged parliament' will not work until and unless an 'identity of a European citizen' is developed with which the people of Europe could identify themselves in relation to a decision-making process at a European level [62]. In addition, it is often argued that the Union itself, as a European Sympoliteia of both States and nations [63], seems to be premised on a unique structure, which could at best sustain equal lawmaking powers for the Council and the European Parliament [64]. One should also not neglect other matters, such as the interaction between EU bodies in general, and in particular between the Council and the European Parliament, which delineate the problem at an empirical level. Indeed, Member States appear quite reluctant to give up their influence over the supranational organisation they have created in favour of an ever-stronger European Parliament [65]. It becomes apparent that the institutional regime introduced by the Treaty of Lisbon is here to stay for years to come. Aside from its future improvement, then, attention should also shift towards expanding democratic legitimisation under the Treaty of Lisbon as it stands, at least with respect to sensitive areas such as criminal law.

Under these circumstances, the question remains as to whether and how the EU can satisfy the basic requirement of a criminal law enacted by parliament in those fields where it possesses the competence to act.

At this point, one should once more recall the types of criminal competence assigned to the EU. On the one hand, the Union may establish minimum rules concerning the definition of criminal offences and sanctions through directives, which shall then be transposed into the domestic legal order (article 83 TFEU) [66]. On the other, it has the authority to establish criminal rules even by itself under such provisions as Article 325 TFEU.

As regards the former, there appear to be grounds for the application of the requirement of a law enacted by parliament. Although some scholars point out that the participation of the European Parliament in the ordinary legislative procedure (Articles 289 and 294 TFEU) – under which minimum rules concerning the definition of criminal offences and sanctions are established through directives – does leave a certain amount of democratic deficit (at least in the sense that certain scholars

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see M. Kaiafa-Gbandi, "The Treaty establishing a Constitution for Europe and challenges for criminal law at the commencement of 21st century", *European Journal of Crime, Criminal Law and Criminal Justice*, 2005, p. 500. Also see the decision by the BVerfG 2BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30 June 2009, margin no. 276f. Cf., however, H. Satzger, "Das Strafrecht als Gegenstand europäischer Gesetzgebungstätigkeit", *KritV*, 2008, p. 25, adding certain reservations at p. 36. Also see criticism towards the decision of the BVerfG by M. Böse (*ZIS*, 2010, p. 82f.), in relation to the democratic deficit in the EU.

62 See R.-A. Lorz, *op. cit.*, p. 343.

63 See Δ. Τσατσος, *op. cit.*, p. 98 and p. 103-114.

64 *Ibid.*, p. 1110-1112.

65 See R.-A. Lorz, *op. cit.*, p. 343-344.

66 Note the narrow interpretation proposed by the BVerG in view of the democratic deficit: 2 BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30 June 2009, margin no. 358-363.

perceive the notion of 'democratic deficit' in relation to the EU's competence in the field of criminal law)[67], requiring that national parliaments already take part in lawmaking at the consultation stage[68] is admittedly an important step. As long as national parliaments remain active in actual practice and their input is taken into account, the directives produced will attain a higher degree of legitimisation as opposed to those issued under a simple co-decision procedure involving the European Parliament alone. Such legitimisation would indeed derive from the European citizenry, represented in their respective parliaments. Needless to say, the procedure adopted for the involvement of national parliaments remains rather loose compared to lawmaking in the domestic context. Some have suggested the adoption of national rules binding the representatives of each Member State to vote for or against a directive establishing minimum rules concerning the definition of criminal offenses based on a prior determination by their respective national parliament[69]. This would indeed contribute towards satisfying the requirement of a criminal law enacted by parliament, since the binding effect of each directive would be democratically legitimised through the participation of national parliaments[70]. It is of course true that a single Member State can now be bound by a directive even when it has voted against it due to the majority principle. Thus, the only way for a Member State to free itself of the relevant obligation is to claim that a draft directive would affect fundamental aspects of its criminal justice system, hence invoking the emergency break clause of Article 83, para. 3 TFEU. Although the allusion to 'fundamental aspects' of a criminal justice system is somewhat vague[71], one could identify at least one circumstance in which the emergency brake clause could undoubtedly be invoked: a breach of one of the

[67] Cf. F. Meyer, *Demokratieprinzip und Europäisches Strafrecht*, Zurich-Saint Gallen, Nomos, 2009, p. 122f.

[68] See Protocol no. 1 on the role of national parliaments in the European Union. It is true, of course, that national parliaments may submit a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity under Article 3 of the said Protocol. However, it would be erroneous to deduce that the role of national parliaments is confined to these 'reasoned opinions' alone. Otherwise Article 12(a) TEU on the active contribution of national parliaments referring to their information by institutions of the EU on draft legislative acts would have no meaning. Even without an explicit clause, a proper reading of the Protocol would lead to the conclusion that national parliaments are not precluded from submitting their opinion on any draft; indeed, such a broadening of the consultation process is likely to expose problems justifying use of the emergency break clause.

[69] See BVerfG, 2 BvR 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30 June 2009, margin no. 365. At the same time, it is argued that exceptional circumstances may occasionally warrant departure from the decision made in the national parliament (*e.g.* due to political considerations weighed up during negotiations leading to the adoption of a given directive); in those cases, it is suggested that the representative in the Council modify his/her Member State's position subject to subsequent ratification by the Parliament: see H. Satzger, "Das Strafrecht als Gegenstand", *op. cit.*, p. 36.

[70] Cf. the objections expressed by M. Böse, *ZIS*, 2010, p. 83, as well as the lower threshold accepted by U. Sieber, "Die Zukunft des Europäischen Strafrechts", *op. cit.*, p. 55 with respect to the democratic legitimisation of criminal rules in the EU.

[71] See H. Satzger, *Internationales und Europäisches Strafrecht*, *op. cit.*, p. 124-125.

fundamental principles of criminal law outlined above as well as of those that will be presented further on.

In conclusion, it could easily be argued that, when it comes to the criminal competence of the EU with a view to the approximation of national laws, respect for the requirement of *nullum crimen nulla poena sine lege parlamentaria* hinges on the degree of involvement of national parliaments in the consultation process. Accordingly, the EU should make sure that it encourages such involvement based *on* the principle of good governance. For their part, national parliaments should not hesitate in actively engaging in the function assigned to them while Member States would be wise to examine the possibility of linking their vote in the Council to a prior decision by their parliament, at least in the field of criminal law. Moreover, the emergency break clause of Article 83, para. 3 TFEU can be interpreted so as to safeguard fundamental principles of criminal law and is thus crucial for democratic legitimisation; and indeed, the said clause in effect ensures against binding criminal law rules being adopted that would only be legitimised at the EU level (*i.e.* insufficiently) and would contradict fundamental aspects of a Member State's criminal justice system.

That being said, more serious problems are likely to arise if and when the EU sets about adopting criminal rules by itself. Even with certain improvements, such as linking votes in the Council to a prior determination by the respective national parliament [72], the co-decision procedure does not seem fit to accommodate autonomous criminal competence, at least not as long as the European citizenry ('Demos') finds itself in *statu nascendi* [73]. Notwithstanding the competence entrusted with it in the Treaty of Lisbon, I believe that the EU should confine itself to the context of regulatory offences for now and abstain from adopting criminal rules by itself until such time has come in which the institutions have evolved in such a way as to bring about a further improvement in the democratic deficit that currently exists [74]. Whenever the exercise of criminal competence appears to be necessary as a last resort, the approximation of criminal laws of Member States via directives would emerge as a viable alternative [75],

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[72] For instance, linking votes in the Council to a prior determination by national parliaments would appear plausible in another case where the ordinary legislative procedure applies, namely Article 325 TFEU concerning fraud against the financial interests of the Union. Nonetheless, the principle of majority on the one hand and the non-applicability of the emergency break clause on the other indicate that Member States cannot absolve themselves of the rules adopted by the EU even if they invoke fundamental principles of theirs. Besides, applying the emergency break clause by analogy in those cases is refuted based on arguments related to functional differences between directives and regulations: see H. Satzger, *Internationales und Europäisches Strafrecht*, *op. cit.*, p. 125-126.

[73] See, *e.g.*, F. Meyer, *op. cit.*, p. 123-124. With respect to Article 325 TFEU see U. Sieber, "Die Zukunft des Europäischen Strafrechts", *op. cit.*, p. 59.

[74] See P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit*, p. 167, arguing that the EU should confine itself to means outside criminal law. Also see S. Braum, *op. cit.*, p. 473-474, criticising the abuse of criminal sanctions for the sake of efficiency.

[75] For an analysis of the institutional regime before Lisbon see N. Bitzilekis, M. Kaiafa-Gbandi and E. Symeonidou-Kastanidou, *op. cit.*, p. 230f.; see, however, R.Hefendel, *op. cit.*, p. 214f., advocating a European criminal law free from intervention by Member States (though stopping short of discussing the democratic legitimisation of the rules produced). In

because nothing in the Treaty of Lisbon precludes that option (see Articles 325 and 79, para. 2, sec. d, TFEU, which allude to measures in accordance with the ordinary legislative procedure, thereby implying, *inter alia*, the adoption of directives).

2. The 'lex certa*' requirement*

This particular facet of the principle of *nullum crimen nulla poena sine lege* requires that a criminal rule contain a precise description of the objective and subjective elements of an offence as well as the sanction to be imposed. It also requires that every offence comprise a human act, thereby ruling out punishment for people's thoughts. In addition, the description must be clear enough so that the ordinary citizen can predict which actions will make him criminally liable. In the absence of such foreseeability, the principle of legality would indeed be rendered moot [76].

It goes without saying that the '*lex certa*' requirement would apply without any distinction to criminal rules introduced by the EU itself, *i.e.* without the need for transposition by Member States, as provided for certain cases in the Treaty of Lisbon [77]. That being said, the main type of criminal competence provided in the latter is the one to be exercised through directives establishing minimum rules concerning the definition of offences and sanctions (Article 83, para. 1 and 2 TFEU). Therefore, the '*lex certa*' requirement is more intricate in this case due to the two distinct stages of criminalising conduct (a European and a national one).

A mere look at the case law of the ECJ [78] (predating the Treaty of Lisbon) shows that the Court has indeed followed the ECHR by requiring that the criterion of foreseeability emanates from the text of the rule itself [79]. In the field of criminal law, the Court has also emphasised, that the obligation of Member States to interpret the law in accordance with a directive [80] (or a framework decision) [81] cannot lead to the establishment or aggravation of criminal liability. This would appear to imply that it is the national criminal rule that should abide by the principle of *nullum crimen*

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that same vein, see the proposals of the programme 'Ein Gesamtkonzept für die Europäische Strafrechtspflege', *in* B. Schünemann (ed.), *op. cit.*, p. 59-60.

[76] See, *e.g.*, P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit.*, p. 49-50.

[77] Note, however, the reservations expressed in the previous chapter. For related questions to the *lex certa* principle in the Union law see C. Peristeridou, "The principle of lex certa in national law and European perspectives", *in* A. Klip (ed.), *Substantive Criminal Law of the European Union*, p. 85f.; cf. also E. Claes, "Legality and lex certa in the Criminal Law-Reply to Christina Peristeridou", *ibid*., p. 95f., and especially p. 102.

[78] See extensively A. Klip, *European Criminal Law*, *op. cit.*, p. 167f.

[79] *Ibid*., p. 169; ECJ, 7 June 2007, Judgement C-76/06, *Britannia Alloys & Chemicals Ltd v Commission of the European Communities* (Agreements, decisions and concerted practices), ECR, p. I-04405.

[80] See A. Klip, *European Criminal Law*, *op. cit.*, p. 168; ECJ, 12 December 1996, Joined cases C-74/95 and C-129/95, *Criminal proceedings against X*, *ECR*, p. I-06609, para. 22; ECJ, 22 November 2005, Judgement C-384/02, *Criminal proceedings against Knud Grøngaard and Allan Bang*, *ECR*, p. I-09939, para. 30.

[81] See A. Klip, *European Criminal Law*, *op. cit*., p. 168; ECJ, 16 June 2005, Judgement C-105/03, *Criminal proceedings against Maria Pupino*, *ECR*, p. I-05285, para. 45.

nulla poena sine lege certa rather than the legislative act through which the EU has compelled its adoption [82].

However, that kind of reasoning fails to take into account certain factors affecting EU law, particularly since the adoption of the Treaty of Lisbon. Through its directives addressing cross-border crime or ensuring the effective implementation of its policies, the EU seeks to establish a minimum content of the definitions of crimes, which shall bind Member States [83] under threat of sanctions in the event of their failing to be incorporated into the domestic legal order [84]. Such minimum content should clearly derive from each legislative act of the Union despite the fact that it is up to each State's legislature to specify the elements of crimes for the purposes of its criminal justice system. By contrast, the sanction to be imposed does not need to be determined by the European legislator. That task could indeed be performed more appropriately at the domestic level, in accordance with the principle of proportionality and the particularities of each criminal justice system [85].

There are two important parameters when it comes to the matter of requiring the EU to clearly stipulate a minimum content of the conduct to be proscribed. First of all, the lack of such a clear stipulation poses a dilemma to national legislators: it means that they will either unilaterally adopt a precise definition and risk diverging from the EU's actual objective, which the European legislator did not adequately describe or they will fail to give a clear description of the offence, thereby violating the principle of *nullum crimen nulla poena sine lege certa*, which would amount to a breach of the Constitution in numerous Member States. It becomes clear that the '*lex certa*' requirement is addressed *to the European legislator as well*, in as much as the latter may bind Member States to adopt minimum elements of an offence. Otherwise, it would become impossible for national legislators to abide by their obligation to transpose EU law without violating the '*lex certa*' requirement [86]. Even worse, fear of possible sanctions might lead Member States to opt to transpose the relevant directives verbatim, which would constitute an outright breach of the principle of legality [87]. Besides, missing a clear delineation of a minimum core of the conduct to be

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[82] See A. Klip, *European Criminal Law*, *op. cit.*, p. 171.

[83] For a discussion of the function of 'minimum rules' in substantive criminal law see M. Kaiafa-Gbandi, "The Treaty establishing a Constitution for Europe", *op. cit*., p. 498f.

[84] See Article 260 TFEU.

[85] According to the case law of the ECJ, the principle of legality does not require that EU law provide for a specific penalty for each offence: see A. Klip, *European Criminal Law*, *op. cit.*, p. 172; ECJ, 15 October 2002, Joined cases C-238/99 P, C-244/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v Commission*, *ECR*, p. I-08375.

[86] See A. Klip, *European Criminal Law*, *op. cit.*, p. 172, referring to specific examples of EU legislative acts causing problems, and suggesting the annulment of the act as the only solution in these cases.

[87] On the adverse effect of international law on the principle of legality in general see B. Jahnke, "Zur Erosion des Verfassungsgrundsatzes 'Keine Strafe ohne Gesetz'", *ZIS*, 2010, p. 463f., esp. p. 469-470; M. Kaiafa-Gbandi, "Die allgemeinen Grundsätze des Strafrechts im Statut des Internationalen Strafgerichtshofs: Auf dem Weg zu einem rechtsstaatlichen Strafrecht der Nationen?", *in Festschrifts für H.-L. Schreiber*, Heidelberg, C. F. Müller, 2003, p. 204f.; S. Gless, "Strafe ohne souverän?", *ZStrR*, 2007, p. 436-437 and p. 442-443.

proscribed by the EU, neither national parliaments nor States' representatives would be able to contribute to the consultation process or appraise the proposed norms in the light of fundamental principles inherent in their respective criminal justice systems as the vagueness of the content may conceal serious deficiencies. As a result, this would drastically diminish the potential ambit of the emergency break clause provided under Article 83, para. 3 TFEU. Since the consultation process and the emergency break clause are both associated with the democratic principle, one can easily perceive a link between the latter and the '*lex certa*' requirement.

Aside from indirectly furthering the principle of *nullum crimen nulla poena sine lege certa* within a national context, introducing specific directives regarding the minimum content of criminal rules to be adopted by Member States also concerns European citizens. This is because the directive itself, coupled with the national piece of law implementing it, can shed light on what exactly is punishable, thus ensuring foreseeability. Of course, this does not mean that the directive – or at least one interpretation thereof – can lead to the establishment or aggravation of offences that the national legislator has not proscribed as such by virtue of domestic rules.

A much more pressing need to preserve the '*lex certa*' requirement arises when a European piece of legislation compelling Member States to criminalise conduct refers to other provisions of EU law[88]. This kind of situation might bring about practical problems as the '*lex certa*' requirement must be observed with respect to every single provision involved. Otherwise, it would become unfeasible to adopt national rules incorporating EU law in a sufficiently unambiguous manner.

Evaluating the practice of the EU in the light of the principle in question –which also applied by analogy to Framework Decisions issued under the third pillar, considering that they too are designed to bind Member States in terms of the result to be achieved – would churn out conflicting examples (as was the case with the other principles discussed above). For instance, where the EU wishes to proscribe any type of conduct occurring within a certain field, it does so through detailed descriptions of offences covering virtually every imaginable situation, such as in the case of drug trafficking[89] or the protection of the euro against counterfeiting[90]. Regrettably, these examples constitute evidence of the exception rather than the rule. The latter is expressed in such cases as the Framework Decision on combating corruption in the private sector, by virtue of which Member States are bound to criminalise both 'active' and 'passive' corruption[91]. The central element of the offence is that a person employed in the private sector requests or receives an undue advantage in exchange for breaching his/her duties. Nonetheless, such a breach of duty is only vaguely circumscribed under Article 1, sec. b and has to "cover as a minimum any disloyal behaviour constituting a

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[88] On this issue see H. Satzger, *Internationales und Europäisches Strafrecht*, *op. cit*., p. 133f.; and F. Zimmermann, "When is resort to criminal law in the European context useful?", *op. cit*., p. 76.

[89] Framework Decision 2004/757/JHA.

[90] Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *OJ*, no. L 140, 14 June 2000, p. 1f.

[91] Framework Decision 2003/568/JHA.

breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions (...)". Thus, the Framework Decision would apply to a breach of duties arising out of contractual arrangements or even mere orders in the workplace. Since the uncertainty emanates from the Framework Decision itself, Member States are bound to get entangled in it. Although Article 2, para. 3 of the Framework Decision allows the Member States to limit the scope to conduct involving a distortion of competition in relation to the purchase of goods or commercial services, this does not address the vagueness related to the breach of duty [92]. Similar flaws have surfaced in other EU legislative acts [93]: another case in point is the recent Directive on combating the sexual abuse, sexual exploitation of children and child pornography [94]. Article 2, sec. b (iii) of the said proposal alludes to visual depictions of any (adult) person appearing to be a child, disregarding the fact that no criterion in law can possibly determine when an adult would "appear to be a child", since appearances may in fact vary significantly from person to person (an eighteen-year-old could easily appear to be seventeen, whatever this may mean). On the other hand wording like 'sexually explicit conduct', which defines the pornographic material in the same directive, is extremely vague. Even the Council of Europe's memorandum of the respective Treaty specifies that the exact meaning of this conduct should be clarified and provides a minimum interpretation [95]. It becomes evident, then, that stipulations of this kind cannot satisfy the requirement of foreseeability and should therefore be left outside the realm of criminal law. Similar flaws also surface in other EU legislative acts. In the proposal for a directive on attacks against information systems [96] *e.g.* the requirement of the legality principle is not fulfilled because the proposed directive does not even attempt to define the notion of 'interception' (Article 6) [97] or 'device which is primarily designed or created to commit an offence' (Article 7), nor does it define the notion of 'minor cases' which are excluded from criminalisation [98].

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[92] On the problem of transposing this framework-decision into the Greek legal order see M. Kaiafa-Gbandi, "Punishing corruption in the public and the private sector: the legal framework of the European Union in the international scene and the Greek legal order", *European Journal of Crime*, *Criminal Law and Criminal Justice*, 2010, p. 178f.

[93] See the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA of 28 November 2008, *OJ*, L 328, 6 December 2008, p. 55f., as well as the Directive on the protection of the environment through criminal law, 2008/99/EC. See pertinent comments in Manifesto on European Criminal Policy, *ZIS*, 2009, p. 711.

[94] Cf. fn. 21.

[95] See para. 143 of the Memorandum of the Treaty of the Council of Europe on the Protection of Children against sexual exploitation and sexual abuse, 25 October 2007.

[96] COM (2010) 517 final and for its evaluation see M. Kaiafa-Gbandi, "Criminalizing attacks against information systems in the EU: the anticipated impact of the European legal instruments in the Greek legal order", *European Journal of Crime, Criminal Law and Criminal Justice*, 2012, p. 59 f.

[97] See however a definition by the Draft Report of LIBE, doc. 2010/0273 (COD), 24 November 2011, Amendment 21, p. 19.

[98] *Ibid.*, Amendment 18, p. 17.

In conclusion, the EU still has a long way to go towards ensuring actual respect for this facet of the principle of legality as well.

3. *The prohibition of retroactive application of criminal laws and the principle of* lex mitior

Last but not least, we need to examine yet another facet of the principle of legality, namely the requirement of non-retroactivity and its corollary, *i.e.* the principle of *lex mitior*. The obvious import of the said requirement is that criminal rules establishing offences or introducing aggravating circumstances thereto shall not apply to acts committed prior to their adoption as this would indeed violate the very core of the principle of legality, *i.e.* 'no punishment without law'[99]. The requirement is explicitly contained in both Article 7, para. 1 ECHR and Article 49, para. 1, sec. a, of the Charter of Fundamental Rights of the EU, which has now attained binding status[100]. Accordingly, under no circumstances may the EU require its Member States to apply their criminal laws retroactively.

The requirement of non-retroactivity acknowledges one notable exception, which – albeit not always constitutionally guaranteed – can be found in virtually every domestic legal order[101]. Criminal law provisions not only can but actually should apply retroactively when they benefit the offender (*i.e.* either render the act not punishable or mitigate the sanction). This is explicitly provided for under Article 49, para. 1, sec. c, of the Charter of Fundamental Rights of the EU, under which the Union may not compel States to apply the law in force at the time of the offence as long as it was amended thereafter (until the decision is made final) in a manner favourable to the defendant. To the extent that the Charter is binding on Member States, this exception is also to be applied by the legislature and judiciary of all Member States. Thus, the principle of *lex mitior* enjoys a more elevated status on a European level compared to certain Member States, presenting an excellent example of how a more comprehensive protection of fundamental rights within the EU can be achieved.

This analysis demonstrates, first and foremost, that the principle of legality in all its aspects presents certain particularities at an EU level and from an institutional perspective, calling for the contribution of Member States in order to leave the core of the principle intact. At the same time, the application of the principle in actual practice (the active involvement of national parliaments in the lawmaking process before EU bodies, faithful application of the '*lex certa*' requirement with respect to the transposition of minimum rules concerning definitions of offences and sanctions) as well as its future institutional form (*lex parlamentaria*) requires further support. Guaranteeing the principle of legality indeed turns the spotlight on the citizen as it serves to limit the power of government to impose criminal sanctions and safeguards

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[99] With regard to European law see, *e.g.*, A. Klip, *European Criminal Law*, *op. cit*., p. 173f.

[100] Even before the Charter attained binding status, the ECJ had recognized the principle. See ECJ, 3 May 2005, Joined cases C-387/02, C-391/02, C-403/02, *Criminal proceedings against Silvio Berlusconi and others*, *ECR*, p. I-3565, margin no. 69, 75, and 78.

[101] See, *e.g.*, Article 7, para. 1 of the Greek Constitution, which enshrines the requirement of non-retroactivity but stops short of guaranteeing the principle of *lex mitior* (the latter introduced in Article 2 CC).

civil liberties. In that sense, the principle of legality provides the citizen with security as well [102].

D. The principles of guilt and proportionality

The principle of guilt is another cornerstone of every liberally oriented criminal justice system [103]. Individual guilt for one's act is indeed an absolute prerequisite legitimising the imposition of any criminal sanction. According to this principle, a criminal sanction can be imposed when a criminal act has affirmatively been proven to be, *inter alia*, the product of a 'guilty mind', *i.e.* it was carried out voluntarily (with the requisite *mens rea*) [104]. Only then shall the individual deserve to bear the blame expressed through punishment. Such substantive content of the principle evidences its association with the principle of proportionality, as well as its function as a limit to the deterrent and/or the rehabilitative orientation of punishment. Penalties are incurred to address acts committed with 'a guilty mind'. Hence they should be proportionate to the 'guilt' and never exceed it for any reason [105]. Thus, the principle of guilt becomes a constraint of state power, protecting against otherwise unbridled deterrent policies, ensuring respect for the human being as an individual and constituting an expression of respect for human dignity.

At a European level and particularly relating to criminal law, the said principle derives from Article 48 of the Charter of Fundamental Rights of the EU, encompassing the presumption of innocence in the following words: "everyone who has been charged shall be presumed innocent until proved guilty according to law"; moreover, Article 1 of the Charter of Fundamental Rights proclaims the inviolability of human dignity [106]. It becomes evident, then, that the EU subscribes to the principle of guilt to its full extent.

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[102] See P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit.*, p. 53.

[103] The principle of guilt has so far withstood every doctrinal objection against it: see P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit.*, p. 65. On the content of the principle of guilt see BVerfG 2 BvE 2-08, BvR5-08, BvR1010-08, BvR1022-08, BvR1259-08, BvR182-09 of 30.6.2009, margin no. 364.

[104] Cf. BVerfG. Even if the affirmation of guilt inevitably entails an evaluation, the ontological foundation of guilt, *i.e.* the actual expression of the offender's mental state vis-à-vis the act, which can only be approached by the judge based on empirical evidence, constitutes a guarantee for the citizen. On the limits set to approaching the concept of guilt through empirical sciences by due process rights see P.-A. Albrecht, *Die vergessene Freiheit*, *op. cit.*, p. 67f.

[105] See N. Ανδρουλακης, Άρθρο 79 ΠΚ, σε Συστηματική Ερμηνεία του ΠΚ, Αθήνα, Δίκαιο και Οικονομία Π. Ν. Σάκκουλας, p. 1038; Μ. Καϊαφα-Γκμπαντι, *Οι σκοποί της ποινής και η επίδρασή τους στην επιμέτρηση*, *σε* Μ. Καϊαφα-Γκμπαντι/Ν. Μπιτζιλεκης/Ε. Συμεωνιδου-Καστανιδου, *Το δίκαιο των ποινικών κυρώσεων*, Αθήνα, Νομική Βιβλιοθήκη, 2008, p. 298-299, Ν. Παρασκευοπουλος, σε Λ. Μαργαριτη-Ν. Παρασκευοπουλου, *Ποινολογία*, Αθήνα-Θεσ/νίκη, Εκδόσεις Σάκκουλα, 7η εκδ., 2005, p. 325.

[106] The case law of the ECJ attests to this conclusion, requiring the affirmation of guilt for the enforcement of administrative sanctions: see A. Klip, *European Criminal Law*, *op. cit.*, p. 189.

It follows that the EU is bound to abstain from compelling its Member States to introduce strict liability crimes or introduce them itself[107]. Another ramification of the principle of guilt is the difficulty of transposing it in those cases where legal persons are responsible for violating fundamental interests in the course of their activities. This is because a number of Member States reject criminal responsibility of legal persons on the grounds, *inter alia*, of its incompatibility with the fundamental principle of guilt[108]. Consequently, the EU had better respect each State's right to choose whether it will introduce criminal liability of legal persons or not (based on their own understanding of the principle of guilt, which varies according to the culture of each people), as has been the case with every framework decision or directive on responsibility of legal persons so far[109].

Having recalled the self-restrained practice of the EU with respect to the principle of guilt, one should also take note of the fact that the Union's legislative acts so far steadily associate criminal responsibility with a requisite *mens rea* and in fact require intent. Beyond rejection of strict liability, this also clearly shows the EU's reticence to uphold criminal negligence, insisting on intent as the basis of criminal responsibility. This position is affirmed by the *ultima ratio* principle – as delineated above – which only leaves room for negligent crimes in exceptional cases, *i.e.* when the significance of the interest harmed and the gravity of the act render them a necessity[110].

Nevertheless, there are further examples indicating the lack of respect for the principle of guilt on the part of the EU. For instance, one should mention Article 1, para. 4 of the PIF Convention on the Protection of the European Union's financial interests, which provides that "the intentional nature of an act or omission (...) may be inferred from objective, factual circumstances". This tends to oversimplify the dispositive nature of intent, which cannot be automatically inferred from 'objective circumstances' connected with the act alone. Likewise, Article 3 of the said Convention concerning the criminal liability of heads of businesses provides that "each Member State shall take the necessary measures to allow [these persons] to be declared criminally liable in accordance with the principles defined by its national law" in cases of fraud affecting the European Communities' financial interests when a person under their authority is acting on behalf of the business. However, this provision does not seem to require the ascertainment of a criminal omission or subjective elements despite the fact that the crime of fraud affecting the Union's financial interests requires intent on the perpetrator's part.

Similar problems arise under a number of EU legislative acts which fail to associate the principle of guilt with proportionality. Indeed, in the absence of a requirement of 'personal guilt', there is no measure by which to evaluate the penalty to be imposed.

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[107] Cf., however, A. Klip, *European Criminal Law, op. cit.*, p. 189, not excluding the compatibility of strict liability offenses with EU law.

[108] See, *e.g.*, M. Kaiafa-Gbandi, "Ein Blick auf Brennpunkte", *op. cit*., p. 277f.

[109] See indicatively Articles 5 and 6 of the Framework-decision on the fight against organized crime (2008/841/JHA) as well as Articles 5 and 6 of the proposal for a directive on trafficking in human beings, COM (2010) 95, of 29 March 2010.

[110] Cf. Council conclusions on model provisions, guiding the Council's criminal law deliberations, doc. 16542/09 of 23 November 2009 under the title 'Intent', points 6-8.

There are other examples [111], including the Framework Decisions on terrorism and organised crime, which require Member States to significantly broaden criminal suppression and should therefore be in line with the principle of guilt. At this point, it is sufficient to mention some examples derived from recent EU legislative acts. One could mention in this respect the Directive on combating trafficking in human beings [112], which punishes behaviours of totally different levels of wrongfulness with the same level of penalties (*e.g.* Article 2, para. 1, many preparatory and supportive acts are being 'upgraded' to acts of direct principality) [113]. The same is true for the proposal of a directive on attacks against information systems [114]. Under the proposed directive, preparatory acts (Articles 7 and 9) are threatened with the same penalty as the directly offensive conduct itself, while Member States have to ensure that every offence mentioned in the directive is punishable by criminal penalties of a maximum term of imprisonment of at least two years (Article 9, para. 2). Aside from undermining the principle of proportionality, such a provision signifies that the EU leans towards inflexible penalties, although the principle of culpability and proportionality are better served by granting a certain amount of room for manoeuvre to the individual Member States, thus allowing them to align each sanction to the corresponding gravity of the respective offences. Overall, it has become clear that the current EU trend leans towards the establishment of stricter penalties while reducing Member States' room for manoeuvre to define them [115].

These conflicting (positive and negative) examples from the practice of the EU concerning the principle of guilt reveal that one cannot count on the Union's commitment in placing restraints on suppressive measures in the form of minimum rules to be adopted by States in the field of criminal law. As long as this remains so, the security that the common European area aspires to achieving cannot be attained in a way that respects liberty and justice.

3. The Commission's Communication on an EU Criminal Policy (COM (2011) 573 final) and the relevant European Parliament resolution (2010/2310 (INI)) in light of the Manifesto of the ECPI

The above analysis based on the Manifesto on European Criminal Policy of the ECPI-group helps us reveal the merits but also the shortcomings of the Commission's Communication to the European Parliament and the Council on "Ensuring the effective implementation of EU policies through criminal law" [116]. This document enhances the

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[111] See the Manifesto on European Criminal Policy, *ZIS*, 2009, p. 711-712.

[112] Directive 2011/36/EU.

[113] See the relevant evaluation of this directive by ECPI (Rapporteurs: H. Satzger/ F. Zimmerman), www.crompol.eu.

[114] COM (2010) 517 final.

[115] See the relevant evaluation of this directive by M. Kaiafa-Gbandi, *European Journal of Crime, Criminal Law and Criminal Justice*, 2012, p. 69-70.

[116] COM (2011) 573 final.

Council's decisions on "Model criminal provisions" and on "The approximation of penalties" (adopted in 2009 and 2002 respectively) [117] in a variety of aspects.

First of all one should stress the utmost importance of the Commission's Communication as it tries to express an EU institutional body's understanding with regard to European criminal policy and to clarify its objectives even though the Communication is restricted to the adoption of criminal law directives to ensure the implementation of EU policies that have been subject to harmonisation measures (Article 83, para. 2 TFEU). In other words, the importance of the Communication lies in its attempt to set up a general framework that answers questions such as 'if' and 'when' the EU can employ its harshest means – *i.e.* criminal law – by binding its Member States to criminalise conduct in areas where it has competence [118]. Thus the Commission's Communication initiates a Union-wide discussion that needs to be held in considerable detail. Especially worth mentioning is the general acknowledgement in the Communication of principles that are to be respected by the EU, such as the subsidiarity principle, the application of criminal law as a last resort, the proportionality principle as well as respect for fundamental rights [119].

I will now focus on certain central issues in the Communication, which generate questions or could be highlighted from another point of view, in comparison with the European Parliament's relevant resolution on an EU approach to criminal law, trying to serve the main objective – documented as such in the Charter of Fundamental Rights of the EU [120] – *i.e.* to place the individual at the heart of its activities.

A. The added value of EU criminal law

First of all it should be stressed that the added value of EU criminal law is unilaterally determined in the Commission's Communication. This added value should not be seen only as "tackling gaps and shortcomings (...) in view of the cross border dimension of many crimes, ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes" [121], but also in safeguarding the fundamental rights of suspects and defendants, whose prosecution is now greatly facilitated on a Union-wide basis. In other words, the Commission's vision for an EU criminal law as "an important tool to better fight crime (...) and ensure the effective implementation of EU policies" [122] is too feeble compared to the

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[117] Council docs 16452/2009, 16798/2009, 16826/2/2009 and 9141/2002. The Council's text on "Model criminal law provisions" aimed at achieving coherent and consistent criminal law provisions, is characterised by flexibility and is meant to be only a starting point for further development, see also H. Nilsson, "25 years of Criminal justice in Europe", *EuCLR*, 2012, p. 106-122.

[118] See also "Editorial", *EuCLR*, 3/2011, p. 209-211.

[119] COM (2011) 573 final, 6-7. Cf. the European Parliament's resolution on a EU approach on criminal law, 2010/2310 (INI), 22 May 2012 (see also the report of the Committee on Civil Liberties, Justice and Home Affairs A7-0144/2012, Rapporteur: Cornelis de Jong), which deals with the fundamental principles for European criminal legislation much more substantially (para. 1-6, 12).

[120] See the Preamble of the Charter.

[121] COM (2011) 573 final, p. 2-3.

[122] *Ibid*., p. 12.

European legal civilization and also stands in opposition to the rule of law, according to which criminal law should be a tool for protecting fundamental interests as well as civil freedoms at the same time. This *double function* of criminal law should expressly determine its added value in the framework of the EU and is much better served in the framework of the European Parliament's recent resolution on an EU approach on criminal law.

B. The function of common minimum rules: serving more than strengthening mutual trust

On the other hand, according to the Commission, common minimum rules are essential to enhance mutual trust between Member States and national judiciaries [123]. Their importance, though, should be seen primarily as determining a minimum punishability of certain behaviours according to the *ultima ratio* principle for protecting fundamental legal interests and in simultaneously safeguarding all the basic principles of a liberal criminal law, which I have referred to. In other words, mutual trust between Member States and judiciaries can be derived from the respect expressed in common minimum rules for fundamental principles of criminal law and is not independent from the quality of such rules [124]. Thus it would be a great loss for the European legal system to come up with common minimum criminal law rules simply as a tool for strengthening mutual trust and facilitating the mutual recognition of judicial measures. Fortunately, the European Parliament's resolution adopts a wider view on the matter than the Commission's stance.

C. Safeguarding coherence and consistency of criminal law rules on both levels (European and national)

The coherence and consistency of criminal law rules [125] is also a key issue in the Commission's Communication. However it is imperative to stress that coherence and consistency of criminal law provisions is not only a fundamental principle for the EU legal order. It is also a fundamental value that should be respected by the EU when intervening in the criminal law system of its Member States. For this purpose, prior to any EU approximation of criminal law rules for a specific field of criminality, a detailed and carefully adjusted analysis of existing national criminal law provisions in the respective field is needed so that the EU avoids compelling individual Member States to constantly increase sanctions, broaden punishability or disregard the proportionality principle in their national framework.

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[123] *Ibid*., p. 5.

[124] Similarly the European Parliament's resolution on an EU approach on criminal law, para. 2-3.

[125] *Ibid*. See also the European Parliament's resolution on an EU approach on criminal law, recitals H, N, O and para. 6, 11, 13.

D. The Commission's two step approach in EU criminal law legislation

With regard to the proposed two-step approach to EU criminal law legislation that the Commission introduced in its Communication of 2011 [126], the methodological structure of this approach can be evaluated in a positive way.

Nevertheless, the first step, *i.e.* referring to the decision as to whether to adopt criminal law measures at all [127], reveals a serious shortcoming. The question regarding the conditions under which to employ criminal law as a last resort for the implementation of a EU policy cannot be sufficient. Prior to such a question, we need to pay heed to the existence and need for the protection of a fundamental interest, which can be derived from the EU's primary legislation and which should be significantly damaged or jeopardised through punishable activities [128] as criminal law is not supposed to be reduced to a mere instrument for the implementation of *any* policy, even when used as a last resort. One can deduce the same basic stance from para. 3 of the European Parliament's recent resolution.

Through the second step, referring to the principles guiding the decision on the kind of criminal law to adopt [129], aside from the general assessment that the Commission downgrades the actual implementation of fundamental principles of criminal law when describing its view on the possible concrete content of EU minimum rules [130], five critical remarks are in order:

– When introducing common minimum criminal law rules, the EU legislator is obliged to respect the principle of legal certainty as far as the minimum content of punishability is concerned to such a degree that its provisions leave no doubt about it and thus satisfy the *lex certa* requirement [131]. Otherwise the national legislators will not be able to transpose the EU common minimum rules into their domestic legal order correctly.
– Regard should be paid to the fact that in the frame of introducing common minimum rules, the EU is not granted competence to introduce a general part of European criminal law [132].

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[126] COM (2011) 573 final, p. 7f.

[127] *Ibid.*, p. 7.

[128] Compare also the European Parliament's resolution on an EU approach on criminal law, para. 3.

[129] COM (573) final, p. 7-9.

[130] Cf. "Editorial" of *EuCLR*, 3/2011, p. 210, referring to a two-fold strategy of the Commission as the Communication makes clear that criminal law has to serve other – political and economic – ends.

[131] See COM (2011) 573 final, p. 8. Cf. the European Parliament's resolution on an EU approach to criminal law, para. 4.

[132] Böse, "Die Entscheidung des Bundesverfassungsgerichts", p. 76 and p. 86; M. Heger, "Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon", *ZIS*, 2009, p. 406 and p. 412. Cf. for this matter A. Klip, "Towards a general part", *op. cit.*, p. 30f. as well as R. Sicurella, "Some reflections on the need for a general theory of the competence of the European Union in criminal law", *in* A. Klip (ed.), *Substantive Criminal Law of the European Union*, *op. cit.*, p. 234f.

– There is an urgent need for the EU to set up a proportionality scale of penalties with reference to the fundamental interests protected on an EU level, which will serve as a benchmark against the national scale of sanctions for the relevant field of offences. National legal systems will thus not face the prospect of being dismantled through the EU's intervention in terms of their internal proportional nature. In other words, a mere decline in the degree of variation between the national systems [133] cannot establish itself as a key rationale of an EU effort to tailor sanctions to crimes.
– It is doubtful whether the EU is acknowledged a relevant competence for laying down rules of jurisdiction [134]. In any case the EU statutes on jurisdiction should be very 'discreet' and abstain from instigating additional conflicts of jurisdiction as long as no European-wide system of a single transnational criminal procedure respecting the rule of law is introduced.
– Mere statistical data outlining the status and trend of criminality in particular fields within individual national legal orders [135] does not suffice as adequate proof for the definite requirement of a new set of EU rules for criminal law. One also has to take notice of the reasons for the respective situation in every Member State and be aware of the fact that these reasons are often related to the implementation of the relevant rules and not to the existing legislation itself.

E. EU policy fields and the possible inevitability of EU criminal law

Lastly, let me proceed to make some observations addressing the Union's policy areas where harmonised EU criminal law rules might be needed. According to the Commission's Communication: "Where the discretion of Member States in implementing EU law does not lead to the desired effect enforcement, it may be necessary to regulate, by means of minimum rules at EU level which sanctions Member States have to foresee in their national legislation. Approximating sanction levels will in particular be a consideration, if an analysis of the current sanction legislation of administrative or criminal nature reveals significant differences amongst Member States and if those differences lead to an inconsistent application of EU rules" [136]. However, such a situation does not at all render the approximation of criminal laws in different EU policy fields *essential* as the Treaty provides. The relevant decisive questions here are the ones concerning the fundamental interests to be protected and the punishable activities causing significant damage to society or individuals. Unfortunately these questions are not discussed in the Commission's Communication.

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[133] However, in this way the Commission, COM (2011) 573 final, p. 9.

[134] See German Bundesrat Drucksache 582/11 v. 4.11.2011, 3-4 (Allgemeine strafrechtliche Rechtsinstitute einer auf Article 83 AEUV gestützten Gesetzgebung sind nur insoweit zugänglich als dies mit der Schaffung von Mindestvorschriften für die Festlegung von Straftaten und Strafen verbunden ist); A.-S. Massa, "Jurisdiction in England and Wales and the Netherlands: A comparative appraisal with a European touch", *in* A. Klip (ed.), *Substantive Criminal Law of the European Union*, p. 118f.; cf. though P. Caeiro, "Commentary on the 'European Touch' of the comparative appraisal", *ibid*., p. 125f.

[135] COM (2011) 573 final, p. 8.

[136] COM (2011) 573 final, p. 10.

Besides, it is important to stress that a common understanding of the guiding principles underlying EU criminal law legislation – as opposed to the Commission's view [137] – goes far beyond the interpretation of basic legal concepts used in criminal law and the added value that criminal law sanctions can provide, as I have already tried to make clear in the first part of this text, referring to the safeguarding of fundamental principles of criminal law and respect for human rights.

4. Conclusions

The above analysis allows us to deduce the following general conclusions:

(i) Even within an international or supranational environment, such as the EU, criminal law will always retain its particular nature since it constitutes the sternest mechanism of social control, which deeply affects fundamental civil liberties.

(ii) Highlighting such a particular aspect does not have the aim of sustaining anti-European sentiment or insulating Member States' criminal justice systems from the EU's legal order. On the contrary, the goal is to emphasise the importance of fundamental principles of criminal law in restraining counter-crime policies so that they are implemented in a manner that respects civil liberties and benefits citizens. The EU ought to apply these principles without altering their substantive content, as it subscribes to the same values as the ones that gave rise to these principles in the first place.

(iii) At this point in history, the institutional identity and political agenda of the EU as outlined after the Treaty of Lisbon present an opportunity that should not be missed, particularly since guaranteeing the fundamental rights of citizens already emerges as a declared goal of the Union. The practical difficulty, of course, is to move from verbally guaranteeing civil liberties to ensuring respect for them in actual practice, an endeavour that has often proven to be quite arduous for Member States themselves.

(iv) True safeguarding of fundamental rights, a task primarily focused on the sensitive field of criminal suppression, hinges on the EU's day-to-day activities, and especially on its legal tools, by which it imposes its decisions to criminalise various types of conduct on Member States. The long and winding path towards preserving civil liberties within a common European area – pursued thus far with the preservation of 'security' in mind – can only be traversed if the liberal fundamental principles governing when and under which circumstances the State may impose criminal punishment are placed at the centre of attention. A first step in this direction is surely made with the Communication of the Commission referring to an EU Criminal Policy and my hope is that there will be many positive steps to follow, not only made by the European Parliament [138] and the Council, but also by an inter-institutional agreement between all these legislative EU actors [139] as well as by a wider academic discussion, the outcome of which could support

[137] *Ibid*., p. 12.

[138] See the European Parliament's resolution 2010/2310.

[139] *Ibid*., para. 15 and 16.

the Union's path towards a liberal criminal law system governed by the rule of law and respect for human rights.

The way forward: A general part of European criminal law

Jeroen H. Blomsma & Christina Peristeridou *

1. Introduction

Many interesting suggestions have been made about how to move ahead in the area of European substantive criminal law. However, these reflections almost exclusively concern the definitions of and penalties for specific offences. By contrast, not much attention has been paid to the general principles of criminal law, such as intent, attempt and participation. This tendency reflects the current state of EU legislation, which deals predominantly with the special part of criminal law. Both EU legislator and academia seem to be less concerned with the general part of criminal law.

In this contribution, we argue that the fact that insufficient attention has been paid to the general part of criminal law has led to various problems. In our view, the way forward in substantive criminal law is therefore to establish a general part of criminal law for the EU. The authors are part of a research team from Maastricht University which has taken up this task. The article is structured as follows. First, we will explain why European criminal law needs a general part. Subsequently, we will explain how the Maastricht research team has been constructing this general part. Finally, given that the Maastricht project is nearly completed, we will also address the question of whether or not such a general part should be codified.

2. The need for a general part of criminal law for the EU

When we speak of the 'general part' of criminal law, we are referring to a certain structural dichotomy whereby criminal provisions are divided up into general and special rules. Traditionally, while the special part of criminal law includes the

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* The opinons expressed herein are those of the authors and do not necessarily reflect the views of the Institutions they work for.

definitions of the different offences, the general part incorporates certain generally applicable principles and concepts, which are common throughout the criminal system. The nature of the general part and the advantages of it being kept separate from the special part can be seen in national criminal law systems. Given the fact that the European criminal justice system is based on national legal systems, we should first take a look at the rationales for the general part in national law.

A. The general part in national law

The distinction between the general and special parts of substantive criminal law is a well-embedded, if not self-evident, feature found in continental traditions. All systems which have been historically influenced by the Germanic and Napoleonic traditions have adopted a general part of criminal law [1]. The general part is quite heterogeneous as it comprises different kinds of norms, including provisions that determine the scope of criminal liability, principles of justice, norms regarding punishment *et cetera* [2].

The normative role of the general part in criminal law depends on the different provisions at hand. Thus, principles of justice such as the principle of legality oversee the application of criminal norms and legitimise the exercise of state power in this regard. Norms on *actus reus, mens rea* and defences determine the scope of criminal liability. Although they describe criminal conduct, the formulation of these norms in the general part comes with a certain *Rechtsgutsblindheit*, *i.e.* they are stipulated without considering different protected legal interests [3]. This means that the general part is not an informative introduction or a mere academic generalisation of special offences. The true relationship between the general and special part is not one of *lex generalis-lex specialis* but a complimentary relationship. The judge applies general principles of criminal liability in order to determine the exact scope of criminal liability of the special offences. The judge determines the scope of criminal liability in an *ad hoc* case by reading together, for example, the definitions of intention, participation and robbery. Therefore, there is a sort of 'clip-function' between the general concepts of criminal liability and special offences (*Klammerfunktion*) [4].

The general part owes its existence to the hypothesis that its provisions are common features of criminal liability with a stable meaning, irrespective of specific offences. The general part is not only based on this hypothesis but it also promotes this

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[1] For example, in France, Livre 1er: Dispositions générales, Articles 111-1 à 133-17, Code pénal; in the Netherlands, Boek 1: Algemene bepalingen, Artikels 1 tot 91, Wetboek van Strafrecht; in Germany, Allgemeiner Teil § 1-79b Strafgezetzbuch (StGB); in Greece, Γενικό Μέρος, άρθρα 1-133, Ποινικός Κώδικας.

[2] M. Fincke, *Das Verhältnis des Allgemeinen zum Besonderen Teil des Strafrechts*, Berlin, J. Schweitzer Verlag, 1975, p. 22-26. See for an English approach, J. Gardner, "On the General Part of the Criminal Law", *in* A. Duff (ed.), *Philosophy and the Criminal Law: Principle and critique*, Cambridge, Cambridge University Press, 1998, p. 207-209.

[3] M. Fincke, *supra* note 2, p. 90. This feature, according to Fincke, is the element that distinguishes norms that belong to the General Part from the norms of the Special Part as opposed to other features such as 'abstractness'.

[4] *Ibid*., p. 8.

idea as a thesis: there *should* be certain common and stable principles and features of criminal liability in a legal system. The question as to whether or not this is a correct and appropriate thesis can be explored by comparing it with a legal system in which this hypothesis is not (fully) shared.

A similar distinction between a general and special part of criminal law cannot be seen in common law systems. In English criminal law, there is no general part, but merely "a set of aspirational principles (...)" [5]. The English system has opted for a 'special-part approach', where different concepts, belonging to the continental general part of criminal law, are developed within specific offences either by the legislator or judicially. Thus, there are statutes that deal with certain aspects of the general part, such as the Serious Crime Act 2007 and the Accessories and Abettors Act 1861 as amended by the Criminal Law Act 1977. At the same time, concepts such as omission, recklessness and defences are either developed judicially or they are defined by statutes only in connection with specific criminal offences [6].

The reason for such a development can be attributed mainly to the fact that traditionally the powers of the judiciary were increased [7]. The legality principle and the separation of powers doctrine have been developed in different ways in England and on the continent. The continental function of the legality principle, which sets limits to judicial interpretation and legitimises the *jus punendi* through the prevalent role of the parliamentary statute did not exist as such in England. Historically, English judges enjoyed a lot of discretion in the development of new criminal liability offences and the interpretation of prior-existing norms, while the legislator was rarely involved in criminal law-making [8]. Therefore, certain constructive elements of criminal liability, such as recklessness and participation, have been developed over a period of many decades through judicial interpretation [9].

Nowadays, the courts have fewer powers [10]. The principle of legality is more widely accepted in the English system and the English legislator has produced criminal liability statutes covering a wide net of common law offences. However, the intervention of the legislator in the area of criminal liability has not led to more consistency [11]. There is still a lack of a unified definition of *mens rea* and *actus reus* requirements that would be applied by the courts with relative consistency to special

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[5] A. Ashworth, *Principles of Criminal law*, Oxford, Oxford University Press, 2009, p. 84-85.

[6] *Ibid.*, p. 98-101 and p. 408-413; see also the Corporate Manslaughter Act 2007 on the definition of the 'duty to care'.

[7] A. Samuels, "Why do we not have a Criminal Code", *The Journal of Criminal Law*, 2003, p. 214-219, where he identifies as reasons the unwillingness of the legislator, the lack of interest of the public opinion, the complexity and controversies and the attitude of the judges.

[8] See J.R. Spencer, *Nulla poena sine lege in English Criminal law*, The Cambridge-Tilburg Law Lectures, Third Series, Deventer, Kluwer, 1980, p. 38-39.

[9] *E.g.* the debate in defining the element of recklessness and the term 'malicious' in R. v. Cunningham [1957] 2 QB 396 and for an overall overview see A. Ashworth, 2009, *supra* note 5, p. 177-189.

[10] *E.g.* R v. Rimmington and R v. Goldstein (joined cases) [2005] UKHL 63.

[11] A. Ashworth, 2009, *supra* note 5, p. 47.

offences. The legislator does not seem very concerned with the consistency of criminal law. By contrast, the legislative output is aimed at codifying specific offences and therefore there are various *actus reus* and *mens rea* requirements that may be relevant only for some offences. One may find various *mens rea* requirements throughout English criminal law, such as intention, recklessness, maliciousness, knowledge and belief, reckless knowledge, negligence and wilfulness. In addition, these terms might carry different meanings depending on the offence at hand [12]. For example, the term 'wilfully' has been interpreted as 'intentionally or recklessly' in the context of the wilful neglect of a child, but in other offences, the term did not generate a *mens rea* requirement [13]. In the end, it is the English academia that is attempting to provide a comprehensive picture of the theory of criminal liability [14].

The fragmented and inconsistent development of criminal liability has fuelled discussion about the potential need for codification and the need to establish common definitions for the requirements of *actus reus* and *mens rea*. Some have argued that, despite the benefits of uniform definitions of the constructive elements of criminal liability, the presumption that criminal law would become more rational and principled with the creation of a general part could be challenged [15]. However, the English 'special-part approach' has drawn more criticism than support. In particular, the lack of a general part has led to inconsistency and legal uncertainty as courts are left with a considerable margin of appreciation [16]. The labyrinth of different elements of criminal liability and lengthy, complicated statutes inhibit accessibility while the administration of justice suffers as well [17]. There have been pleas to bring accessibility, comprehensibility, consistency and certainty to the criminal law system and turn towards a more 'principled' approach: "Matters of this kind (…) should be resolved only after a thorough and methodical consideration of how the components of the offence relate to the general principles (…) [T]here is a pressing need to develop a theory of criminal legislation that establishes a set of principles (...)" [18]. The Law Commission took up the task of codifying criminal law by producing several codification documents, including a Draft Penal Code in 1989 [19]. Whilst the

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[12] *Ibid.*, p. 170-191.

[13] *Ibid*., p. 190.

[14] Such as the work of A. Ashworth, 2009, *supra* note 5; G. Williams, *Criminal Law: The General Part*, London, Stevens & Sons, 1961; A.P. Simester et G.R. Sullivan, *Criminal Law: Theory and Doctrine*, Oxford, Hart Publishing, 2010.

[15] J. Gardner, *supra* note 2, p. 247.

[16] Lord Bingham, "A Criminal Code: Must we wait for ever?", *Criminal Law Review*, 1998, p. 695.

[17] P. Alldridge, "Making Criminal Law Known", *in* S. Shute et A.P. Simester, *Criminal Law Theory: Doctrines of the General Part*, Oxford, Oxford University Press, 2002, p. 103 and p. 111-113; S. Gardner, "Reiterating the Criminal Code", *Modern Law Review*, 1992, p. 839-847.

[18] A. Ashworth, "Towards a Theory of Criminal Legislation", *Criminal Law Forum*, 1989, p. 42-43.

[19] See for the Law Commission's output in http://lawcommission.justice.gov.uk/areas/legislating-the-criminal-code.htm, accessed 28 June 2012.

codification process was welcomed by many [20], it drew criticism as well [21]. In the end, the codification process as such was abandoned [22].

The analysis of the English 'special-part' approach shows that the hypothesis on which the general part is based (namely that there should be certain common and stable features and principles governing criminal liability) is supported by some strong arguments.

First of all, common and stable definitions of the conditions and requirements of criminal liability support the *protective* finality of criminal law as they safeguard legal certainty and the separation of powers [23]. Certainly, there is a margin of appreciation as to how the constitutive elements of criminal liability apply in different cases. However, stable and common definitions of the elements of *mens rea* and *actus reus* for the plurality of offences restrain the courts from applying arbitrary concepts of criminal liability in a casuistic manner. The legislator is also restricted in this regard. For example, the preference for 'intention' as the main *mens rea* requirement obliges the German legislator to refer explicitly to the commission of offences by negligence. As such, it also acts as a brake on the frequent criminalisation of negligent behaviour. Criminal liability also becomes more accessible and comprehensible because individuals can foresee the evaluation of their involvement in an offence and the conditions under which such a prohibited act would be excused or justified with more certainty [24].

Secondly, the establishment of a general part also benefits the *instrumental* finality of criminal law, namely the administration of justice. There is a practical reason for the establishment of common and stable criminal liability concepts [25]. It is simply more practical and reasonable to concentrate all the rules and principles that show a similar pattern in a structured manner rather than repeating them for every single specific criminal offence. That would amount to criminal codes and legislation of such length and complexity that it would diminish the expediency of justice, efficiency and enforcement of criminal liability by the authorities.

Thirdly, the general part also has benefits at the philosophical level. Feuerbach has referred to the general part as a philosophical part [26] because it is a manifesto of the theoretical approach of the legislator towards criminal liability and punishment phenomena as it attaches an ideological colour and character to the criminal law

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[20] Mrs Justice Arden, "Criminal Law and the Crossroads: the Impact of Human rights from the Law Commissions' Perspective and the Need for a Code", *Criminal Law Review*, 1999, p. 439; Lord Bingham, *supra* note 16, p. 694.

[21] G. De Búrca and S. Gardner, "The Codification of the Criminal Law", *Oxford Journal of Legal Studies*, 1990, p. 559-571; A. Ashworth, 2009, *supra* note 5, p. 47; G. Williams, "What should the Code do about omissions?", *Legal Studies*, 1987, p. 92-118.

[22] Law Com no. 311; Editorial, "RIP: the Criminal code (1968-2008)", *Criminal Law Review*, 2009, p. 1-2.

[23] M. Fincke, *supra* note 2, p. 4.

[24] P. Alldridge, *supra* note 17, p. 111-119.

[25] M. Fincke, *supra* note 2, p. 8-9.

[26] *Ibid.*, p. 18.

system as a whole [27]. In the general part we find answers to certain very fundamental questions of criminal liability that mirror the stance of every system *vis-à-vis* human rights and the Rule of Law. Who is the subject of criminal liability? Can an animal, a firm or the mind be a perpetrator? What is a criminal act made of? Are there different levels of involvement in the crime? How are individuals with an incapacitated state of mind treated? The general part thus represents the orientation framework of criminal liability on which further legislation and case law is based. It crystallises the criminal policy and criminal theory of a system and facilitates the development of a consistent body of criminal science [28].

B. A general part for European criminal law?

Having seen the benefits and reasons that underpin the existence of a distinct general part with defined fundamental concepts at the national level, the question that arises is how much added value such a development represents for European criminal law.

European criminal law is an area of law in transition and is still developing [29]. On the one hand, the European criminal system has an *instrumental* finality whose aim is to harmonise certain criminal offences, enforce European policies and create a European order where individuals can exercise the four freedoms. Articles 83(1) and (2) TFEU establish *jus punendi* powers for the European legislator, which are shared with the national legislators. However, such harmonisation is in practice quite incomplete due to vague prescriptions in European instruments as well as considerable differences in criminal liability rules from one national system to another [30]. Directives and Framework Decisions focus on the elements of specific offences and pay very little attention to definitions of the *actus reus* and *mens rea* concepts that are mentioned in these instruments [31]. While the European legislator requests that the aiding, abetting or negligent commission of a criminal offence is criminalised, there are no explanations of what these terms mean [32]. In national systems, the same terms of *actus reus* and *mens rea* might correspond to different concepts whilst certain terms used in Directives as such might not exist in a national system [33]. Given the normative

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[27] I. Manoledakis, Ποινικό Δίκαιο*:* επιτομή γενικού μέρους*,* Θεσσαλονίκη, Σάκκουλας, 2001, p. 46.

[28] M. Fincke, *supra* note 2, p. 6.

[29] A.H. Klip, *European Criminal law: an Integrative approach*, Antwerp, Intersentia, 2012, p. 1.

[30] C. Peristeridou, "The principle of lex certa in national law and European perspectives", *in* A.H. Klip (ed.), *Substantive Criminal Law of the European Union*, Antwerpen, Maklu, 2011, p. 88-89.

[31] K. Ambos, "Is the development of a Common Substantive Criminal Law for European Possible?", *Maastricht Journal*, 2005, p. 175.

[32] Framework Decisions and Directives refer to criminal liability notions such as attempt, aiding and abetting without any further explanation on their scope, *e.g.* Article 4 of Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, *OJ*, no. L 328, 6 December 2008, p. 28.

[33] See for example, J. Keiler, "Towards a European concept of participation in crime", p. 135-159 and J.H. Blomsma, "Fault elements in EU Criminal law: the case for recklessness",

influence of these concepts in the determination of the scope of criminal liability (the clip-function), the harmonisation of criminal offences at the European level has therefore only been half-achieved [34]. The minimum scope of criminal liability that the European legislator requests to be criminalised is incomplete without any definitions of *actus reus* and *mens rea*. This results in discrepancies in the implementation as national legislators and courts employ national concepts of criminal liability [35]. For example, helping out a friend to commit theft of credit cards would imply a different scope of criminal liability in England in comparison to Germany given the different approach and definitions of participation and perpetration in the two systems [36].

While the national legislators are obliged to transpose only the minimum scope of criminal liability prescribed in the Directive, how are Member States to fulfill this obligation if they cannot know what the minimum requirements are supposed to encompass? The instrumental finality of European criminal law presupposes a clear mandate to national legislators to achieve the minimum scope of criminalisation. Furthermore, one can argue that knowing what the minimum scope encompasses facilitates also a more transparent decision-making and dialogue within the national parliaments. In particular, the choice to criminalise beyond the minimum scope of the Directive should be consciously made by the national parliament after a thorough debate on whether stricter rules would be in line with the principles of *ultima ratio* and proportionality at the national setting.

On the other hand, there is also a *protective* finality of European criminal law, in which the individual/accused is protected against arbitrary state power through the establishment of principles of justice that legitimise and limit criminal liability. The protective finality of European criminal law is relatively underdeveloped [37]. Despite the codification or judicial recognition of certain criminal law principles (principle of legality, guilt, proportionality, etc.), these have not received a European context within which they can unfurl their protective function in the multilevel European criminal justice system. Does the legality principle acknowledge only statutes as a source of criminal liability or also case law precedent? What is the level of precision that implementing legislation of criminal law Directives should reach in order to be considered in compliance with European obligations? The general part does not only incorporate these principles but it also puts them into practice by reflecting the extent to which they are respected in the conceptualisation of the criminal phenomenon and its constitutive elements. The choices made in a general part are a way of applying certain principles of justice and human rights. For example, a system that does not distinguish between perpetrators and participants respects the principle of proportionality to a different degree than a criminal liability model that does. An analysis of these

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p. 135-106, both *in* A.H. Klip (ed.), *supra* note 30.

[34] *E.g.* Commission Staff Working Paper, Annex to the Report from the Commission of Council Framework decision of 13 June 2002 *on combating terrorism*, SEC (2004) 688, 8 May 2004, p. 20.

[35] R. Sicurella, "Some reflections on the need for a general theory of the competence of the European Union in criminal law", *in* A.H. Klip (ed.), *supra* note 30, p. 243.

[36] J. Keiler, *supra* note 33, p. 135-159.

[37] See *e.g.* The Manifesto on the European Criminal law Policy, http://www.crimpol.eu/.

principles that also shows their relationship with criminal liability choices has not been made at the European level: "There should be a common understanding on the guiding principles underlying EU criminal law legislation, such as the interpretation of basic legal concepts used in EU criminal law" [38].

The underdeveloped status of the instrumental and protective finalities of European criminal law can be attributed to a more general and ongoing deficiency, namely the lack of a deep political, philosophical and theoretical debate on the goals of harmonising criminal liability, the position and nature of the subjects towards criminal law and the general philosophical framework within which the criminal phenomenon in Europe functions. What has been criticised over the years is the lack of a European criminal policy: "The European institutions making criminal policy decisions on a large scale have failed to acknowledge criminal policy as an autonomous European policy. As a consequence they do not follow a coherent concept of criminal policy" [39]. The fact that European criminal policy has no autonomy mirrors a lack of autonomy of criminal law *per se*. In essence, the philosophical value of the general part in national systems is that it attributes an autonomous character to criminal law by creating an ideological platform for the criminal system. Hidden within the general part is a choice for a criminal justice model for every system. Answers to the questions about the criminal liability of legal entities or about the relationship between the mind and the criminal act should not be susceptible to short-term policy decisions. The EU institutions have recognised this and taken the first steps in this direction [40]. However, much work remains to be done. With the development of a general part for European criminal law, Europe will be forced to confront the relationship between criminal liability choices and the Rule of Law.

From a more practical point of view, the development of a European general part of criminal law seems to be already on the way. Already in *Intertanko*, the ECJ gave an autonomous definition of serious negligence [41]. It is likely that, in the future, when the ECJ takes on full competence in this field, more judicial definitions of these concepts will be produced. Concepts borrowed from national law always gain an 'autonomous interpretation' in European law by the ECJ [42]. What this autonomous meaning might be for the different concepts of the general part used in Directives remains to be seen. Certain choices have already been made in the area of competition law. In that context,

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[38] Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, Brussels, COM (2011) 573, 20 September 2011, p. 3 and 12.

[39] From the Preamble of the Manifesto, see *supra* note 37.

[40] Council document, Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations, Brussels, 16542/2/09 REV 2, 27 November 2009; Towards an EU criminal policy?: Ensuring the effective implementation of EU policies through criminal law, Commission Communication of 20 September 2011 COM (2011) 573 and European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310 (INI)) (see annex to the present book).

[41] ECJ, 3 June 2008, C-308/06, *Intertanko*, *ECR*, I-4057, para. 71.

[42] ECJ, 16 November 2010, C-261/09, *Mantello*, *ECR*, I-11477, para. 38.

the ECJ has already defined certain elements of liability, such as participation[43]. In addition, the principle of legality has been slowly developing within the European context: for example, in competition law cases, the ECJ has accepted the notion of *droit* as opposed to *loi* and it praised the increased role of case law in the development of the scope of statutory criminal liability[44].

The question therefore is not whether there should be definitions of elements of criminal liability at the European level but what these might be. The process of constructing a European general part and developing a European concept of criminal liability necessitates a thorough consideration of different parameters. In the next part, we will deal with the question of how certain common elements of liability belonging to a general part should be identified.

3. The 'Maastricht Project'

In order to establish a general part of criminal law for the European Union, a research project was set up at Maastricht University in 2007. Under the supervision of Professor André Klip, four PhD researchers originating from different Member States began working on the establishment of the general principles of criminal law. Opting for a thematic approach, these general principles were divided into four areas. In 2007, Johannes Keiler (AT) started his research on *actus reus* and participation[45], Jeroen Blomsma (NL) began investigating *mens rea* and defences[46], Christina Peristeridou (EL) started her study on the principle of legality and Anne-Sophie Massa (BE) started her research on *locus delicti* and jurisdiction. In this way, one individual gathered and compared the data and construed the general principles out of that comparison.

A. Two stages

In short, the research was conducted in two stages. In a first stage, general concepts of criminal law were deduced from the legal systems of the Member States and that of the EU. In other words, the Maastricht general part is established from the *acquis commun* and the *acquis communautaire*. In a second stage, a synthesis was put together from these similar and different principles, thus establishing the general principles of criminal law for the EU. Later on, we will explain what sources were used and according to which criteria the synthesis was produced.

The selection of the sources for the project followed from the Treaties. After all, Article 6(3) TEU reads: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". Article 67(1) TFEU reads: "The Union shall constitute an area of freedom, security and justice with respect for

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[43] CFI, 8 July 2008, T-99/04, *AC Treuhand v. Commission*, *ECR*, II-1501.

[44] ECJ, 28 June 2005, Joined Cases C-189/02 P and Others, *Dansk Rørindustri and others v. Commission*, *ECR*, II-1681, para. 217.

[45] J. Keiler, *Actus reus and participation in European criminal law* (dissertation), Antwerpen, Intersentia, 2013.

[46] J.H. Blomsma, *Mens rea and defences in European criminal law (dissertation)*, Antwerpen, Intersentia 2012.

fundamental rights and the different legal systems and traditions of the Member States". Thus, in establishing a general part of criminal law for the European Union, several sources should be taken into account: first, the fundamental rights as can be found in, most notably, the ECHR and secondly, the legal traditions of the Member States.

It is also logical to take into account EU law when establishing general principles for European criminal law. This includes those general principles or aspects thereof that have already been identified by the ECJ. The aforementioned articles lay down the method the ECJ has used for decades to identify the general principles of Union law. As explained in the previous section, the ECJ has established some general principles of EU law by considering the legal traditions of the Member States and the guidelines supplied by the international treaties on human rights [47]. Unfortunately, the ECJ has only identified some principles of criminal law and with limited guidance. Until now, there are thus only fragments of a general part of European criminal law.

B. Comparative legal research

The reference to the constitutional and legal traditions of the Member States gave rise to comparative legal research. Ideally, comparative research should be conducted in all relevant Member States. It was, however, impossible to deal with all 29 legal systems of the European Union [48] because of the lack of the linguistic skills required when dealing with 23 different European languages. After all, most legal terms cannot be translated without losing their unique meaning. Similar terms can have different meanings and different terms can have a very similar meaning. In order to avoid errors, the sources of law were therefore studied in their original language. This meant that the researcher had to master the languages of the Member States being researched. This was one reason to limit the number of States that were studied. Another reason is that it was impossible to carry out an in-depth study into all legal systems within the four years allocated for this research.

The Member States were therefore divided into four 'legal families'. The term 'legal family' serves to designate groups of legal systems with similar legal features, enabling one to speak of the relative unity of those systems [49]. The following division was made: a first group of states consists of 'Common law States', including England and Wales, Ireland, Scotland, Northern Ireland, Malta and Cyprus. A second group can be called 'Germanic and Scandinavian States'. This group includes Germany, Spain, Sweden, Denmark, Finland, Estonia, Portugal, Greece and Austria. A third group consists of 'Napoleonic States', which are the Netherlands, France, Belgium, Luxembourg and Italy. England was chosen to represent the states with a common law tradition, Germany was chosen to represent the Scandinavian and Germanic states and the Netherlands was selected to represent the Napoleonic States. The risk of not incorporating relevant aspects of a specific domestic system was reduced by

[47] ECJ, 28 March 2000, C-7/98, *Krombach v. Bamberski*, *ECR*, I-1935.

[48] The United Kingdom consists of three separate jurisdictions that each have their own legislator and judiciary.

[49] K. Zweigert and H. Kötz, *An introduction to Comparative Law*, Oxford, Oxford University Press, 1998, p. 40-42.

a conference held on 20-21 January 2011, where some of the results were presented to legal experts from many different nationalities. The comments made during this conference and at other points during the research were taken into account [50].

4. Conditions of a European general part of criminal law

In a second stage of this research, each researcher compared the concepts of national and Union law and made a synthesis of the investigated general principles. The synthesis is based on fundamental rights and the common ground of these general principles in national and Union law. Clearly, there are also many differences in the content, nature and focus of these principles between the investigated legal systems. When choosing between competing approaches to legal concepts, certain criteria were applied, such as that a general part of European criminal law should be consistent, coherent and enforceable. We will now explain why these requirements were selected and what they entail.

A. Consistency and coherency

Consistency and coherency have been explicitly recognised as core values of future European criminal law by the Council, Commission and Parliament [51]. Consistent means that the general principles of criminal law must be in line with each other and should not conflict. Coherency requires that there can be no logical gaps in their construction. These conditions of coherency and consistency follow from the attempt to identify a general part. A general part presupposes a logical, consistent and coherent ordering of legal principles. Without this, there would be no general part and no legal system. By identifying general principles of criminal law and by separating those from the mistakes and anomalies that do not fit in this whole, a logical, coherent whole can be constructed. Such a general part can further the clarity and understanding of the law and make it more rational, predictable and fair [52].

Applying the criteria of consistency and coherency ensures that inconsistent legal concepts are set aside. For example, the inconsistency inherent in the concept of *dolus eventualis*, or *bedingter Vorsatz* was one reason to favour the functional equivalent of 'recklessness' over this lowest form of intent [53]. For example, it frequently occurs that a driver of a vehicle is ordered to stop by a police officer but he refuses and continues to drive, whereby the officer has to jump to one side to avoid being hit by the vehicle. Whereas this is generally charged and often accepted as attempted intentional killing in the Netherlands [54], it is not considered to constitute this offence in Germany. The difference is remarkable considering that both States apply a similar concept of *dolus eventualis*.

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[50] See A.H. Klip, 2011, *supra* note 30.

[51] *Supra* note 40.

[52] C. Elliott and C. De Than, "The Case for a Rational Reconstruction of Consent in Criminal Law". *Modern Law Review*, 2007, p. 225-227; P. Cane, "The General/Special Distinction in Criminal Law, Tort Law and Legal Theory", *Law and Philosophy*, 2007, p. 474.

[53] For other reasons, see J.H. Blomsma, 2011, *supra* note 33, p. 135-159.

[54] See for example HR 15 January 2008, *NJ* 2008, 609 and HR 6 February 1951, *NJ* 1951, 475.

German courts generally argue that the defendant relies on the policeman reacting to the moving vehicle. The defendant accepts that he is putting the police officer's life in danger but does not actually contemplate the possibility that he might kill him. He is thought to have considered the likelihood of death as being improbable as he is confident that the officer will anticipate such actions and is mentally prepared to jump. This is confirmed by the fact that these situations hardly ever lead to fatalities. There is therefore no acceptance of death and no intentional liability [55]. Such reasoning is not present in Dutch law, where the acceptance of the risk, required for *dolus eventualis*, is easily deduced from the circumstance according to which the defendant, whilst being aware of the risk, did not stop or avoid a collision.

It may be argued that this divergence is due to national differences. However, on a purely national level, cases can also be identified in which, apparently without any good reason, *dolus eventualis* is accepted in one case but rejected in an almost identical case. For example, in two cases, the defendant hit a person on the head with a firearm. As a result of this action, in both cases the firearm went off and killed the victim. The Dutch Supreme Court quashed the conviction based on intent in one case but upheld the conviction in another [56]. It can be claimed that *dolus eventualis* is dependent on the precise circumstances of the case and the manner in which a court gives its reasons for its decision, but it can also be argued that *eventualis* is prone to judicial whim. Elsewhere, it is explained in more detail why this concept leads to inconsistency. It is almost impossible to draw a clear line between taking the results for granted and trusting everything will turn out all right. It is therefore very difficult to state where *dolus eventualis* does and does not apply in theory, let alone in practice. The divergent case law is testament to this [57].

B. Enforceability

The criterion of enforceability aims to establish a balance between dogmatic complexity and practical application. A general part of European criminal law needs to be comprehensible, accessible to and useable by lawyers from all legal traditions [58]. Criminal law is all about communication. It aims to send a message to the defendant and the general public. A simple message often conveys the message of the law to those addressed by it much more effectively. It makes what is criminal more foreseeable. Hence, a simple and straightforward solution in our general part may be favoured over a needlessly complex one. By balancing the divergent interests of dogmatic consistency, communication and practical application, a choice can be made. The law should not make overly complex distinctions. A general part must be conceptually rich enough to enable a judge to make all those distinctions that must play a role in the administration of criminal justice and at the same time be simple and easy enough to apply [59].

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[55] See for example BGH 21 November 1995 NStZ-RR 1996, 97.

[56] HR 9 June 1998, *NJ* 1998, 731 and HR 24 February 2004, *NJ* 2004, 375 respectively.

[57] See J.H. Blomsma, 2011, *supra* note 33.

[58] K. Ambos, "Remarks on the General Part of International Criminal Law", *Journal of International Criminal Justice*, 2006, p. 661.

[59] Jareborg according to K. Ambos, 2005, *supra* note 31, p. 178, cited almost literally.

An example of such complexity is the issue of perpetrators who were intoxicated when they committed a crime and therefore may not have had the required *mens rea* or cannot be considered to have been a responsible agent at that time. Different doctrines have been devised to deal with this problem. In English law, the defendant who voluntarily intoxicated himself cannot be convicted of a crime of 'specific intent' but he can be convicted of a crime of 'basic intent'[60]. However, no principled distinction can be made as to which crimes are basic and which crimes are specific. Moreover, there is controversy on what the requirements for liability of such a basic intent offence should be. In German law, a defendant who was drunk at the time when he committed a crime can benefit, in terms of his defence, if the estimated level of alcohol reaches a specific threshold. His sentence will then be reduced to a lower level[61]. However, in more recent times, other factors have also been taken into account, making it hard to predict when the defendant will be excused and when he will be held liable. This type of defence is sometimes rejected due to the voluntariness of the intoxication, but there is no consensus about the precise legal basis and criteria.

The abovementioned complex approaches to intoxication and the controversy surrounding them support the conclusion that it may be more appropriate to simply accept that intoxicated perpetrators are not allowed to rely on their voluntary intoxication as a legitimate exception to principles of criminal law. The conclusion is backed up by the fact that, even in Germany, there is a strict fall-back offence available, which creates the possibility of punishing a defendant who relies on a defence of intoxication. Even in a state where dogmatic consistency is considered a virtue, an exception is therefore made to the principle that a blameless person cannot be punished when the reason for this blamelessness was alcohol or drugs. This illustrates that, whereas important legal distinctions should be taken into account, complexities devised solely to bring a solution into line with other legal principles should be avoided. Complete dogmatic consistency is unattainable and should thus not be considered a goal in itself.

C. Compatibility with fundamental rights

Any general part of criminal law and especially one designed for the European Union should be compatible with fundamental rights. This follows from the aforementioned articles in the Treaties, the Charter of Fundamental Rights of the European Union (hereafter CFR) and the case law of the ECJ. After all, the ECJ has held that human rights form an integral part of the general principles of law protected by the Court[62]. A violation of a human right is therefore incompatible with Union law[63]. As an example, in some cases, for instance when a very serious offence is charged, strict liability will violate Article 6 ECHR and is therefore rejected.

The requirements under the ECHR are generally regarded as minimum criteria, implying a threshold that may not be crossed. It is in this context that the supremacy of Union law, specifically the requirements of the ECHR, becomes apparent. The

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[60] DPP v. Majewski [1976] UKHL 2.

[61] 22 November 1990 BGHSt 37, 231.

[62] ECJ, 12 November 1969, C-29/69, *Erich Stauder v. City of Ulm*, *ECR*, 00419.

[63] ECJ, 13 July 1989, C-5/88, *Wachauf v. Federal Republic of Germany*, *ECR*, 26069.

principles identified here may not be contrary to the ECHR. The rights guaranteed by the ECHR are not all absolute but exceptions to those rights can only be made under the strict conditions set out by the Eur. Court HR. A general part of criminal law for the EU may therefore offer more protection than required by the ECHR, but never less. According to its Article 52(3), the CFR may provide for more extensive protection than the ECHR. As an example of how this criterion operates in construing the general part in our project, consider *lex mitior*. This principle of the retroactive application of the more lenient provision was recognised by the ECJ and the Eur. Court HR [64]. As a result, it must be included in a general part of criminal law for the EU.

D. Compatibility with legal traditions

It also follows from the already mentioned Union legal sources that a general part needs to be in line with the legal traditions of the Member States. Although Article 6(3) TEU refers to the constitutional traditions, this should be interpreted as fundamental principles of criminal law common to the EU Member States. These principles need not necessarily be guaranteed by a Constitution [65]. The possibility of a so-called emergency break procedure under Article 83 TFEU also forms a practical argument in favour of this criterion. When a Member State considers an EU legislative proposal to be at odds with the fundamental aspects of its legal system, it can suspend the legislative procedure.

Sometimes legal traditions differ between Member States. This begs the question as to what to do when these legal traditions differ. On the one hand, it can be argued that a general principle can only be adopted in a general part of criminal law for the EU if it is compatible with all the legal traditions of the Member States. The ECJ clearly sets great store by the popularity of a legal concept. Considerable differences make it difficult to identify general principles [66]. What is important for the ECJ is not that a concept exists in all legal systems but that it is popular in many national legal systems. If a principle is common to the law of most Member States, the ECJ will recognise it as a general principle of Union law.

On the other hand, the TFEU already takes into account the possibility that a solution may not be in line with all legal traditions. Even if a Member State with a different legal tradition were to 'pull' the emergency break, other States may still use the method of enhanced cooperation to continue with the adoption of the Directive. The possibility of differing traditions or principles is unavoidable. This is not a problem if one considers that legal traditions are hardly ever absolute in nature. They develop and change over time. For example, the principle or legal tradition that only individual natural persons can be punished is interpreted very differently by Member

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[64] ECJ, 3 May 2005, Joined cases C-387/02 and others, *Silvio Berlusconi and others*, *ECR*, I-3565 and Eur. Court HR, 17 September 2009, *Scoppola v. Italy*, appl. no. 10249/03.

[65] ECJ, 14 October 2004, C-36/02, *Omega Spielhallen*, *ECR*, I-9609, para. 34. See also Article 67(1) TFEU.

[66] ECJ, 21 September 1989, Joint Cases C-46/87 and C-227/88, *Hoechst AG v. Commission*, *ECR*, 2859.

States. For example, the Belgian legislator dropped its objections to the criminal liability of legal entities in 1999[67].

Furthermore, it is impossible to construct a general part of criminal law that is in line with all domestic legal systems. In dealing with different legal approaches, solutions and rules, choices have to be made. A choice in favour of one legal system is automatically a choice that may be at odds with another. If the synthesis would need to be in line with the criminal legal traditions of all the Member States, only lowest common denominators could be identified, consisting of the similarities of, for example *mens rea*, between the legal systems under investigation. In such a case, we could only establish the most serious forms of *mens rea*, such as purpose, and the least serious forms of *mens rea*, such as negligence. Since legal systems approach the *mens rea* of foreseeing the risks of one's actions differently, no choice could be made that would be in line with all legal traditions. The result would be an incomplete spectrum of *mens rea*, which does not define any other mental elements besides purpose and negligence. This would not bring about a coherent set of conditions for criminal liability and would therefore not be in line with this criterion of the synthesis. The ECJ does not seek the lowest common denominator either but is looking for the most appropriate solution with a view to meeting the Union's objectives[68].

Compatibility with legal traditions can therefore not be applied as an absolute criterion. This brings about that, when constructing the general part of criminal law for the EU, no choices should be made based on the majority. The choice in favour of national legal solutions in the synthesis is not based on the popularity or political feasibility of such choices but is based on what is considered to be the most appropriate option, as determined by other conditions. By separating this academic task from political negotiations, it was possible to keep any political considerations out when constructing the synthesis. For instance, in the context of foreseeing risks, recklessness was adopted even though *dolus eventualis* is the more popular concept. The aim of the Maastricht general part is to provide for an extensive and complete discussion on what general principles of criminal law should look like. These results will offer political bodies a set of arguments to evaluate what formal legislation on a general part should look like.

The difference in weight between the two compatibility conditions can be illustrated by strict liability, which is liability that does not require proof of fault as to each and every single element of an offence. It ranges from offence definitions that only criminalise objective conduct, such as straightforward speeding on the road to offence definitions that criminalise intentional conduct but not the accompanying circumstance or consequence. For example, it is possible in Dutch law to be liable for indecent acts with a minor without proof that the defendant knew or should have known that the other person was a minor[69]. In German law, the possible lethal

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[67] D. Roef, *Strafbare overheden – Een rechtsvergelijkende studie naar de strafrechtelijke aansprakelijkheid van overheden voor milieuverstoring*, Antwerpen, Intersentia, 2001, p. 134-162.

[68] See T. Tridimas, *The General Principles of EU Law*, Oxford, Oxford University Press, 2006, p. 21.

[69] Article 245 of the Dutch CC. By contrast, see paragraph 176 of the German CC.

consequences of taking part in a brawl are strict elements. Intention only needs to relate to the brawl itself and not the consequence [70].

Although this form of liability should be kept within appropriate limits, neither the ECJ, nor the Eur. Court HR have precluded it [71]. In other words, strict liability is compatible with fundamental rights and the fragments of the general part identified by the ECJ. Strict liability does not exceed the limit set by these courts. In assessing the compatibility of strict liability with the legal traditions of the Member States, however, this is at least at odds with the German legal tradition of the principle of guilt, which is protected by the constitution. Under German law, this principle is interpreted as 'no punishment without *mens rea*', which arguably creates an injunction on the use of strict liability in criminal law [72]. Even though Dutch and English scholars criticise strict liability, it is frequently used in criminal law. The European courts use a similar approach, which implies that the principle is understood as 'no punishment without blameworthiness'. This means that, under those legal systems, as long as the defendant is able to rebut a presumption of *mens rea*, as long as he is able to avoid conviction for a strict offence by advancing an exculpating defence of, for example, due diligence, the principle of guilt is not violated.

Accepting strict liability in a general part of criminal law for the EU may therefore violate the constitutional tradition of German law but, since this compatibility is not an absolute condition, it is not precluded. This is not to say that in our general part of criminal law, strict liability is advocated as a proper tool of criminalisation [73]. It is simply argued that strict liability is not precluded under the first two conditions of the general part. It illustrates that legal traditions are interpreted differently in the different legal systems of the EU.

E. Scope of the general part of criminal law

As a rule, the general principles of criminal law should be interpreted uniformly in the context of each single offence definition. However, the special part of criminal law does influence the general part. For example, if a general part of criminal law for the EU were to only relate to offences against the EU's financial interest, it would make little sense to include a justification such as self-defence. It would also be unlikely that insanity and duress would ever be relevant. Against charges of budgetary fraud, a defendant is most likely to raise a mistake of law, a necessity type defence or enter a plea of due diligence.

On the one hand, such a limited application of a general part of criminal law for the EU may be read into Article 86(1) TFEU, which enables the establishment of a European Public Prosecutor's Office (hereinafter EPPO) for the protection of the financial interests of the Union. The general part in the *Corpus Juris* was established with a view to applying only to these offences. Ever since the debate on this EPPO

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[70] Paragraph 231 of the German CC.

[71] ECJ, 10 July 1990, C-326/88, *Anklagemyndigheden v. Hansen and Søn* I/S, *ECR*, I-2911 and Eur. Court HR, 7 October 1998, *Salabiaku v. France*, appl. no. 10519/83.

[72] Nevertheless, some exceptions to this rule can be identified, such as the offence mentioned above.

[73] For our view on strict liability, see J.H. Blomsma, 2012, *supra* note 45.

started, it has been related to the EU's financial interests [74]. The case for an EPPO is strongest in relation to offences affecting these interests. Besides the difficulty of prosecution because of the often complex nature and transnational character of the crimes, the fight against these crimes is hampered by a lack of ownership. Because it is not the national budget that is affected, national authorities appear to be more reluctant to prosecute offences relating to the EU budget.

On the other hand, Article 86(4) TFEU stipulates that the European Council may also extend the competency of the EPPO to serious crimes with a crossborder dimension. Moreover, it is not just the creation of the EPPO that warrants the identification of a general part of European criminal law. As explained, the current technique of harmonisation requires such general principles too. In that respect, Article 83(1) TFEU refers almost exclusively to serious crime. These crimes include terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking and so on. Under Article 83(2) TFEU, the Union is also competent for approximating criminal law relating to areas of a much more regulatory nature, such as road transport and environmental protection, provided that this is essential in order to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation.

Hence, the possible scope of application of a general part of criminal law for the EU is quite broad, ranging from criminal penalties for not properly documenting the number of hours one has driven to terrorist offences. The general principles of *mens rea* and defences in this research are therefore not established to apply merely to a certain type of offences. They are established, as in national law, to apply to crimes of a diverging nature and of diverging gravity. The general part could be applied to the prosecution of both human trafficking and violations of fishing quotas [75].

Nevertheless, the pertinent offence does influence the general principle of criminal law, which can be illustrated again by reference to strict liability. This may be out of the question when it concerns a traditional offence, *mala in se*, and/or it concerns an element essential to the offence, such as the intention to kill in murder or the lack of consent in rape. However, this is far less controversial when it concerns regulatory offences relating to norms in professional contexts. If such offences are to be prosecuted, including fraud against the EU, much more of the justifications and pragmatic reasons in favour of strict liability apply. For example, it can be imagined that financial offences would be very hard to prosecute if intention had to relate to each and every single element of the offence. Strict liability is also justified by an appeal to protect particularly vulnerable interests, such as the interests of children against sexual exploitation or the victims of trafficking in human beings. Given the focus of European criminal law on both categories of offences, strict liability should perhaps not be dismissed too easily. This third criterion of establishing a general part of criminal law thus brings about that the question of whether or not strict liability

[74] See the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715, 11 December 2001.

[75] Of course, criminal penalties to enforce fishing quotas should be available and imposed only as a last resort.

should be allowed in European criminal law and is a matter that is to be assessed in the context of every offence.

In the end, the construction of a general part of criminal law for the EU requires an assessment of competing values, including the defendant's right to a fair trial and the interests of the criminal justice system in securing convictions. Any criminal justice system should strike a proper balance between its functions as a shield and as a sword. When discussing these criteria, it became clear that most debate on the content of the general principles of European criminal law is the result of a different focus on the instrumental or protective finality of criminal law. For example, does one focus on the effective protection of EU financial interests or on the safeguards of criminal law that protect the defendant [76]? In our opinion, criminal law ensures that the citizen is protected against the State but also against other citizens. Justice is served by balancing security with freedom.

5. What about the codification of a general part for the EU?

The question as to whether to codify a general part of criminal law for the EU is a logical consequence of this discussion. In the Maastricht project, however, we do not aim at codification. We do not create a 'European Model Code' [77]. Our purpose is to provide the necessary theoretical framework and constructive dialogue for a European general part of criminal law. These results will offer political bodies a set of arguments to evaluate what formal legislation on a general part should look like. In this last part of our contribution we will limit ourselves to a brief discussion of the possibilities for codification and its implications.

A. The need for codification

One could question whether formal codification is even necessary. The codification of a general part is not a precondition for the existence of common concepts of criminal liability [78]. General principles and common criminal liability concepts can also exist in the form of soft law. As explained, the ECJ develops certain autonomous definitions of criminal liability in its case law. However, leaving the ECJ to continue this development without any legislative initiative can result in certain problems.

First, there are concerns about the separation of powers. The allocation of tasks between the ECJ and the European legislator is already critical as the ECJ has, over the years, demonstrated quite strong powers and ambitions when interpreting legislation. In criminal law though, the separation of powers between the courts and legislators is an important principle that safeguards the democratic legitimacy of criminal law. We cannot and should not expect from the ECJ that it replaces the European legislator in this matter. Moreover, leaving the development of European concepts of criminal liability entirely to the ECJ may result in casuistry and inconsistency.

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[76] Compare A.A.G. Peters, "Het rechtskarakter van het strafrecht", *in* Y. Buruma (ed.), *100 Jaar Strafrecht: Klassieke Teksten Van De Twintigste Eeuw*, Amsterdam, Amsterdam University Press, 1999 (reprint 1972).

[77] See C.J. Enschedé, *Een Uniform Europees Strafrecht?*, Arnhem, Gouda Quint, 1990.

[78] A.H. Klip, "Towards a General Part of Criminal Law for the European Union", *in* A.H. Klip (ed.), *supra* note 30, p. 31.

In addition, it appears that the ECJ does not always do a thorough comparative analysis and there is little transparency in terms of the reasoning behind certain choices [79]. Therefore, it cannot be guaranteed that a general part would emerge from a proper consideration and balancing of the diverging national traditions. Neither should we expect that the ECJ will conduct an in-depth dialogue with regard to the character and theory of criminal liability in European law. Finally, there is also a danger that certain jurisprudence in competition law will also be employed in criminal law. Certainly, competition law and criminal law may share some features. However, in competition law we have a different balance between the instrumental and protective finalities of liability.

B. Possibilities of codification

Whether we choose to acknowledge the need for a general part for European criminal law or not, its development is already happening, as we have demonstrated. The issue as to the codification of the general part is therefore a question of how we want to establish the common concepts. In practice, the choices for the development of common definitions are as follows: (i) the codification of common concepts in a separate Directive or Regulation by the European legislator, a sort of 'general part Directive/Regulation'; (ii) the codification of common concepts in every Directive that deals with the criminalisation of specific offences.

The first possibility, namely to establish common definitions in a *separate* legal instrument, comes closer to the nature and structure of a general part as we know it in national law. In this way, *Rechtsgutsblindheit* can be ensured, while it is also much more practical to gather together all these notions which are common for the Directives criminalising specific behaviours. Certainly, a general part Directive or a general part Regulation is a far-fetched initiative as it may create serious turmoil, especially in terms of considerations relating to national sovereignty. The general part of criminal law is a topic very close to the heart of national traditions. In addition, one may wonder how a Regulation on substantive criminal law would be reconciled with the principle of *lex parliamentaria*.

The second possibility seems more feasible given the current political climate of European criminal law. Each Directive could provide its definitions of *actus reus* and *mens rea* requirements. However, this possibility does not safeguard a clear contextual demarcation between the general and special part, which would be the case with a general part Directive or Regulation. Directives would be rather long in their content and to some extent confusing, while the definitions of the constructive elements of criminal liability could be influenced by the specific legal good protected with every instrument. Perhaps the first disadvantage may be less problematic at this stage as there are not many Directives harmonising criminal liability. The second problem, however, may be of great concern. If the European legislator defines the constructive elements of criminal liability such as perpetration and *mens rea* in different ways in the various Directives, problems of inconsistency will occur. One of the benefits of

[79] See the Opinion of AG Kokott of 20 November 2007 in ECJ, 3 June 2008, C-308/06, *Intertanko*, *ECR*, I-4057.

the separation of the general part in a codification is that this dichotomy safeguards a coherent and harmonic theory on criminal liability. Questions on perpetration, participation, *mens rea* and defences cannot and should not be answered differently in a criminal system. Especially with Directives based on Article 83(2) TFEU, the European legislator might be more eager to deviate from pre-established criminal law principles in order to adjust the criminal liability model to the European policies protected. As a result, the only way to avoid a piecemeal general part in this second option is for the legislator to be committed to *repeating the same definitions for the same terms in every instrument*.

Finally, one could wonder whether the EU has the competence to define concepts of *mens rea* and *actus reus* in European instruments. In the case of a Directive based on Article 83 TFEU, there is nothing to preclude the possibility of defining terms such as recklessness and attempt [80]. We have already explained that the harmonisation of these offences is incomplete as the core notions of the general part play a necessary normative role in the determination of criminal liability. However, in the case of a Regulation based on Articles 86 or 325 TFEU, the competence of the EU to harmonise elements of substantive criminal law have been questioned [81]. Nevertheless, especially with Article 86 TFEU, it might become necessary to define certain substantive elements of criminal liability – such as participation in fraud – in order to demarcate the competences of the EPPO.

To conclude, we hope that, through our contribution we can offer a way forward for European criminal law. Certainly, the development of a Europeanised criminal system raises the question of the constitutional relationship and interrelations between European and national legal systems. Our goal is to raise awareness of the important role that a general part could play in giving a direction and a more principled framework to European criminal law. The tasks of developing common concepts of criminal liability, of readdressing the principle of legality and of finding solutions for the allocation of jurisdiction are not to be taken lightly. They involve a certain 'rethinking' of criminal liability and balancing of the finalities of criminal law. We have to 'go back to the basics' and face up to the uncomfortable question of the true relationship between principles of justice and criminal liability concepts. We are convinced that working in this direction will make it possible for the academia and the European institutions to engage in a constructive dialogue regarding the purpose, idiosyncrasy and future of European criminal law.

[80] R. Sicurella, *supra* note 35, p. 243-244.
[81] *Ibid.,* p. 239.

Part II

Sectorial approach

Introductory reflection on evaluation and its lacunae

Gisèle Vernimmen-Van Tiggelen

1. Introduction: why is evaluation necessary?

In the context of the approximation of substantive criminal law within the European Union, evaluation is not only relevant but is absolutely essential. It is a crucial part of fostering the credibility needed for the EU to take action in this field. Action at EU level must be strictly justified. Its necessity must be demonstrated and its scope must be proportionate to its aim. Article 5, para. 3 and 4 TEU specifies what must be understood by the principles of proportionality and subsidiarity: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5, para. 3). "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" (Article 5, para. 4). These proportionality and subsidiarity tests are overseen by the European Court of Justice.

Meeting these requirements nowadays presupposes following a procedure detailed in Protocol 2 of the Lisbon Treaty, to which Article 5 TEU refers, involving national parliaments too. The protocol explains the different aspects under which a potential initiative must be contemplated in terms of proportionality and subsidiarity. It underlines the need to provide, together with any draft legislative act, a detailed statement containing some assessment of the proposal's financial impact as well as, in the case of a directive, its implications for domestic national legislation. The reason for acting at Union level should be substantiated by qualitative indicators (and quantitative ones where possible) and the burden, whether financial or administrative,

for the Union but also for national governments, local authorities, operators and citizens, minimised and commensurate with the objective to be achieved.

2. Current situation

A. Evaluation ex ante

The European Commission often conducts broad consultations, issuing green papers, inviting all the stakeholders to preparatory meetings, mandating preliminary studies, etc. The result is summarised in an impact assessment attached to any new Commission proposal. A very good and recent example is to be found in the Commission staff working paper accompanying the proposals for a regulation on insider dealing and market manipulation and for a directive on criminal sanctions for insider dealing and market manipulation [1]. The analysis is extremely detailed and very well documented. An executive summary has therefore been provided in a separate document [2].

The requirements explained above are equally applicable to initiatives submitted by a group of Member States. It is therefore expected that any such draft be supported by a similar though often less in-depth analysis. While Article 75 TFEU allows a quarter of the Member States to take an initiative in any of the areas covered by chapter 4 of Title IV TFEU, no example can be found in relation to the approximation of substantive criminal law. But indicators regarding compliance with the proportionality and subsidiarity requirements were presented, for instance, together with the initiative for a Directive regarding the European Investigation Order (EIO) in criminal matters [3].

Whether or not the principles are fully observed remains an issue. The Manifesto on European Criminal Policy [4] challenges their compliance with respect to a series of instruments, including, for instance, the directive on the protection of the environment through criminal law [5]. According to the authors, a group of academics constituting the European Criminal Policy Initiative, "the criminalisation of administrative offences does not comply with the principle of proportionality and its sub-principle, the principle of *ultima ratio*". This example is worth mentioning since another author, in an article on criminal sanctions in the field of EU environmental law concludes, on the contrary,

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[1] Commission staff working paper – Impact assessment accompanying the proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) and the proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (SEC (2011) 1217 of 20 October 2011, accompanying COM (2011) 615).

[2] SEC (2011) 1218 of 20 October 2011.

[3] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliaent and of the Council regarding the European Investigation Order in criminal matters – Detailed Statement (Document of the Council 9288/10 ADD 2 of 23 June 2010).

[4] The Manifesto can be found on site of the European Criminal Policy Initiative (ECPI): https://sites.google.com/site/eucrimpol/

[5] Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, *OJ*, no. L 328, 6 December 2008, p. 28.

that "criminal sanctions, including imprisonment, are more dissuasive in nature because it is the only sanction that cannot be passed on to customers, shareholders or other third parties" [6]. While this example points to divergent interpretations of the requirements, it does not by any means permit one to conclude that the Union may spare itself from complying with the principles. It only shows that the criteria must be, progressively, refined, that more and better evidence should be gathered, that the necessity for Union action should be better corroborated by empirical and less disputable arguments and based on more solid data.

B. Evaluation ex post

Prior assessment of the likely impact of a considered action is of course not the end of the evaluation process. It would not make sense to estimate the need, impact, result and effect of a measure before it is taken as carefully as possible without then looking at the outcome it has effectively produced when implemented. The truth, however, is that so far very little has been done to carry out an *ex post* assessment of the real impact of EU instruments or policies in the area of criminal law and criminal justice.

1) Commission reports

The methodology followed by the Commission to produce reports on the implementation of framework decisions has drawn a considerable amount of inspiration from the Commission's experience in checking that directives have been correctly transposed into national law. The same criteria are also used in the methodology for framework decisions and directives because of the similarities which exist between the two types of instruments. As explained, for instance, in the report on the Framework Decision on attacks against information systems, "the rules implementing the FD must function effectively taking account of its aims, must satisfy the requirements of clarity and legal certainty, must assure full application of the text in a sufficiently clear and precise manner and must be implemented within the period prescribed" [7]. The main difference is obviously that, up to the end of the transitional period, *i.e.* up to December 2014, failure by a Member State to fulfill its obligations under a framework decision cannot be brought before the European Court of Justice.

The analysis underpinning the reports is essentially based on information provided by the Member States themselves and deals almost exclusively with the transposition *stricto sensu*, in other words whether or not the Union instrument has been introduced into national law fully, correctly and in time. No attention is paid to the instrument's practical use and effect and no assessment is made as to whether the measures adopted in national law meet the intended objectives, specific as well

[6] J. Öberg, "Criminal sanctions in the field of EU environmental law", *NJECL*, 2011, vol. 2, p. 402.

[7] Report from the Commission to the Council based on Article 12 of the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (COM (2008) 448, 14 July 2008, p. 3).

as general [8]. The aforementioned report, for example, expressly recalls that "actual application of those rules is beyond the scope of this report" [9].

As to the follow-up, nothing systematic can be said. While some reports identify issues requiring further action [10], discussion of the reports in Council seldom takes place despite the often explicit wording of the instruments themselves [11] and parliamentary questions on Commission reports are not commonplace.

2) Peer evaluation

A mechanism inspired by the Financial Action Task Force (FATF) model has been put in place by the Council Joint Action of 5 December 1997 [12] and is still functioning. While the Commission also takes part, it is essentially a peer-evaluation method, which presents interesting features. Firstly, it involves a learning process both for the evaluators and for those subject to evaluation. Moreover, these roles are interchangeable. Secondly, it does not normally concentrate on one given instrument but rather covers a wider, specially identified area where the Union has developed, or is developing, a common policy, or has established deeper cooperation mechanisms. Five rounds of evaluation have been conducted so far, namely on mutual legal assistance, on the fight against drug trafficking, on the exchange of information between law enforcement bodies and Europol, on the functioning of the European arrest warrant and on investigations against financial crimes. The last one, dealing with the national interface with Eurojust, started in June 2011. Thirdly, it is not a paper-based exercise but is based on on-the-spot visits and interviews, looking at the practical operation of instruments, and ending up with conclusions being issued, including best practices and concrete recommendations [13]. Actions and measures taken or planned in response are

[8] S. DE BIOLLEY and A. WEYEMBERGH, "L'évaluation dans le cadre du troisième pilier du traité sur l'Union européenne", *in* A. WEYEMBERGH and S. DE BIOLLEY (ed.), *Comment évaluer le droit pénal européen ?*, Brussels, Editions de l'Université de Bruxelles, 2006, p. 80.

[9] COM (2008) 448, p. 3.

[10] COM (2008) 448, p. 10. The Commission has since then proposed a directive which addresses some issues identified in the 2008 report (COM (2010) 517, 30 September 2010). See also Report from the Commission based on Article 12 of the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, COM (2007) 716, 16 November 2007, p. 9. The FD has thereafter been replaced by Directive 2011/93/EU of 13 December 2011 (*OJ*, no. L 335, 17 December 2011, p. 1).

[11] See for instance Article 9, para. 2 of the Framework Decision 2003/568/JHA on combating corruption in the private sector (*OJ*, no. L 192, 31 July 2003, p. 54). Two Commission's reports have been published: COM (2007) 328, 18 June 2007; COM (2011) 309, 6 June 2011.

[12] Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (*OJ*, no. L 344, 15 December 1997, p. 7).

[13] See *e.g.* the final report of the fourth round of evaluation (Document Council 8302/4/09 REV 4 of 28 May 2009), and the final report of the fifth round of evaluation (Document Council 12657/2/12 REV 2 GENVAL 51).

in turn discussed and periodically reviewed within the Council structures [14]. However, the mechanism has not so far been used in the area of the approximation of substantive criminal law.

3) Schengen evaluation

Although the matter is outside the topic of substantive criminal law, a brief examination of the situation with regard to the Schengen *acquis* is of some relevance. A Standing Committee was set up in 1998 by the Schengen executive committee with a twofold task regarding evaluation [15]. The first was to verify that all preconditions for the application of the Schengen *acquis* have been met by Member States wanting to join the Schengen area: a verification process which has yet to be completed regarding Cyprus, Bulgaria and Romania for instance. The same mechanism also applies to third countries wanting to take part in the Schengen area [16]. The second task was to check that the Schengen *acquis* was being correctly applied by Member States or third countries implementing the *acquis*.

The evaluation mechanism is a peer review mechanism for both these tasks. So far, the mechanism continues to be entirely within the hands of States participating in the Standing Committee.

On 16 November 2010, the Commission submitted a proposal for a Regulation modifying the evaluation mechanism to verify application of the Schengen *acquis* [17], leaving the first part of the Standing Committee mandate as it stands. Under the original proposal, responsibility for implementing the evaluation mechanism in the future would have rested with the Commission, in close cooperation with Member States and with the support of European bodies such as FRONTEX [18], which would provide risk analyses. The proposal was amended by the Commission in September 2011, in particular by introducing the possibility of imposing specific measures to address and remedy serious shortcomings in the way in which external border control or return procedures identified in the evaluation report were carried out. The new proposal contained, as a last resort, the possibility of a Union-based mechanism for the temporary reintroduction of border control at internal borders where a Member State

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[14] See *e.g.* the follow-up to the evaluation reports on the fourth round of mutual evaluations: practical application of the European arrest warrant and the relevant surrender procedures between Member States (Document Council 15815/11 of 28 October 2011).

[15] Decision of the executive committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (*OJ*, no. L 239, 22 September 2000, p. 138).

[16] See *e.g.* Recital 3 of Council Decision on the full application of the provisions of the Schengen acquis in the Principality of Lichtenstein (*OJ*, no. L 334, 16 December 2011, p. 27).

[17] Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen acquis (COM (2010) 624, 16 November 2010*)*.

[18] Council Regulation (EC) no. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union *OJ*, no. L 349, 25 November 2004, amended by Regulation (EC) no. 863/2007 (*OJ*, no. L 199, 31 July 2007, p. 30*)* and by the Regulation (EU) no. 1168/2011 (*OJ*, no. L 304, 22 November 2011, p. 1).

was persistently neglecting its obligation to monitor its section of the external border and "the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level" [19]. The draft instrument was hotly debated, in particular with regard to the proposed legal basis. For the Commission, in view both of the ambition of the future instrument and of its close link with border controls, the Regulation should be based on Article 77, para. 2 (e) TFEU. However, the Council unanimously agreed to replace the legal basis: the future instrument should be based on Article 70 TFEU since this is the only Treaty provision dealing explicitly with evaluation. The choice has further implications. On the one hand, Article 70 does not involve a co-decision procedure [20]. On the other hand, Ireland and the United Kingdom, who do not participate in the part of the Schengen *acquis* falling within the ambit of Article 77, would not have been bound by the proposed Regulation, while they would have been involved in an evaluation process based on Article 70 [21]. The text currently on the table also departs from the Commission's proposal in other aspects, in particular as the evaluation mechanism would also be used to verify that countries wanting to join the Schengen area meet all the conditions to start applying the *acquis* and as the responsibilities would be shared between the Member States and the Commission.

3. Expected improvements: can the *lacunae* be remediated?

The need for dedicated effort towards a more in-depth and systematic evaluation of all types of measures in the freedom, security and justice area, especially with regard to the approximation of substantive criminal law, has already been emphasised in the Hague Programme [22]. The essential nature of evaluating implementation was seen as "essential to the effectiveness of Union action" and the Hague Programme called for the evaluations to be "systematic, objective, impartial and efficient, while avoiding too heavy an administrative burden on national authorities and the Commission". A practice-oriented approach to evaluation was favoured as the goal was not only to check whether a measure decided at Union level had been implemented but also to "address the functioning of the measure and to suggest solutions for problems encountered in its implementation and/or application".

ECLAN launched the debate with a conference in October 2005 entitled 'Evaluate the implementation of criminal law in the EU: which method?' and published the contributions the year after [23]. The main conclusion was that EU policy in the field of criminal law lacked a comprehensive and consistent approach and that the evaluation

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[19] See Recital 14 and Articles 14 and 15 of the amended proposal (COM (2011) 559, 16 September 2011).

[20] Council has decided to consult the European Parliament and to take its opinion into consideration "to the fullest extent possible" (Press release of Council meeting "Justice and Home Affairs" 7-8. VI.2012 (10760/12, p. 9).

[21] Under conditions to be fixed: see Article 3, para. 1 of Protocol 21 to the Lisbon Treaty.

[22] See section 3 of the general orientations of The Hague Programme : strengthening freedom, security and justice in the European Union, *OJ*, no. C 53, 3 March 2005, p. 12.

[23] A. Weyembergh and S. de Biolley (ed.), *Comment évaluer le droit européen ?*, Brussels, Editions de l'Université de Bruxelles, 2006.

of the impact of earlier instruments was not moving forward. Lessons were learnt from these substantial exchanges and comparisons and the resulting product took the form of an evaluation model which was further tested on the Framework Decision of 19 July 2002 on preventing and combating trafficking in human beings[24]. Under the ECLAN model and in line with the general orientation of the Hague Programme itself, evaluation should not only deal with the correct and timely transposition of EU law into domestic legislation but should encompass its practical implementation *i.e.* to what extent the norm is used by the relevant authorities, including the available means at their disposal for making use of it. In addition to that, the effectiveness of the instrument should be assessed by measuring the extent to which the intended objective has been achieved. The efficiency of the instrument should also be estimated. This refers to its cost (financial or non-financial) including possible negative side effects, incurred by the measure, compared with its benefits. In other words, the question is whether the legal instrument, alone or together with flanking measures, provided 'the' or at least 'an' adequate response to the common concerns that it sought to address, and also how different instruments complement each other.

The aforementioned observations clearly illustrate the fact that *ex ante* and *ex post* evaluations are intrinsically linked: benchmarks for assessing proportionality must be identified when designing the instrument or measure whereas the observed practical impact must be taken into consideration whenever reviewing the adopted measure is contemplated and must influence the way it is amended, complemented or replaced. Without a permanent monitoring cycle covering the various but combined aspects identified in the methodology, there can be no genuine EU criminal policy in any field and directives whose aim is to approximate substantive criminal law will always appear as one-off measures dictated by circumstances instead of parts of a comprehensive, consistent and global strategy.

However, the testing exercise conducted by ECLAN on Framework Decision 2002/629/JHA[25] shed some light as to how hard it is to evaluate a legal instrument of that kind. Clearly domestic laws have been approximated and this should by itself facilitate cooperation, thereby stepping up the fight against this serious type of crime. But such statements remain rather abstract as they could not be supported by specific observations. A common finding was that the law of Member States was often more severe, particularly at the level of sanctions, but sometimes also regarding the definition of the crime, than what was required under the framework decision. This would suggest that the increased severity of sanctions is not the direct effect of the EU instrument, which introduces a minimal amount of harmonisation. If a common trend toward more severity in the sanctions is ascertained, the reason for this must lie in media or political pressure and not in the approximation of Member States' laws as a result of the framework decision. It also proved difficult in some cases to distinguish

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[24] Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, *OJ*, no. L 203, 1 August 2002, p. 1. The FD has thereafter been replaced by Directive 2011/36/EU of 5 April 2011, *OJ*, no. L 101, 15 April 2011, p. 1.

[25] A. Weyembergh and V. Santamaria (ed.), *The evaluation of European criminal law: the example of the framework decision on combating trafficking in human beings*, Brussels, Editions de l'Université de Bruxelles, 2009.

the criminal phenomenon covered by the 2002 framework decision, *i.e.* trafficking in human beings, from migrant smuggling, pimping or other forms of criminal activity. Finally, given that other international instruments had been adopted and ratified on the same or a similar subject, especially within the ambit of the UN [26], the precise impact of the EU instrument was even harder to pinpoint.

Responding to the action plan implementing the Hague Programme [27], where the establishment of an evaluation system was the first measure to be mentioned, the Commission submitted, in 2006, a communication [28] proposing a fully-fledged, permanent method focusing, beyond the implementation of legal instruments (the so-called 'Scoreboard plus' concept), on the tangible results of the application of the legislation in practice. The idea was that this would make it possible to assess interventions according to their results and measured against the needs that they aimed to satisfy. The combination of both would ultimately improve policymaking by encouraging systematic feedback into the decision-making process. In selected priority areas, an in-depth strategic policy evaluation was to be conducted. The idea was that the overall system would be designed to deliver substantial added value, notably by assessing entire policies and analysing consistency between different measures within a given policy.

The annex to the communication contained proposed factsheets for all justice, freedom and security policies, examining for each of them the factors influencing (positively or not) the evaluation mechanism, indicating the objectives pursued within each sub-area as well as identifying, for the main instruments relevant for the area, possible indicators of the immediate results, outcomes and impacts achieved.

From 2006 to 2009, the Commission issued a yearly review of the progress made in the implementation of the Hague Programme by the European institutions and by the Member States [29]. The exercise has not been pursued since the Stockholm Programme was published [30]. The annexes to the reports present, respectively, an implementation scoreboard, an institutional scoreboard giving a general overview of the instruments and deadlines provided in the programme and action plan and an extended report on the evaluation of the Hague programme [31]. The extended report sets out the main achievements and the future challenges by policy area. Some indications and estimates

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[26] United Nations Convention against transnational organized crime, Protocol to prevent, suppress and punish trafficking of persons, especially women and children, and Protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention, 15 November 2010.

[27] Council and Commission action plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (*OJ*, no. C 198, 12 August 2005, p. 1).

[28] Communication from the Commission to the Council and the European Parliament, Evaluation of EU Policies on Freedom, Security and Justice (COM (2006) 332, 28 June 2006).

[29] See COM (2006) 333, COM (2007) 373, COM (2008) 373, COM (2009) 263.

[30] The Stockholm Programme – An open and secure Europe serving and protecting citizens (*OJ*, no. C 115, 4 May 2010, p. 1). The situation following the Stockholm Programme will be considered below.

[31] The 2009 evaluation (COM (2009) 263, 10 June 2009) is accompanied by three documents: SEC (2009) 765, SEC (2009) 766 and SEC (2009) 767.

can be found in the reports concerning the scope of, and trend in, particular types of crimes, such as sexual exploitation of children, cybercrime or corruption. Information is gathered from various sources, but remains piecemeal and random. The exercise runs into considerable difficulties, which may not be unique for criminal policies but which are nevertheless felt particularly acutely here. To begin with, it goes without saying that a comprehensive evaluation system of this size requires significant amounts of resources. Secondly, the communication on evaluation itself admits that it may be difficult to measure causal links between outputs, outcomes and impacts. This statement cannot be denied. How could one assess, for instance, the degree to which the application of a particular instrument, such as the directive on combating sexual exploitation of children[32], led to more successful prosecutions, better deterrence and ultimately reduced sexual exploitation? Are the numbers of complaints or the numbers of detected and closed illicit child pornography websites key indicators of the relevance and quality of the legal instrument? Is it possible to observe a lower level of illicit waste and pollution and to conclude from that that the directive on the protection of environment through criminal law[33] is a success? Surely other factors may have played a role, including the legal, political and administrative framework in which Member States have implemented the Union instrument. Questions arise such as: Do the Member States apply the legality or opportunity principle? Do they know the rule about the criminal liability of legal persons? Is this criminal phenomenon a priority area in all of the Member States? How much money and time do the Member States devote to fighting it? In addition, the possibility that criminal activities may have shifted to other, more lenient jurisdictions needs to be factored in… Establishing causal links between EU interventions and reductions in levels of crime will always be problematic.

The main difficulty, however, relates to the collection of data. In this respect, the communication on evaluation acknowledged that substantial improvements in the quality and availability of statistical information were needed. Soon afterwards, the Commission adopted a five-year EU action plan for the development of a comprehensive and coherent EU strategy to measure crime and criminal justice[34]. Two experts' groups were created: One, under the auspices of DG Justice, Freedom and Security (JLS) and, as of 2010, DG Home Affairs (HOME), is about the policy needs for data on crime and criminal justice; the second, in parallel, is a Eurostat working group whose task is to implement the findings and recommendations of the first experts' group. Although significant efforts have produced some positive developments, the results continue to have gone largely unnoticed and substantial progress is still to be achieved. There are a number of reasons for these shortcomings. We have picked out two of these reasons. The first is the difference in the reporting systems. The fact that different reporting rules apply among Member States, for instance as to the criterion

[32] Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA of 22 December 2003, *OJ*, no. L 335, 17 December 2011, p. 1.

[33] Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law, *OJ*, no. L 328, 6 December 2008, p. 28.

[34] COM (2006) 437, 7 August 2006.

(offender or offence) or as to the point in time where offences are recorded often leads to double counting, and in all cases, to a lack of comparability. The second is, in a sense paradoxically, the superabundance of requests for data collection from EU and other international organisations. National authorities frequently face similar but slightly different demands and this no doubt increases their administrative burden. At this stage, information on traditional forms of crime, such as theft or homicide, is of relatively good quality, reliable and comparable, whereas in the area of more interest at EU level, that of crossborder organised crime and especially the so-called 'euro-crimes' listed under Article 83, para. 1, TFEU, very little statistical material is available despite there being some encouraging trends for cybercrime, trafficking in human beings or money laundering. The second action plan runs from 2011 to 2015 [35]. It will put the emphasis on the quality of collected data, the analysis and dissemination of results. An important aspect of the analysis will be to gather additional information on the context and quality of collected figures, *i.e.* 'metadata', to prevent misleading interpretation and comparison.

The Stockholm Programme confirms [36] the need for an evaluation of the effectiveness of legal instruments adopted at EU level. It points to judicial cooperation in criminal matters as the first area for evaluation, prior to EU substantive criminal law, while the latter is obviously not excluded. The programme issues a direct invitation to the Commission to submit proposals under Article 70 TFUE and formulates the framework and basic elements that they should be based on. Article 70 TFEU opens the way for a new monitoring procedure, which could extend to any of the Union policies under Title V TFEU. The arrangements, as the provision calls them, would build on the practice of peer evaluation, with the involvement of the Commission. Article 70 TFEU provides for information from the European Parliament and national parliaments as well. The system is of course notwithstanding possible infringement procedures, which are regulated under Articles 258 to 260 TFEU. It is mainly a consensual method, not oriented towards sanctions, but rather envisaged as an informative and supporting tool for a better implementation of EU policies and a backbone for a full application of the mutual recognition principle. The mechanism could encompass entire policies instead of being limited to single instruments. Even where they have not exercised their opt-in right and have not taken part in some or all legal instruments relevant for a given evaluation round, the United Kingdom and Ireland would be allowed to take part in it [37]. However, no initiative of that kind has been tabled by the Commission so far [38]. The only activity linked to the concern

[35] COM (2011) 713, 18 January 2012.

[36] The Stockholm Programme – An open and secure Europe serving and protecting citizens, point 1.2.5. (*OJ*, no. C 115, 4 May 2010, p. 1).

[37] See Article 3, para. 1, second indent of Protocol 21 to the Lisbon Treaty. Nothing similar is provided in relation to Denmark, however where the evaluation under Article 70 TFEU deals with Schengen matters, and therefore builds upon the Schengen acquis, Denmark could decide, within six months of the adoption of the instrument, whether it will implement it in its national law, and thus participate in the mutual evaluation.

[38] The text currently under discussion on evaluation of the Schengen acquis was originally based on Article 77 TFEU, it is the Council which decided afterwards to refer instead to Article

of improving full and timely implementation of EU legal acts relates to the mutual recognition instruments. In October 2010[39], the Council endorsed a methodology[40] ensuring, on the one side, regular exchange of information among Member States, through Council working groups or the network for legislative cooperation set up by Council Regulation in 2008[41]. On the other side, the European Judicial Network[42] was required to upload on its website, for each mutual recognition instrument, the state of play of implementation, national fact sheets that were available, the handbook where a handbook exists (as is the case for the European arrest warrant), the certificate or warrant in electronic format and the updated Judicial Atlas, which provides the relevant information as to the competent local authorities to which the mutual recognition instrument should be sent. While all of this implies some monitoring, it is still far from the fully-fledged evaluation mechanism envisaged by the Lisbon Treaty and the Stockholm Programme.

To sum up, although some mechanisms have been developed to assess and enhance, on the one hand, the degree of compliance by Member States with certain EU policies or areas of intensified cooperation, and on the other hand, the global impact of the Union's achievements in these areas, a truly systematic and thorough assessment of the effect of the initiatives and activities of the Union in the fields of criminal law where approximation instruments have been implemented is still largely missing.

As we have already seen, the effectiveness and efficiency of EU action against a given criminal sector also depends on the legal and administrative environment in which the domestic legal rules implementing EU law operate. This is particularly the case with regard to the quality of justice and of the judiciary.

There are very good reasons to evaluate the quality of justice in Member States. After all, creating a single area for EU justice was the first of the EU objectives set out in Article 3, para. 2, TEU. It is an area in which all citizens – indeed all persons living on EU territory – should be able to take advantage of "free movement of persons (…) in conjunction with the prevention and combating of crime". Individuals should therefore logically be entitled to receive the same protection (as an offender, if that were to be the case, but also as a potential victim), to be dealt with according to the same standards and to benefit from the same treatment wherever they are in the EU. While there is no methodical system of checking if Member States respect the values on which the Union is founded, which are enumerated in Article 2 TEU and include

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70 (see Council document 5754/6/12 REV 6, 4 June 2012).

[39] Council conclusions of the JHA Council of 7-8 October 2010 (see Council document 13403/1/10 REV 1, 27 September 2010).

[40] Council document 13405/1/10 REV 1, 27 September 2010.

[41] Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council (2008/C 326/01), on the establishment of a Network for legislative cooperation between Ministries of Justice of the European Union (*OJ*, no. C 326, 20 December 2008, p. 1).

[42] Joint Action (98/428/JHA) of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (*OJ*, no. L 191, 7 July 1998, p. 4).

the rule of law, quite radical sanctions are foreseen under Article 7 in the, hopefully unlikely, case of serious and persistent breach of these values by a Member State.

A specific paragraph of the Hague Programme dealt with the issue of the quality of justice [43]. The Stockholm Programme is less explicit but refers to improving evaluation mechanisms and the training of judges as measures to strengthen mutual trust [44]. It may be going too far to assume from that that all Member States are ready to agree to institutional supervision or even to start mutually assessing their respect of the rule of law and the quality of their respective judicial systems. This has never been done within the Union. Some thinking along those lines was carried out by the Dutch Ministry of Justice, culminating in a conference held in Maastricht in June 2009 [45]. The European Commission for the efficiency of justice (CEPEJ) also regularly evaluates the judicial systems of the Council of Europe's Member States [46]. It has recently agreed to prepare, for the Commission, a study on the impact of the functioning of justice systems of EU Member States on their economic situation [47].

Monitoring the quality of justice in EU Member States would not only be helpful for the principle of mutual recognition. It would also contribute to an effective and efficient EU criminal policy whatever the area of substantive law the Union decides to legislate on. It cannot be denied that the effect of a law is largely contingent on access to justice, the length of procedures and, more generally, the means, resources, learning and ethics of the judiciary.

In the context of the accession of new Member States, a pre-accession verification process is carried out on the basis of the so-called 'Copenhagen criteria' [48]. They have been progressively refined and cover in particular political stability, democracy and the rule of law as well as human rights protection. During accession negotiations, issues such as the independence, impartiality, quality and efficiency of the judiciary, fundamental rights and anti-corruption policy form part of a particular chapter. Several sources are exploited in order to measure the degree of compliance of the applicant country with the requirements. A safeguard clause for the first three years following accession was included in that respect within the accession acts of Bulgaria and Romania [49]. The Commission undertook to assist both Member States [50] to remedy

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[43] "In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality" (section 3. 2. of the Hague Programme, *OJ*, no. C 53, 3 March 2005, p. 11).

[44] Section 3.2. of the Stockholm Programme (*OJ*, no. C 115, 4 May 2010, p. 13).

[45] M. Dane and A. Klip (ed.), *An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust*, Tilburg, Celsus, 2009.

[46] The 2012 report, based on figures from 2010, was published on 20 September 2012.

[47] CEPEJ-BU (2012)1 of 15 February 2012.

[48] See Conclusions of the Presidency, Copenhagen European Council 21-22 June 1993 (SN180/1/93 REV 1, p. 13).

[49] Article 31 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union (*OJ*, no. L 157, 21 June 2005, p. 41).

[50] Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the area of judicial reform and the fight against corruption (*OJ*, no. L 354, 14 December 2006, p. 56), and

weaknesses or shortcomings and to regularly verify progress against a number of interlinked benchmarks, forming part of a broad reform of the judicial system and of the fight against corruption. The Commission reports twice a year under this cooperation and verification mechanism (CVM). The latest reports [51] were issued in July. They still confirm weaknesses and express concerns.

In September 2012, Commissioner Reding announced to the European Parliament [52] that she wanted to extend annual reports to the other Member States. She made the proposal, prompted by claims about the deterioration of the rule of law in both Romania and Hungary, to add a mechanism for measuring and comparing the strength, efficiency and reliability of justice systems in all Member States to the economic and social benchmark in the European semester. The idea was to introduce this scoreboard as an extension to the Commission's annual growth survey. Given the mainly economic perspective of the survey, it is not sure that the reports would deal exhaustively with those aspects of quality of justice which are the most relevant in the context of sectoral EU criminal policies. Nevertheless, it would provide food for thought and contribute to a better global assessment of the effectiveness of Union action in substantive criminal law.

4. Conclusion

Evaluation is needed more than ever, particularly to support the credibility of Union action. It should go well beyond formal implementation of EU instruments and cover their harmonious integration into the national legal framework of each Member State as well as their practical use by national competent authorities with due consideration for the legal, administrative and factual environment in which they apply. And not only should the evaluation process be looked at from the perspective of the Member States' duty to put the instruments in practice. The evaluation should also assess the relevance of the EU instruments themselves vis-à-vis their declared purpose. By so doing, these instruments may not be seen in isolation but as part of a global policy together with all the flanking measures and supportive mechanisms. Their consistency with other instruments, whether or not they deal with the same criminal phenomenon, should be considered as well.

The first task is probably to combine the various evaluation exercises in order to build up the widest possible picture when assessing the impact of EU harmonisation in the field of substantive criminal law. The second is to try to set up more homogeneous indicators to evaluate the prevalence of 'euro-crimes' so as to draw reliable conclusions both in terms of assessing past actions and deciding on future ones. The task is a very demanding one. It is a long-term learning process and results will continue to be unsatisfactory for some time to come. That is why there is no time to lose.

Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the area of judicial reform and the fight against corruption and organized crime (*OJ*, no. L 354, 14 December 2006, p. 58).

[51] COM (2012) 410 (Romania) and 411 (Bulgaria) of 18 July 2012.

[52] See debates on point 11 on the agenda, available at http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20120912&format=XML&language =EN&secondRef=SIT #creitem21

Content and impact of approximation: The case of terrorist offences
(Council Framework Decisions of 2002 and 2008)*

Pedro Caeiro and Miguel Ângelo Lemos

1. Context

On 5 September 2001, the European Parliament passed a recommendation on the role of the European Union (EU) in "combating" terrorism, calling on the Council to adopt a framework decision with a view to, *inter alia*, "approximating legislative provisions establishing minimum rules at European level relating to the constituent elements and penalties in the field of terrorism" [1]. Less than a week later, the attack on New York was carried out and, within two weeks, the European Commission presented a Proposal for a Council Framework Decision on combating terrorism [2], which was adopted, with modifications, in June the following year [3]. As expected, the proposal made extensive reference to the attacks in the USA and recalled that the "legal rights affected by [terrorist offences] are not the same as legal rights affected by common offences". Consequently, the criminalisation of terrorist offences as autonomous crimes was deemed indispensable for "preventing and combating (…)

* The authors wish to thank Prof. Anne Weyembergh for her useful critical remarks on an earlier version of this text.

[1] European Parliament recommendation on the role of the European Union in combating terrorism (2001/2016 (INI)), *OJ*, no. C 72 E, 21 March 2002, p. 135. For a more detailed analysis of the background of European law on terrorism, see F. Galli and A. Weyembergh, "Introduction", *in* Id. (eds.), *EU counter-terrorism offences. What impact on national legislation and case-law?*, Bruxelles, Editions de l'Université de Bruxelles, 2012, p. 13, with further references.

[2] Proposal for a Council Framework Decision on combating terrorism, COM (2001) 521 final, 19 September 2001.

[3] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3.

terrorism", as a means of achieving the EU objective of providing citizens "with a high level of safety within an area of freedom, security and justice" [4].

The proposal observed that there were significant differences in the national legal frameworks for the prevention and repression of terrorist offences in several EU Member States (MS). In fact, according to the Commission, only six MS punished terrorist offences as such. Hence, taking into consideration the competence provided for in Articles 29 and 31(1)(e) of the Treaty on the European Union (TEU), which already referred explicitly to terrorism, the adoption of a framework decision for the approximation of the substantive laws of MS was both legitimate and necessary so as to establish a common EU response to a common problem and also to facilitate judicial and police cooperation among the MS in that regard [5].

The Council Framework Decision of 13 June 2002 on combating terrorism (2002 FD) included a definition of the minimum elements of crimes (*terrorist offences* and *terrorist group offences*) and minimum thresholds for maximum penalties. It is clear that the EU was competent to legislate on those issues under Article 31(1)(e) since the "field" of terrorism certainly includes terrorist group offences as well as public provocation to commit a terrorist offence, recruiting and training for terrorism, which were later introduced in Article 3 of the 2002 FD [6]. It also imposed minimum grounds of jurisdiction and the obligation for MS to investigate and prosecute those offences *ex officio* (*i.e.* irrespective of a report or accusation by possible victims), pursuant to Article 34 (2)(b) TEU [7].

Concerning the original *terrorism-linked offences* (aggravated theft, extortion and drawing up false administrative documents with a view to the perpetration of a terrorist offence), the situation is different as they are *not* terrorist offences and cannot be seen as pertaining to that "field". The 2002 FD does not define their constituent elements but imposes on MS the duty to consider them as "terrorism-linked offences", which is, to say the least, an obscure obligation. In practical terms, the FD purported to extend to those offences the norms relating to penalties (Article 5(1) – but not 5(2)) and (optional) mitigation, liability of legal persons, jurisdiction and prosecution *ex officio*.

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[4] Article 29 of the Treaty on European Union, in the version then in force (TEU).

[5] See G. DE KERCHOVE, "Impact de l'incrimination de terrorisme sur la coopération européenne en matière de lutte contre le terrorisme", *in* F. GALLI and A. WEYEMBERGH (eds.), *op. cit*., p. 216; and R. GENSON, "How far do the new EU counter-terrorism offences facilitate police cooperation?", *ibid.*, p. 222.

[6] See *infra*.

[7] Under Article 34(2)(b), the EU was competent to approximate, through framework decisions, the "laws and regulations of the Member States", including procedural and jurisdictional rules, whenever that might contribute to "the pursuit of the objectives of the Union" (Article 34(2) TEU), except for the incriminations and sanctions, the approximation of which was restricted to the domains designated in Article 31(1)(e). Through interpretation, it should be concluded that the imposition of minimum grounds of jurisdiction was also limited to those domains, unless the EU acted under Article 31(1)(d), with a view to preventing negative conflicts of jurisdiction (see P. CAEIRO, "Commentary on the 'European touch' of the Comparative Appraisal", *in* A. KLIP (ed.), *Substantive Criminal Law of the European Union*, Antwerp, Maklu, 2011, p. 125).

Even if such an extension applies only when those crimes are committed with a view to perpetrating terrorist offences, one might question the competence of the EU to legislate in this area pursuant to Articles 31(1)(e) TEU and 34(2)(b), since they retain their status as "non-terrorist" offences both in their legal definition and in its application (convictions for common offences). On the other hand, it might be argued that the EU could legitimately legislate on the punishment of preparatory acts of terrorist offences and terrorist group offences *in general* (as they are still "constituent elements of criminal acts" in the "field" of terrorism) and it would therefore seem nonsensical that such competence ceased when those acts are *also* crimes *per se*.

However, for a given conduct to qualify as preparatory acts for a concrete offence, all the required *subjective* elements of the prepared offence must be present (in most cases, those elements are actually essential to determine *which* offence is being prepared). Consequently, terrorism-linked offences can only be considered as preparatory acts of terrorist or terrorist group offences – and, hence, under the prescriptive jurisdiction of the EU – when the aggravated theft, extortion, etc., are already part of a plan to commit a *concrete* terrorist or terrorist group offence. If that is not the case, the acts should be deemed not to be included in the scope of the FD.

Finally, according to the minimum rules scheme, the states retained the power to maintain or pass new legislation containing broader incriminations or grounds of jurisdiction as well as higher penalties.

In 2007, the Commission submitted a Proposal for a Framework Decision amending the 2002 FD [8]. The new instrument aimed at criminalising public provocation to commit a terrorist offence, recruitment and training for terrorism. In the Commission's view, that kind of conduct had become particularly dangerous because it now had global reach thanks to the use of modern technologies such as the internet.

Although the duty to criminalise those acts already existed under the Council of Europe Convention on the Prevention of Terrorism (2005), the Commission found it "important" to include them in the FD so that they would be subject to "the more integrated institutional framework of the European Union (…), the specific legal regime [of the FD], in particular in respect of the type and level of criminal penalties and compulsory rules on jurisdiction" and the "cooperation mechanisms referring to the Framework Decision".

The second Framework Decision was eventually adopted by the Council in 2008 (2008 FD) [9], pursuant to Article 31(1)(e) TEU [10].

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[8] Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism (presented by the Commission), COM (2007) 650 final, 6 November 2007.

[9] Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 330, 9 December 2008, p. 21.

[10] See *supra*.

2. Content of the 2002 FD (as amended)

A. Elements of the offences (mandatory minimum incrimination)

1. Terrorist offences

The 2002 FD was quite "ambitious"[11], since it could not base itself on a pre-existing, comprehensive and commonly agreed definition of terrorism as a criminal offence, either at the European or at the international law level[12]. Nevertheless, the structure of the terrorist offences established in the FD seems to have taken inspiration from Article 2(1)(b) of the UN Convention for the Suppression of the Financing of Terrorism (1999).

In fact, Article 1, 2002 FD provides for a comprehensive definition of terrorist offences, according to which the intentional acts referred to in Article 1(1)(a) to (i) (the list of "underlying offences", harming or endangering life or limb, or personal freedom, as defined in MS criminal law) shall be deemed to be terrorist offences if two other elements are present. The *objective* element consists of the requirement that the acts, given their nature or context, be capable of seriously damaging a country or an international organisation. Regarding the *subjective* element, the acts must be guided by one of the following specific purposes ("terrorist intent"): seriously intimidating a population; unduly compelling a government or international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the

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[11] E. Dumitriu, "The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism", *German Law Journal*, 5, 2004, p. 585 f.

[12] The eight United Nations conventions and protocols passed between the early 1960s and the early 1990s concerning conduct that might be deemed as terrorist offences do not even use the term 'terrorism' (see A. Cassese, *International Criminal Law*, 2nd ed., 2008, p. 169 f.). As the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism has never entered into force, the European Convention on the Suppression of Terrorism (1977) was the first international binding normative instrument explicitly directed against terrorism. However, in spite of that, it did not provide for a *specific* and *autonomous* definition of terrorism as a discrete criminal offence. Terrorism is a crime under customary international law when it amounts to a war crime or a crime against humanity (A. Cassese, *ibid*., p. 171 f.). Save for those cases, the question of whether terrorism qualifies as an international offence in time of peace under customary law remains controversial: for an affirmative answer, see A. Cassese, *ibid*., p. 162 f., as well as the recent decision of the Appeals Chamber of the Special Tribunal for Lebanon (UN Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, 16 February 2011). This stance has been convincingly criticised by a number of authors: see, before the decision of the Special Tribunal, G. Werle, *Principles of International Criminal Law*, 2nd ed., The Hague, TMC, 2009, p. 30, marginal number 85, and T. Weigend, "The Universal Terrorist. The International Community Grappling with a Definition", *JICJ*, 4, 2006, p. 915; and, afterwards, B. Saul, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism", *LJIL*, 24, 2011, p. 677. In a similar direction, K. Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?", *LJIL*, 24, 2011, p. 670, to whom terrorism is not (yet) a crime under international law, but may be "on the brink" of becoming one.

fundamental political, constitutional, economic or social structures of a country or an international organisation.

The use of the indefinite article "a" to indicate the possible targets of terrorist offences (*a* population, *a* country, *a* government or *an* international organisation) significantly widens the ambit of protection of traditional anti-terrorism law, which was bound, in most jurisdictions, to the nation state and its population. Together with the common (minimum) definition of terrorist offences, the punishment of European and international terrorism – directed against the Union itself (its institutions, bodies and agencies), as well as other states, together with their nationals and residents – is certainly one of the most relevant features of the FD.

In this regard, the foreign or transnational nature of the protected interests (relating to the contents of the *fattispecie*) should not be confused with the extraterritorial scope of the norms (relating to the reach of a given penal law system).

2. Terrorist group offences

Article 2 provides for a definition of terrorist group offences. MS have the obligation to incriminate the act of *directing* or *participating* (including funding) in the activities of a structured group of more than two persons, established over a period of time, acting in concert to commit terrorist offences. The same norm defines "structured group" as one that "is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".

3. Terrorism-linked offences

Article 3 contains a list of offences linked to terrorist activities comprising aggravated theft or extortion with a view to committing a terrorist offence as well as forgery of administrative documents with a view to committing a terrorist offence (except where the underlying offence is threats) or to participate in a terrorist group.

In the view of the drafters of the FD, the ultimate terrorist purpose of those acts justifies that they be treated, in some aspects, as if they were terrorist offences.

The 2008 FD has extended this list so as to encompass the offences set out in the Council of Europe Convention on the Prevention of Terrorism (2005), *i.e.* public provocation to commit a terrorist offence; recruitment for terrorism (soliciting another person to commit terrorist offences or terrorist group offences); and training for terrorist offences. The obvious (and dangerous) proximity of those "new offences" to the exercise of fundamental rights and freedoms has led the drafters to state emphatically, in Article 2, that measures to be taken by the MS cannot contradict fundamental principles relating to freedom of expression and freedom of the press.

4. Incitement, complicity and attempt

Article 4 of the FD establishes that MS shall provide for the punishment of inciting (except for the "new offences"), aiding or abetting any of the previous offences, as well as the attempt to perpetrate terrorist offences (except where the underlying offence consists of possession of weapons or explosives, or of threats to commit a terrorist offence) or terrorist-linked offences (except for the "new offences").

5. Legal persons

Article 7 of the 2002 FD provides for the (criminal or administrative) liability of legal persons for the preceding offences, entailing the penalties set forth in Article 8, as long as they are committed for their benefit by "any person (…) who has a leading position within the legal person", based on "a power of representation of the legal person, an authority to take decisions on behalf of the legal person [or] an authority to exercise control within the legal person".

B. Sanctions (mandatory features and minimum levels)

The sanctions applicable to all three categories of crimes should be effective, proportionate and dissuasive, allowing for extradition proceedings.

In the case of terrorist offences, they should also be heavier than those applicable to the underlying offences (common murder, kidnapping, etc.) so as to reflect the specificity of the terrorist (objective and subjective) elements, save where the former are already punishable with the maximum penalties provided for by national law.

As for terrorist group offences, the European legislator set minimum maximum custodial sentences: not less than fifteen years imprisonment for "directing" the terrorist group (or eight years in the case where the group purports only to produce threats with terrorist intent), and not less than eight years for "participating" in its activities.

C. Jurisdiction (mandatory grounds of jurisdiction)

Article 9 imposes on MS the duty to establish certain grounds of jurisdiction: territoriality; flag (of the vessel) or registration (of the aircraft); active nationality or residence of the offender, or place of establishment of the legal person for whose benefit the offence is committed; protection (institutions or population of the MS and European institutions and bodies based in that MS); and surrogate (vicarious) jurisdiction (on refusal of extradition or surrender).

D. Investigation and prosecution

The 2002 FD imposes on MS the duty to investigate/prosecute the three categories of offences *ex officio*, *i.e.* irrespective of a report, complaint or accusation by possible victims.

E. Powers conferred on Member States

Alongside the preceding obligations, the FD includes some options for the MS, namely the powers to extend their jurisdiction over offences perpetrated in the territory of another MS (a sort of European territoriality); to reduce the punishment for offenders who renounce their activity and cooperate with the authorities; and to incriminate the attempt to recruit or to train for terrorist offences.

3. Impact on domestic law

The impact of a framework decision (or a directive) on the criminal law of a particular MS should not be assessed through a straight comparison between the text of the European act and the relevant national law and case law, examining semantic

correspondence to ascertain compliance. Impact is better described as a process, which encompasses all the decisions taken by national authorities regarding the implementation of European law.

In fact, the specific feature of framework decisions and directives (in criminal matters) is that MS are called upon to: (i) check whether their laws make it possible for the (binding) "results" set in these legal acts to be achieved and, if that is not the case, (ii) adopt the adequate legislative measures to that effect, choosing the "form and methods". Both moments are part of the impact process and were deliberately designed for the MS to interpret the European acts, assess their own legal system and proceed with legislative action.

Section A below addresses two problematic issues in the transposition of the 2002 FD. In the first case, national authorities and the European Commission have actually expressed divergent views on the binding content of the FD. In the second one, a thorough interpretation of the FD in the light of the Treaties might have led to the same result. Under the legal framework then in force, disagreement about the interpretation of FDs in general could not be adjudicated by the European Court of Justice in infringement proceedings[13]. The absence of an impartial third party endowed with the power to state the correct interpretation of secondary legislation with authority left the disagreement unsettled at a normative level: MS might stick to their own construction of what the "binding results" were, as they actually did, covered (at least at a formal level) by the exercise of their legitimate powers. At worst, this stance could only be subject to a political assessment by the Council[14]. Hence, from an EU perspective, it could be upheld that the margin of discretion left to the MS in the implementation of framework decisions should be as narrow as possible so as to avoid 'legitimate' discrepancies to the maximum extent.

On the other hand, the obligation to put in place hard-hitting norms whose impact cannot be "cushioned" and adapted to national environments has sometimes prompted imbalances rather than harmonisation. Section B describes one of these cases.

The Treaty of Lisbon has abolished framework decisions and has replaced them with directives. This means that defective transposition of EU acts in criminal matters can now give rise to infringement proceedings. In the current legal context, there is much less of a risk of the defective transposition of an EU act continuing for a

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[13] Regarding framework decisions, the Commission observes: "Whereas the Commission has within the first pillar the authority to start an infringement procedure against a Member State this possibility does not exist within the TEU. (…) Nevertheless, as the Commission fully participates in third pillar matters, it is coherent to confer on it a task of a factual evaluation of the implementation measures enabling the Council to assess the extent to which Member States have taken the necessary measures in order to comply with this Framework Decision" (Report from the Commission based on Article 11 of the Council FD of 13 June 2002 on combating terrorism, COM (2004) 409 final, 8 June 2004, p. 5).

It should be noted that the tighter scrutiny by EU bodies to which the implementation of directives is subject does not affect the *existence* of MS powers in that realm, only the competence to define their scope and boundaries.

[14] See Article 11(2) 2002 FD and Council document 11687/2/04 REV 2 DROIPEN 40, 12 October 2004.

long period of time. Hence, it is argued that such a risk should not play a role in determining the extent to which MS should be accorded a margin of discretion in the implementation of directives in criminal matters.

A. Construing "binding results"

1. Labelling terrorist offences

The sharing of competence between the EU and the MS described above might attract divergent views on what should be deemed as a "binding result", especially when, as is the case, framework decisions/directives are designed to set a comprehensive common regime, where partial lack of transposition might compromise the "result" as a whole [15].

A good example is the debate over the existence of an obligation to incriminate terrorist offences as a separate set of crimes and branding them with that label [16]. Article 1(1) of the 2002 FD establishes that "each Member State shall take the necessary measures to ensure that [the designated acts] *shall be deemed to be terrorist offences*". In this particular case, the several linguistic versions of the norm seem to have, *ne varietur*, the same meaning [17]: the FD requires MS to consider the listed acts *to be* terrorist offences as soon as the specific elements are present. In other words, domestic legislation cannot limit itself to punishing those acts: it must reflect the *change of nature* of common offences to terrorist crimes and name them as such.

In the authors' view, there is merit in the contention that this is a "result" that is binding on MS. Singling out terrorist offences and giving them an autonomous status *vis-à-vis* the underlying 'common' offences plays a threefold role. In the first place, it differentiates, at a normative level, conduct that is inherently different – not only in its subjective elements, but also in respect of the harmed or endangered legal interests [18] – and should be treated as such. In the second place, and as a consequence, it allows for the expression "terrorist offences" to become an essential "anchorage

[15] "Partial or inexistent implementation of an article or part of an article will also reflect on linked provisions that considered independently might seem to comply with the requirements of the Framework Decision and will affect the system as a whole" (Report from the Commission, 2004, *op. cit*., p. 5). Nevertheless, the circumstance that the result intended is a "system as a whole" does not preclude the need to establish the competence of the EU to legislate on each "partial" result (constituent elements of the offences, penalties, jurisdiction, etc.).

[16] See Report from the Commission, 2004, *op. cit*., p. 5; and M. Böse, "The impact of the Framework Decision on combating terrorism on counterterrorism legislation and case law in Germany", *in* F. Galli and A. Weyembergh (eds.), *op. cit.*, p. 66 f., with further references.

[17] "*(...) als terroristische Straftaten eingestuft werden (...)"; "(...) pour que soient considérés comme infractions terroristes (...)"; "(...) siano considerati reati terroristici (...)"; "(...) worden aangemerkt als terroristische misdrijven (...)"; "(...) sejam considerados infracções terroristas (...)"; "(...) skall betraktas som terroristbrott (...)*".

[18] See *supra*.

point" to which other norms (on penalties [19], jurisdiction [20], judicial cooperation, etc.) refer [21]. Last but not least, naming terrorist offences as such helps in ensuring that the special (or even exceptional) rules that apply to them do not extend to the "common" underlying offences – provided, of course, that the label is not subject to manipulation and abuse [22].

Nevertheless, the negative effects of not incriminating terrorist offences as such on the establishment of a common regime on the prevention and repression of terrorism should not be overestimated. Despite the extensive approximation sought by the FDs, national laws remain significantly different because many of them go beyond the scope of the European definition. In some cases, the existing domestic notion of terrorist offences already complied with the 2002 FD and needed no specific amendment [23]. In other cases, MS took the opportunity to pass laws that reach far beyond that concept [24].

Consequently, if it is true that the failure to single out terrorist offences and name them as such can hamper the creation of a European *core regime* of terrorist offences, it is nonetheless also true that domestic legal systems might contain *other* terrorist offences subject to *other* rules, leading to a sort of dual regime on terrorism (European *versus* national sources of law), which clearly undermines harmonisation. When such a dual regime does not exist, the broader definition of terrorist offences in national law ends up making the 'European regime' applicable to an array of criminal acts *considerably wider* than those intended by the FD. In this respect, it should be noted that this spillover effect is of immediate European concern, namely the extended application of the rules on (optional) extraterritorial jurisdiction over acts committed

[19] As said, the FD imposed the obligation to punish terrorist offences more severely than the underlying offences, which means that the sanctions applicable to the former should be separate and higher than those applicable to the latter so as to ensure that a terrorist offence can be punished more harshly than the gravest act subsumable to the corresponding underlying offence.

[20] See *infra*.

[21] J. Vestergaard, "Denmark: criminal law as an anchorage point for proactive anti-terrorism legislation", *in* F. Galli and A. Weyembergh (eds.), *op. cit*., p. 169.

[22] P. Caeiro, "Concluding remarks", *ibid.*, p. 308 f.

[23] Namely, France, Germany, Spain and the United Kingdom – see, respectively, the assessments of the national rapporteurs, *in* F. Galli and A. Weyembergh (eds.), *op. cit.*: H. Labayle, "Les infractions terroristes en droit pénal français. Quel impact des décisions-cadres de 2002 et 2008?", p. 62 ; M. Böse, "The impact of the Framework Decision on combating terrorism on counterterrorism legislation and case law in Germany", p. 77; M. Cancio Meliá, "The reform of Spain's antiterrorist criminal law and the 2008 Framework Decision", p. 108; and J. Spencer, "'No thank you, we've already got one!' Why EU anti-terrorist legislation has made little impact on the law of the UK", p. 119.

[24] *E.g.*, Austria: see R. Kert, "Austrian counter-terrorism legislation and case law", *in* F. Galli and A. Weyembergh (eds.), *op. cit.*, p. 134.

in the territory of other MS [25] and on surrender *not* subject to the control of dual criminality [26].

In short, failure to incriminate terrorist offences separately and label them as such may lead to the defective transposition of the FD as a whole, but it should be seen as relatively minor damage inflicted on a common regime on terrorist offences that barely exists.

2. Interpreting framework decisions in the light of the EU Treaties

Transposition is primarily about interpretation. As with any other legal act, framework decisions and directives must be interpreted in the light of the constitutional setting to which they belong. In this respect, one of the most challenging features of the framework decisions' impact on national law is the need to put together (i) the incrimination of domestic, European and international terrorist offences, (ii) the required grounds of jurisdiction and (iii) the competence of the EU to legislate on those matters.

As outlined above, according to Article 1 of the FD, the intentional acts listed in Article 1(1)(a) to (i), as defined under national law, shall be deemed terrorist offences if, given their nature or context, "they may seriously damage a country or an international organisation" (objective element) and if "they are 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 structures of a country or an international organisation (subjective element) [27].

The legal interests protected by this incrimination seem to range from traditional internal public peace within a country to world peace, where the entities against which the offences are perpetrated [28] bear no link whatsoever with the EU or the MS. However, the universal dimension of the protection apparently provided by the FD must be confronted with the powers assigned to the EU in criminal matters, bearing in mind the principle of conferral [29]. In fact, and notwithstanding the growing external

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[25] Article 9(1)(a) 2002 FD.

[26] Article 2(2) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

[27] The argument developed in the following considerations also applies, *mutatis mutandis*, to terrorist group offences, since they are defined as groups of persons who "act in concert to commit terrorist offences".

[28] Traditionally, the analysis of terrorist offences distinguishes between primary targets (the concrete victims against whom the violent act is directed) and secondary targets (the state or populations that the act is intended to threaten or terrorise). In the past, the latter equalled the nation state and the resident population. Yet, with the criminalisation of international terrorism, the entities that can be "seriously damaged" might not coincide with the ones that the offender intends to compel, terrorise, etc.: a terrorist bombing directed against a state (secondary "immediate" target) might be intended to compel, say, the International Monetary Fund (secondary "ultimate" target) to take a certain decision, and *vice-versa*.

[29] In *Lindqvist* the European Court of Justice ruled: "Consequently, it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent

dimension of the area of freedom, security and justice (AFSJ) [30], there is considerable doubt as to whether the EU can impose on MS the obligation to protect third states or international organisations *through criminal law* without further requirements.

The Union's powers relating to the prevention and repression of crime in general, and terrorism in particular, are exercised with the purpose of providing citizens with a high level of security within a common area of freedom, security and justice [31]. Unlike certain international organisations that enjoy an unrestricted scope of action (*e.g.* the United Nations) – but not legislative powers of the same kind – the EU must bind its intervention to the protection of the AFSJ. In this sense, the AFSJ is a parameter that serves both to justify and to limit the obligations deriving from the FDs.

Therefore, the EU has a legitimate claim to impose on MS the incrimination of terrorist offences that jeopardise the AFSJ in any way: those that might impinge upon the MS and their population or the EU institutions or bodies (either as primary or secondary, immediate or ultimate targets), wherever they are committed, and those that, albeit targeting third states, are committed in European territory. In all those cases, it can be said that the terrorist offences affect, directly or indirectly, the AFSJ – or, more accurately, the public peace that should be enjoyed by the population residing in that space. It should be stressed that this reasoning does not relate, at all, to the jurisdictional issues dealt with in Article 9 of the 2002 FD: at this stage, we are still in the process of characterising the powers of the EU to define the ambit of protection of MS criminal law against terrorist offences (the content of the incriminations).

If we take one step further, 'international terrorism' (whatever the content of that expression might be) is said to endanger every state and international organisation, which would offer a sound basis for EU action in this field as an indirect way to protect the AFSJ. Nevertheless, one might question whether the EU enjoys the competence to impose on MS the obligation to punish *concrete* terrorist offences perpetrated outside the AFSJ that do not affect, in one way or the other, the MS, European institutions or population. In fact, if one assumes that terrorism is not a discrete crime under international law [32], the punishment of terrorist offences that do not have the remotest link to the AFSJ can only rely on an offender-centred (as opposed to act-centred) type of criminal law: "a terrorist is a terrorist", etc. [33]. Apart from being inherently illegitimate, such an approach is arguably outside the scope of

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with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order *or with the other general principles of Community law*" (emphasis added). See ECJ, 6 November 2003, Judgement C-101/01, *Lindqvist*, ECR, p. I-12971, para. 87.

[30] See J. Monar, *The External Dimension of the EU's Area of Freedom, Security and Justice. Progress, potential and limitations after the Treaty of Lisbon*, SIEPS, 2012, 1; and V. Mitsilegas, "The European Union and the Globalisation of Criminal Law", *Cambridge Yearbook of European Legal Studies*, 12, 2009-2010, p. 337 f.

[31] Article 67 TFEU.

[32] See *supra*.

[33] See M. Cancio Meliá, *Los Delitos de Terrorismo: Estructura Típica e Injusto*, Madrid, Reus, 2010, p. 23.

EU *legislative competence in criminal matters* even if it might guide certain *political initiatives* directed against international terrorism at large [34].

In sum, should the answer to the competence question be in the negative, Article 1(1) of the 2002 FD would be partly *ultra vires* and could be construed restrictively by the legislators of the MS, in accordance with the competence assigned to the EU in Articles 29 and 31(1) TEU.

In light of the preceding considerations and turning now to the jurisdictional rules laid down in Article 9 of the 2002 FD, which define the reach of the substantive norms, there should be no obstacles to the transposition into national law of Article 9(1)(a), (b) and (e) of the 2002 FD, which embody, respectively, the rules of territoriality, flag (of the vessel) / registration (of the aircraft) and national / European protection. In respect of the latter, one might regret that the FD has limited extraterritorial jurisdiction by reserving it to the MS in which the European institution or body is based [35]. This is one of the few cases where an EU-wide assignment of extraterritorial jurisdiction to all MS would be clearly justified: all MS should be able to prosecute and try extraterritorial offences perpetrated against the Union because all are affected by them in the same manner [36].

Yet, if we accept the answer suggested *supra*, regarding the lack of competence of the EU to protect third states against terrorist offences committed in non-European territory, a different conclusion might be drawn in respect of Article 9(1)(c) and (d) (respectively, extraterritorial jurisdiction over offences committed by nationals or residents, or for the benefit of a legal person established in the MS). Both suppose offences perpetrated outside the area of freedom, security and justice, with no link to European targets (the full protection of the latter is provided already by the protective principle). Consequently, it can be argued that the jurisdictional rules referring to that part of the incrimination have no object and cannot be seen as a "binding result" either.

Member States may, if they deem it adequate, implement (or even go beyond) the solutions provided by the EU without the necessary competence, as long as, in doing so, they do not contravene international law. But, in that case, they will be implementing their own law, which will remain at their disposal for modification or repeal.

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[34] See V. MITSILEGAS, *op. cit*., p. 407: "The abolition of the pillars does not avoid uncertainty with regard to whether EU external action on terrorism falls under criminal law or foreign and security policy (…)".

[35] Arguably, MS can extend, on their own, the protection rule to (extra-European) terrorist offences against the EU, which would certainly be seen as compatible with international law.

[36] Instead, the optional ground of jurisdiction provided for in Article 9(1)(a) (offences committed in the territory of other MS) should have been avoided because it constitutes a useless violation of Article 31(1)(d) TEU, which sets the prevention of conflicts of jurisdiction as an objective (or a feature, depending on the linguistic versions of the Treaty) of the "common action in judicial cooperation in criminal matters": see P. CAEIRO, *op. cit.*, p. 130.

B. Minimum sanctions

Although this is not the place to delve into a general theory of punishment, some of its aspects are of direct interest here. It is well known that the establishment of applicable penalties is determined via a normative "calculation" that relates the offence and the sanction according to the fundamental principle of proportionality. In a sense, this judgement has an absolute nature because it represents a (normative) correspondence between two entities and does not therefore refer to a third party: *e.g.* life imprisonment (or twenty-five years imprisonment) as a maximum applicable penalty might be seen as proportional to the gravity (*lato sensu*)[37] of genocide.

However, within a legal system that provides for the punishment of offences of diverse gravity, proportionality also has a "relative" dimension[38], comparing the penalties applicable to those offences so as to attain a balanced – and, thus, just[39] – global result[40]. Each system sets its own minimum and maximum thresholds for punishment and all the offences have their place on that scale, in a (potentially) coherent whole[41].

Article 5(3) 2002 FD 2002 provides for quantitative minimum (maximum) thresholds of the penalties applicable to directing or participating in a terrorist group (respectively, fifteen years[42] and eight years imprisonment). The obligation for the MS to implement those minimum penalties is clear and definitive.

Still, one is left to wonder how the EU legislator has reached those values. Why fifteen years imprisonment, and not twenty, or ten? The question is relevant because the EU cannot follow the same procedure applicable in domestic law as there is no such thing as a European system of penal sanctions, *i.e.* a European parameter that might endow those penalties with a position – a *meaning* – in the proportionality scale. True, these offences are defined by European law and the EU is certainly entitled to express its (binding) view on the severity of the applicable punishment. However, the norms that *actually* punish terrorist offences are also part of twenty-seven national legal systems with quite diverse penal scales. A maximum penalty of fifteen years

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[37] For the purpose of this study, it is irrelevant whether proportionality of the penalty should refer to the gravity of the offence/guilt of the offender (as propounded by retributive theories), or rather, as the authors would prefer, to the prevention of crime (deterrence, restatement of the validity of the violated norm, etc.): in a system governed by the rule of law, all punishment should be subject to the principle of proportionality, irrespective of the theoretical approach one might follow.

[38] J. DE FARIA COSTA, *Direito Penal Especial. Contributo a uma Sistematização dos Problemas "Especiais" da Parte Especial*, Coimbra, Coimbra Editora, 2004, p. 57.

[39] In Dante's famous formula, "*ius est realis et personalis hominis ad hominem proportion*" (D. ALIGHIERI, *De Monarchia*, Liber II, 5.1).

[40] This is what Romance languages call *perequação* (*péréquation*, *perequazione*), from the latin *peræquatio* (equal distribution): see J. DE FARIA COSTA, *op. cit.* A similar argument is developed by P. ASP, *The Substantive Criminal Law Competence of the EU*, Stockholm, 2012, p. 199 f., using the concepts of "ordinal" (relative) and "cardinal" (absolute) proportionality.

[41] On the principle of coherence (*rectius*: the principle of respect for the coherence of national systems), see EUROPEAN CRIMINAL POLICY INITIATIVE, "A Manifesto on European Criminal Policy", *ZIS*, 2009, p. 709; and, in more detail, P. ASP, *op. cit.*, p. 206 f.

[42] Or eight years if the group purports to commit terrorist threats only.

imprisonment is unlikely to have the same meaning in Italy or Portugal as in Sweden or the Netherlands.

If differences in the concrete application and execution of the penalties among the MS (and the inherent "unequal" treatment) can be written off as costs of (limited) harmonisation (as opposed to unification) – they are not concerned by approximation –, the same cannot be said when a European act sets a minimum maximum penalty that, in the abstract, corresponds to the harshest sanctioning level in one MS and to the lower half of the scale in the other. In short, setting minimum quantitative thresholds can lead to fake harmonisation because the relevance given to the same offence will vary from MS to MS, according to each one's penal scale [43].

As the first signatory of this study has argued elsewhere, European legislation on applicable penalties could avoid those shortcomings by following a three-step procedure.

In the first place, the EU should establish, by means of a directive, a three or four-position *general* penal scale (light, medium, serious and most serious penalties), imposing on MS the obligation to pass legislation in order to fill in those categories with values drawn from their own systems [44]. Once this equivalence is implemented in the MS, the EU will be able to impose on MS the obligation to ascribe, *e.g.* (at least) "serious penalties" for a given offence, and this assessment will prevail over any possible national evaluation tending to provide for more lenient penalties. Finally, the European concept of "serious penalties" will be transposed, in each MS, according to the previously defined national parameters.

The obvious advantage of such a mechanism of double qualification, or double determination, lies in the circumstance that the European assessment of the gravity of punishment would still be uniform and binding on the MS, ensuring at the same time a kind of *perœquatio* at the European level. Actually, this mechanism is already present in the definition of some elements of criminal offences: for instance, if a European act provides for the punishment of attempt, or complicity, it is for the national systems to fill in those *forms* [45]. At the end of the day, depending on the *applicable* national law, the same conduct can be considered as (punishable) attempt or as (non-punishable)

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[43] H. SATZGER, *Internationales und Europäisches Strafrecht. Strafanwendungsrecht. Europäisches Straf- und Strafverfahrensrecht. Völkerstrafrecht*, 4. Aufl., Baden-Baden, Nomos, 2010, p. 123, marg. nº 45.

[44] *E.g.* the category 'light penalties' corresponds to imprisonment for a maximum of one year or a fine, 'medium penalties' to imprisonment for a maximum of five years and so forth. This mechanism is conceived for minimum maximum penalties, but can also be adapted, *mutatis mutandis*, to minimum minimum thresholds – or, should there be a most welcome change in the "minimum rules" competence set in the Treaties, to maximum (minimum and maximum) penalties.

[45] Double qualification might even be required for a proper construction of the relationship between jurisdiction (of an internationalised court) and the applicable (domestic) substantive norms: see P. CAEIRO, "Commentary", *in* A. KLIP and G. SLUITER (eds.), *Annotated Leading Cases of the International Criminal Tribunals. Timor Leste. The Special Panels for Serious Crimes 2001-2003*, vol. 13, Louvain-la-Neuve, Anthemis, 2008, p. 823.

preparatory acts – but that does not hamper the European law's aim of punishing *attempt*.

It might be objected that the EU has no competence for adopting a directive aimed at the harmonisation of penal sanctions *in the abstract*, but solely for establishing "minimum rules" concerning the applicable penalties in the fields designated in Article 83(1) and (2). The authors do not share that view. First, a directive with the said content could certainly be seen as a minimum rule (in the sense of a pre-condition) concerning "the definition of (…) sanctions" in the fields subject to approximation. Secondly, the general scope of the directive would not infringe upon that material limitation because it would not entail *per se*, in any sense, an obligation to modify the penalties provided for by the MS systems, which would first emerge with the specific definition, by the means of a directive, of actual sanctions applicable to the offences under the EU's (prescriptive) jurisdiction.

Content and impact of approximation
The case of drug trafficking

Robert Kert & Andrea Lehner

1. Introduction

In 2004, the Council of the European Union adopted the Framework Decision (FD) 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [1]. The provisions of the FD had to be transposed into national legislation by 12 May 2006. The European Commission is now exploring the possibility of replacing the FD in order to step up the fight against illicit drug trafficking. In September 2011, the Commission therefore gave the European Criminal Law Academic Network (ECLAN) the task of preparing, together with the consultancy Ecorys, a *Preparatory study for an impact assessment on a new legislative instrument on illicit drug trafficking*. A key element of the study was an *evaluation of the functioning of the FD* across EU Member States (MSs) and at the EU level. The study not only focused on the Framework Decision but also analysed the way in which the legal framework in the field of illicit drug trafficking functions in general and identified strengths and gaps, including elements that are related to the FD but are primarily covered by horizontal legislation (*e.g.* participation in criminal organisations or confiscation). The data in the following chapters is based on information which was collected while this study was being put together [2].

[1] *OJ*, no. L 335, 11 November 2004, p. 8.

[2] The two reports with the results of the study (Report on the evaluation of the transposition and impacts of the FD 2004/757/JHA on drug trafficking; Preparatory study for an impact assessment on a new legislative instrument replacing the Council Framework Decision on illicit drug trafficking) were published by the Commission in the EU bookshop (http://bookshop.europa.eu).

Using the ECLAN network, national experts in all 27 MSs wrote reports in response to a comprehensive questionnaire on their national drug trafficking legislation systems. The aim was to identify the strengths of and the gaps in the different drug trafficking legislation systems. To answer the questions, national experts were obliged to carry out at least four interviews with practitioners from different legal professions in their MS. The starting point for the study was the *Report from the Commission on the implementation of the Framework Decision 2004/757/JHA, laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking*[3] from 2009. But the study was expected to be more detailed and to fill in the gaps in the aforementioned report and to go further by looking not only at the implementation of the FD but also at the legal framework surrounding the implementation legislation and what happened in practice in the prosecution of illicit drug trafficking and the anti-drug trafficking legislation of the MSs as a whole.

2. Council Framework Decision 2004/757/JHA on illicit drug trafficking and the international drug control treaties

Framework Decision 2004/757/JHA on illicit drug trafficking[4] lays down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit trafficking of drugs in order to facilitate a common approach at EU level to the fight against illicit drug trafficking[5].

The term *drug* is defined in Article 1 FD as substances listed under the Single Convention on Narcotic Drugs 1961 (Single Convention) and the Convention on Psychotropic Substances 1971 (Convention 1971). In order to fill existing gaps within the international control mechanism, Article 1 also includes new psychoactive substances which are subject to control under Community legislation, *i.e.* Council Decision 2005 on the information exchange, risk-assessment and control of new psychoactive substances[6]. The European Commission is currently conducting an assessment of Council Decision 2005 to see if it is still an appropriate instrument to cope with the rapidly changing market for new psychoactive substances[7]. *Precursors* are defined as substances scheduled in Community legislation[8] giving effect to the

[3] Report from the Commission on the implementation of Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, COM (2009) 669 final.

[4] Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *OJ*, no. L 335, 11 November 2004, p. 8.

[5] Third Recital, *OJ*, no. L 335, 11 November 2004, p. 8.

[6] Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances, *OJ*, no. L 127, 20 May 2005, p. 32 replaced Joint Action 97/396/JHA of 16 June 1997 concerning the information exchange risk assessment and the control of new synthetic drugs, *OJ*, no. L 167, 25 June 1997, p. 1.

[7] See http://ec.europa.eu/justice/anti-drugs/new-drugs/index_en.htm (status as of 20 December 2012).

[8] See Article 2(a) and Annex 1 of Regulation (EC) no. 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, *OJ*, no. L 47, 18 February 2004, p. 1 and Article 2(a) and the Annex of Council Regulation (EC) no. 111/2005 of 22 December

obligations deriving from the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, 1988 (UN Convention 1988). Thus, the term precursor is primarily based on Community legislation but arises indirectly out of the UN Convention 1988 [9].

In Article 2 the FD defines *offences* linked to trafficking in drugs and precursors. Article 2(1) (a) FD lists, in essence, the production [10], distribution [11] and transport [12] of drugs as criminal offences. Furthermore the mere cultivation of opium poppy, coca bush and cannabis plant is forbidden (Article 2(1) (b) FD), which means that it is not necessary for the purpose of the cultivation to obtain narcotic substances from the cultivation of these plants [13]. The purchase and possession of drugs, if the aim of the perpetrator is to distribute or transport these drugs, is also a behaviour that is punishable (Article 2(1) (c) FD). As regards precursors, Article 2(1) (d) FD criminalises the manufacture, transport and distribution of precursors if the perpetrator knows that they are to be used in or for the illicit production of drugs. All the acts mentioned are only punishable when they are committed intentionally and without the person having the right to carry out the act. A right to, for example manufacture or distribute drugs, may only exist if the Single Convention or Convention 1971 provides for permission to do so [14]. If the conduct mentioned is exclusively committed for the perpetrator's own personal consumption, it is not included in the scope of the FD. Thus, petty offences are excluded from the scope of the FD [15] and it is up to the discretion of the MSs whether to punish activities committed for personal consumption or not.

A comparison with the UN Convention 1988 shows that Article 2 FD reproduces, nearly in identical terms, the provisions laid down in the first four paragraphs of Article 3(1) (a) UN Convention 1988. However, there are some differences. Under the UN Convention 1988 the cultivation of opium poppy, coca bush or cannabis plant shall only be punishable if it is done for the purpose of producing narcotic drugs. As regards precursors, the parties shall, according to the UN Convention 1988, also criminalise the manufacture, transport or distribution of *equipment* and *materials* when this is done in the knowledge that they are to be used in or for the production of drugs. Pursuant to Article 3(1) (c) (ii) UN Convention 1988 the parties shall – subject to their constitutional principles and basic concepts of their

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2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors, *OJ*, no. L 22, 26 January 2005, p. 1.

[9] M. Böse, "para. 20 Drogenhandel", *in* U. Sieber *et al.* (eds.), *Europäisches Strafrecht*, Baden-Baden, 2011, p. 353.

[10] Next to production Article 2(a) FD also lists the manufacture, extraction and preparation of drugs.

[11] Next to distribution also offering, offering for sale, sale, delivery on any terms whatsoever and brokerage are defined as offences.

[12] Furthermore, dispatch, dispatch in transit, importation and exportation of drugs are listed.

[13] M. Böse, *supra* note 8, p. 355.

[14] *Ibid*., p. 355 f. For example under Articles 29 and 30 Single Convention the manufacture and distribution of drugs is permitted, if a license to manufacture or distribute drugs has been issued.

[15] Compare B. Hecker, *Europäisches Strafrecht*, Berlin Heidelberg, 2010, p. 389 and M. Böse, *supra* note 8, p. 356.

legal systems (the so-called 'safeguard clause')[16] – also criminalise the *possession* of equipment, materials or precursors. The possession, purchase or cultivation of drugs for *personal consumption* is also included in the Convention. However, the parties have to implement these activities as criminal offences only if such provisions do not contradict their constitutional principles and basic concepts of their legal systems.

Article 3 FD obliges the MSs to make *incitement* to commit, *aiding and abetting* and *attempting* one of the offences referred to in Article 2 a criminal offence. Regarding offering, preparation or possession of drugs, it is up to the discretion of the MSs to decide if they make the attempt to carry out any of these offences a criminal offence. Article 3(1) (c) (iv) UN Convention 1988 foresees a similar provision.

Moreover, MSs are obliged to take the measures necessary to ensure that the offences are punishable by effective, proportionate and dissuasive *criminal penalties* (Article 4 FD). Beside this general obligation, minimum levels for the upper limit of prison penalties are provided for. Furthermore, the FD contains different *aggravating circumstances* which change the range of penalties. Thus, higher penalties are foreseen if the offence either involves large quantities of drugs, drugs which cause the most harm to health, the offence has resulted in significant damage to the health of a number of persons or has been committed as part of the activities of a criminal organisation. UN Convention 1988 also contains circumstances which shall make the commission of the offence particularly serious. Aside from the involvement in the offence of an organised criminal group to which the offender belongs – which is contained both in the FD and the Convention – the Convention contains a lot of other circumstances which are not included in the FD, such as the use of violence or arms or the fact that the offence is committed in, for example, an educational institution (see Article 3(5) (a)-(h) UN Convention 1988). In Article 5 the FD contains a *mitigating circumstance* which can be described as a so called 'leniency notice'[17]. According to that provision, a MS may reduce the penalties foreseen if the offender renounces criminal activity and provides the authorities with information which they would not otherwise have been able to obtain. However, there is no obligation for the MS to introduce such a provision.

According to Article 4(5) FD, MSs are obliged to take the necessary measures to enable the *confiscation* of drugs and precursors, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities. The UN Convention 1988 in principle contains the same provision on confiscation (see Article 5(1) (a)-(b)) but foresees further rules containing procedural aspects in order to secure confiscation.

Article 6 FD provides for a general provision on the *liability of legal persons,* which is foreseen in many European legal instruments[18]. Generally speaking, it

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[16] See United Nations, Commentary on the United Nations Convention against illicit trafficking in narcotic drugs and psychotropic substances 1988, UN Doc. E/CN.7/590, New York, 1998, p. 72.

[17] M. Böse, *supra* note 8, p. 357.

[18] See for example Second Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial

obliges a MS to take the necessary measures to ensure that legal persons can be held liable for all offences defined in the FD if they are committed for their benefit by a representative of the legal person or by a person under its authority (in the latter case only if the commission of the offence has been made possible due to lack of supervision by a representative). However, the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the mentioned offences. As penalties for legal persons, MSs shall foresee criminal or non-criminal *fines* and may include other sanctions (*e.g.* exclusion from entitlement to tax relief or other benefits, temporary or permanent disqualification from the pursuit of commercial activities) (Article 7 FD).

The provisions on jurisdiction (Article 8 FD) provide for the obligation to establish jurisdiction over all offences listed in the FD where the offence is committed in whole or in part within the MS's territory (territoriality principle). Noteworthy is the fact that situations in which offences are committed on vessels or aircrafts of a MS are not governed by this provision. In addition, a MS should, but is not obliged to, establish jurisdiction over offences which are committed outside their territory and where the offender is one of its nationals or the offence is committed for the benefit of a legal person established in the territory of that MS. In those cases of extra-territorial jurisdiction, the FD allows the MS to waive or limit its jurisdiction (Article 8(2) FD). If a MS makes this decision, it shall inform the General Secretariat of the Council and the Commission about its decision to do so (Article 8(4) FD). Compared to the UN Convention 1988 the standards set in the FD are relatively low. In contrast to the FD, Convention 1988 foresees the mandatory establishment of jurisdiction by a State when the offence is committed on board a vessel flying its flag or on an aircraft which is registered under its laws at the time the offence is committed. Furthermore, the parties to the Convention should, but are not obliged to, establish jurisdiction over offences when they are committed not only by one of states' nationals but also by a person who has his habitual residence in their territory. However, as regards jurisdiction relating to legal persons, the FD introduced a new element compared to the UN Convention 1988.

Article 8(3) FD provides that a MS which, under its laws, does not extradite its own nationals, shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2 and 3 when it is committed by one of its own nationals outside its territory. After the adoption of the European arrest warrant this provision has lost most of its significance, since the FD 2002/584/JHA on the European arrest warrant and the surrender procedures between MSs [19] do not foresee that own nationals are not surrendered. Moreover illicit trafficking in narcotic drugs and psychotropic substances is an offence listed in Article 2 FD on the European arrest warrant, for which it is foreseen that MSs give rise to surrender without verification of the double criminality of the act if the offence is punishable in the issuing MS by a custodial sentence or a detention order

interests, *OJ*, no. C 221, 19 July 1997, p. 12.

[19] *OJ*, no. L 190, 18 July 2002, p. 1.

for a maximum period of at least three years [20]. However, it is unsure whether MSs transposing the FD on the European arrest warrant foresaw ways not to surrender their own nationals. In these cases the provision might have some relevance.

3. Legislation to implement the Framework Decision on illicit drug trafficking

A. Introduction

The report by the Commission on the implementation of the FD indicated that, by the year 2009, the implementation of the FD had not been completely satisfactory [21]. Many MSs reported that they had not amended their current legislation in spite of the requirements of the FD. The majority of the MSs already had provisions in their laws and saw no reason to amend their legislation due to the FD. Thus, the Commission concluded that the FD has had only relatively little impact in the alignment of national measures in the fight against drug trafficking [22].

B. Definitions

1. 'Drugs'

All MSs comply with the definition of the term 'drugs' contained in Art. 1(1) FD. However, MSs have different ways of transposing this provision. Half of them refer to definitions of the relevant UN Conventions [23] and the other half have lists of prohibited substances, which are amended by the parliament or by government regulations if new international or European legislation is adopted [24]. Some of those MSs which refer to UN Conventions and Community legislation also have lists of substances in government regulations making the general definitions more specific.

2. 'Precursors'

The definition of the term 'precursors' according to Article 1(2) FD is sufficiently implemented in the vast majority of the MSs. Similarly to the way in which the MSs have dealt with the implementation of the term 'drugs', one group of MSs provides for a general definition of the term 'precursors' and in the other group of States laws or government regulations contain lists of substances. Only one MS [25] does not criminalise trafficking in precursors at all and thus does not have a definition of 'precursor' in

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[20] For more details see Report from the Commission on the implementation of Framework Decision 2004/757/JHA laying down provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, COM (2009) 669 final, p. 8. According to Article 9(2) FD the Commission had to submit – on the basis of MS' information – a report to the European Parliament and to the Council on the functioning of the implementation of the FD, including its effects on judicial cooperation in the field of illicit drug trafficking by 2009.

[21] The Commission had received information on the implementation of the FD from 21 MSs.

[22] COM (2009) 669 final, p. 10.

[23] AT, BE, BG, CZ, DK, FI, HU, IE, LU, LV, RO and SE. ES only mentions "toxic drugs, narcotics and psychotropic substances" in their laws, but this is interpreted by the Spanish courts as covering all substances included in the Single Convention 1961 and Convention 1971.

[24] CY, DE, EE, FR, GR, IT, LT, MT, NL, PL, PT, SI, SK and UK.

[25] FR.

its laws. Another MS[26] has no concept of precursors as such, but provides only a schedule of banned substances which (also) contains precursor chemicals in its laws.

C. Offences linked to trafficking in drugs and precursors

The laws of most of the MSs are consistent with the offences listed in the FD. Disparities compared to the FD can be found more in the details of the national provisions rather than in fundamental considerations of the MS.

As regards the definition of offences, all MSs provide for criminal provisions on drug trafficking and nearly all MSs provide for criminal provisions on precursor trafficking[27]. Concerning *drug trafficking offences*, the majority of MSs[28] already contained criminal offences as defined in the FD in their laws. As a result, they did not regard it as being necessary to transpose this part of the FD. In some national laws[29] minor changes were necessary in order to comply with the FD. Most of the MSs go even further than the FD and provide for possession of drugs as an offence, including where they are intended exclusively for their own personal consumption. With regard to illicit trafficking in *precursors*, the majority of MSs[30] provide for separate provisions against precursor trafficking. In some MSs this is treated in the same way as illicit trafficking in drugs by criminalising the same activities[31]. That is why these MSs go further than the FD and criminalise more activities (*e.g.* import, export, possession or storage of precursors) than necessary.

In general it is interesting to note that not all national laws list all the activities mentioned in Article 2 FD. However, often certain terms imply other activities as well so that in only a few cases does a MS's provision not comply with Article 2[32]. For example, several laws do not list each of the following terms – 'production', 'manufacture', 'extraction' and 'preparation' but list only the term 'production' or 'manufacture'. However, these terms are regarded as broad enough to cover the other mentioned activities as well.

D. Penalties

1. General considerations

Special problems had already been identified in the Commission's report from 2009[33] referring to penalties. Whereas, for example, most of the definitions of offences in the FD are similar to the UN Conventions and therefore provisions of most MSs had already been in compliance with the FD before it came into force, with regard to penalties, the UN Conventions only provide quite general requirements. In this respect the FD introduced some new elements. As already mentioned, alongside the

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[26] MT.

[27] As already mentioned, FR does not criminalize trafficking in precursors.

[28] BE, BG, CY, CZ, DE, DK, EE, ES, FR, HU, IE, IT, LU, LV, MT, PT, RO, SI, SK and UK.

[29] AT, FI, GR, LT, NL, PL and SE.

[30] AT, CY, DE, EE, ES, FI, GR, HU, IT, LV, LT, NL, PL, PT, RO and SE.

[31] BE, BG, CZ, IE, LU, SI and SK.

[32] Only five MSs (DK, IT, MT, PL and SK) do not comply with Article 2 FD.

[33] Report from the Commission, COM (2009) 669 final, p. 4 f.

general obligation to provide for *effective, proportionate and dissuasive penalties*, the FD provides *minimum maximum sentences* for the offences linked to trafficking in drugs and precursors and certain aggravating circumstances.

As a first result, the study shows that in nearly all MSs the penalties foreseen in the national laws in principle comply with the provisions of the FD. As the 2009 report indicated, most of the MSs provide *significantly higher sentences* than the FD. One main difference between the system of the FD and the system of criminal penalties in most national laws is that the MSs' systems are more differentiated than the one in the FD. In most States there are various levels of sanctions depending on different activities and different factors such as, for example, different quantities or different purity and/or weight, specific addressees or specific means of commission (*e.g.* force, weapons).

For all the following explanations about criminal sanctions it must be considered that sanctioning legislation is difficult to compare since it is not enough to take into account only the sanctions foreseen for the specific offences but also other provisions which are not contained in the specific provisions for criminal offences ('special part'), but in the general part or in procedural law (*e.g.* suspended sentences, conditional release, measures of diversion) need to be taken into account. To evaluate the impact of an EU instrument providing criminal sanctions on national legal systems it is also important to consider which sentences are imposed in practice. This is a task which cannot be done in a short-term study, but would need an empirical long-term study. Therefore only tendencies can be presented. However, it is obvious and well known that there are big disparities in sentencing practice between the various MSs but also within the MSs [34].

2. Imprisonment penalties

Regarding the *basic offences referred to in Article 2 FD*, maximum penalties of *at least between one and three years of imprisonment* are provided for in the FD (Article 4(1) FD). The MSs' provisions vary regarding maximum penalties between less than one year and life imprisonment. Only one MS [35] does not fully comply with this requirement since it provides sentences lower than one year for certain offences of cannabis trafficking. Most other MSs provide significantly higher maximum penalties than one year of imprisonment. Regarding precursor trafficking (Article 2(1) (d) FD), in all MSs which have provisions on precursor trafficking, the penalties comply with the FD's requirements although the level of penalties in the MS is in general lower for precursor trafficking than for trafficking in drugs (the FD provides the same penalties for the basic offences).

A general look at the *maximum imprisonment sanctions* for drug trafficking shows the differences between the different MSs' laws and between the national laws and the FD. As mentioned above, the FD provides a maximum of at least ten years

[34] See *e.g.* the differences within Germany between courts in the South and in the North or Austria between courts in the East and in the West, compare *e.g.* M. Burgstaller et F. Csaszar, "Zur regionalen Strafenpraxis in Österreich", *Österreichische Juristenzeitung*, 1985, p. 1.

[35] BE.

imprisonment. Regarding drug trafficking, twelve MSs [36] provide for *life imprisonment in severe cases* (in nine MSs when the offences are committed in the framework of a criminal organisation, in six MSs for trafficking of large quantities of drugs, in three MSs, if drugs cause most harm to health). Three MSs [37] foresee as maximum sentences imprisonment of more than twenty years, three [38] between fifteen and twenty years and six [39] more than ten years. Only two MSs [40] provide ten years as a maximum. With regard to *precursor trafficking*, four MSs [41] provide life imprisonment, four [42] more than fifteen years, whereas in five MSs [43] not more than five years imprisonment are provided for.

The big differences between the MSs' penalties are mainly due to different sanctioning systems. Whereas some MSs stipulate different penalties for differentiated levels of severity of the offence depending on the existence of aggravating and mitigating circumstances, others foresee high penalties for the basic offence and such circumstances are considered by the court in the sanctioning process. Therefore these figures do not say anything about the penalties actually imposed in practice.

Since the Framework Decision 'only' contains *minimum maximum sentences,* higher sentences are admissible. Therefore there is no problem of MSs' laws not complying with the FD if their penalties are higher than the ones in the FD. When the FD came into force, only a few MSs had to raise their penalties to bring their legislation into line with the FD. As penalties in many MSs were higher before the adoption of the FD, this was not a reason for them to amend their legislation with regard to the level of prison sentences. As a result, there are still legislative disparities between the MSs and the FD has not had an approximating effect since most MSs have not amended their sentences after the adoption of the FD.

The MSs' reports also show how *difficult* – or nearly impossible – an *approximation of penalties* is since the principles and concepts not only of drug law, but also of criminal law in general are very different in the various MSs. The research findings have confirmed that individual MSs approach sanctioning in a variety of ways. Regarding drug law there are MSs which provide harsh sentences in their criminal provisions in drug law and also use them while others have lower sentences and use alternative ways to combat drug trafficking [44]. But all of them report that, in principle, their system works well. It is not therefore possible to conclude from the MSs' reports

[36] AT, CY, EE, FR, GR, HU, IE, LT, LU, MT, SK and UK.

[37] IT, PT and RO.

[38] BE, CZ and DK.

[39] BG, DE, ES, LV, NL, PL and SI.

[40] FI, SE.

[41] GR, LT, SK and UK.

[42] DK, IT, LU and PT.

[43] AT, CY, PL, RO and SE.

[44] *E.g.* in PT repression of drug trafficking was significantly downgraded in the agenda of police and prosecutors over the last 10 years. Public agencies and bodies were created to deal with the prevention and treatment of drug addiction and the society at large learned to live with and manage its addicts and dealers. According to the prosecutors interviewed, the decriminalisation of consumption did not lead to an increase in the number of trafficking cases.

that penalties in drug law are too high or too low in the MSs to combat drug trafficking successfully.

3. Financial penalties

Besides prison sentences, nearly all MSs also provide for *financial penalties* for individuals, which are not foreseen in the FD. In all of these MSs, these financial penalties are of a criminal nature. However, the provisions and the extent of the fines differ considerably. The maximum amount of financial penalties in cases of drug trafficking is between around € 23,000[45] and an unlimited amount[46]. An important and fundamental difference is the system of determining financial penalties. Whereas one group of MSs[47] provides systems of daily fines for financial penalties, other MSs provide absolute amounts of financial penalties. In the latter group the basis for the determination of the financial penalty differs and depends on various factors (*e.g.* the situation of the offender, the value or sort of drugs). In some national laws, financial penalties are foreseen as an alternative to prison sentences whereas in others they can be imposed cumulatively together with prison sentences. These groups differ from the ones with or without a daily fine system. Finally, there are significant differences when financial penalties are applied. In most of the MSs they are only foreseen for or only applied to minor offences, but there are some MSs where they are used in cases of major drug trafficking. In these States, financial penalties seem to have another (additional) function as compensation for gains made by trafficking activities.

These fundamental differences between the national provisions on financial penalties for drug trafficking offences make it clear why an approximation of financial penalties has not taken place up until now. The systems are more differentiated and complex than the systems of imprisonment. An approximation only in the field of drug trafficking is difficult since in most national laws these systems are not only applied to drug trafficking offences but to all criminal offences. Therefore specific systems of financial penalties for drug trafficking would come into conflict with national legal systems.

4. Aggravating circumstances

The FD provides as aggravating circumstances for drug trafficking offences that the offence involves *large quantities of drugs* or that the offence either involves drugs that cause the *most harm to health* or has resulted in *significant damage to the health* of a number of persons (Article 4(2) FD). For these cases, the MS shall provide for criminal penalties of a *maximum of at least between five and ten years of imprisonment* (precursors are excluded). If such an offence is committed in the framework of a *criminal organisation,* penalties of a *maximum of at least ten years of imprisonment* shall be provided for (Article 4(3) FD). If an offence of precursor trafficking is committed within the framework of a criminal organisation, criminal

[45] SE.
[46] DK, ES, FI and UK.
[47] AT, CZ, DE, DK, EE, FI, HU, PL, PT and SE.

penalties of a *maximum of at least between five and ten years of deprivation of liberty* shall be foreseen (Article 4(4) FD).

In this regard the provisions of the FD have *not been transposed to the full extent by all MSs*. Only ten MSs[48] have transposed all of the aggravating circumstances provided for in the FD and in eight of these the level of penalties fulfils the requirements of the FD. This does not mean that in the other MSs these circumstances are not considered, but in contrast to the FD, which provides that such circumstances change the range of penalties, they are only respected in the determination of penalties as aggravating or mitigating factors.

a) Quantity of drugs

Regarding the *quantity of drugs*, nineteen MSs[49] foresee it as an aggravating circumstance that influences the range of penalties. In some other MSs, the quantity is an aspect which can influence sentencing. There is no consensus as to what is a large quantity. The FD does not define that and leaves this decision to the MSs' legislators. In the MSs, various definitions can be found but a common understanding is missing. Some refer to the total weight of drugs, others to the weight of the pure substance or the value of drugs. That is why even if MSs have transposed these provisions into national laws, there are differences when this aggravating circumstance is applied.

The penalties foreseen in the MSs that have a provision on large quantities are all in compliance with Article 4(2) FD. Since in the other MSs the maximum penalties for the basic offence are at least five years (or higher), the penalties in all MSs are in compliance with Article 4(2) FD.

b) Harm to health

The aspect of *harm to health* as an aggravating circumstance is only contained in the drug trafficking legislation of seventeen MSs[50]. In some[51], harm to health is only a factor which influences sentencing by the judge. Some MSs have lists of different categories of drugs which are more or less dangerous[52].

Regarding the maximum penalties, all MSs that provide this aggravating circumstance foresee penalties which are in compliance with the FD. In most other States, the maximum penalties for the basic offence are so high that they are in compliance with the FD. In three MSs[53] the maximum penalties are lower than five years and do not comply with the FD.

c) Commission in the framework of a criminal organisation

Even the fact that the offences have been committed *within the framework of a criminal organisation* is not foreseen as an aggravating factor in all MSs.

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[48] CY, CZ, DE, ES, FI, GR, IT, LV, NL and SK.
[49] AT, CY, CZ, DE, DK, EE, ES, FI, GR, HU, IE, IT, LT, LV, NL, PL, SE, SK and UK.
[50] BE, BG, CY, CZ, DE, DK, ES, FI, GR, IE, IT, LU, LV, NL, PT, SK and UK.
[51] *E.g.* AT, EE, FR, LT, SI, UK.
[52] *E.g.* NL.
[53] EE, PL (for some activities) and SE.

Regarding illicit trafficking in drugs, this is contained in twenty-four MSs' laws [54]. Whereas the FD provides that large quantities of drugs or drugs that cause the most harm to health are involved, the MSs' provisions do not require this precondition. In those States which contain this aggravating circumstance, there are big discrepancies concerning penalties. Nine MSs [55] provide for penalties up to life imprisonment and three other States a maximum penalty of more than twenty years imprisonment. Five MSs foresee imprisonment of up to twenty years, eight of up to fifteen years and two MSs a maximum penalty of up to ten years. One MS [56] provides for a maximum penalty of less than ten years and does not therefore fulfil the requirements of the FD.

Regarding precursor trafficking in the framework of a criminal organisation, only eighteen MSs provide such provisions [57]. With the exception of one State [58], all of them foresee maximum penalties of more than five years and fulfil the requirements of the FD.

Aside from the provisions on trafficking in illicit drugs, most of the MSs' laws contain specific provisions on the participation of individuals in criminal organisations independently of drug trafficking. In most of these MSs these are rarely used in cases of drug trafficking, since the penalties foreseen for participation alone are significantly lower than the ones for trafficking in drugs.

d) Other aggravating circumstances

By comparison with the FD, national laws contain a wide variety of other aggravating factors: *e.g.* the possession or use of dangerous means, the commission of drug offences for commercial gain, serious consequences of the offence or specific addressees like minors. In some States there is a long list of aggravating circumstances while others do not provide any other circumstances than those provided for in the FD. Most of the additional aggravating circumstances are listed in the UN conventions [59].

5. Mitigating circumstances

As a *mitigating circumstance*, the FD stipulates that penalties may be reduced if the offender renounces criminal activity relating to illicit trafficking in drugs and precursors and provides the administrative or judicial authorities with information which they otherwise would not have been able to obtain, helping them to prevent or mitigate the effects of the offence, identify or bring to justice other offenders, find further evidence or prevent further drug and precursor trafficking offences (Article 5). These provisions are *not mandatory* but MSs *may* take these measures to ensure that the penalty may be reduced. Particularly in cases of drug trafficking, which is usually committed within the framework of criminal groups, such a so-called *leniency notice* is often necessary and helpful for the investigation of the structures of the groups.

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[54] It is missing in DK, IE and SE.
[55] AT for leaders, CY, EE, FR, GR, LT, MT, SK, UK.
[56] NL.
[57] BE, BG, CY, CZ, DE, ES, FI, GR, HU, IT, LT, LU, LV, NL, PT, SI, SK and UK.
[58] CY.
[59] See Article 3(5) UN Convention 1988.

Eleven MSs[60] provide for such provisions in their drug laws and foresee a reduction of the penalty or even the possibility for the prosecutor to cease the proceedings against the perpetrator. Not all of these regulations provide for exactly the same and all the requirements as foreseen in Article 5 FD. The reason for that is that none of the MSs has amended its legislation in this respect as a result of the FD. These States had such provisions already before the adoption of the FD. Other MSs take these aspects into account in other ways. Some national laws take them into account when determining the sentence[61], others provide special regulations in procedural law. The requirements differ in the various MSs and do not completely comply with the ones in the FD.

6. Concluding remarks

Regarding penalties we have a situation where, on the one hand, the *penalties in most of the MSs in general are in compliance* with the FD, but that, on the other hand, there are still *big disparities between the MSs*. The FD did not therefore have much of an approximating effect. With regard to aggravating circumstances, only eight MSs provide *all* the aggravating circumstances contained in the FD. However, the penalties of nearly all MSs are in compliance with the FD in this regard since the penalties for basic offences are already very high. In the light of these observations, the aim of the FD could be questioned given that an amendment of the national laws was not necessary to be in compliance with the FD.

The results of this analysis show the problems of approximation of penalties within the EU. Sentencing systems are so different that more approximation causes problems in the MSs' legislation since penalties do not fit into the national legal systems. The study shows that even approximated penalties in national legislation only have limited effects on the imposed penalties. The sentences actually imposed have not significantly changed even if MSs have amended their legislation after the adoption of the FD. Judges are used to their national sanctioning systems and therefore use sanctions in a way that they fit into the whole system of sanctions.

Considering the rationale of sentencing, this is not very surprising. The sentencing process in criminal matters aims at the individualisation of criminal justice reactions to undesirable and criminalised behaviour of individuals found guilty by a court. The proper and adequate application of sanctions therefore requires high degrees of flexibility and judicial discretion as well as proportionality between the seriousness of the criminal act, the personal situation and history of the offender and the sentence applied. For reasons of fairness and proportionality, sanctioning systems require a balance to be struck between the different penalties depending on the gravity of the offence. The definition of criminal offences often covers a rather wide diversity of actions with varying levels of gravity. Most definitions of offences, even of the more serious offences, include cases where the individual fault of a certain offender participating in the offence may be minor. Criminal justice systems in the MSs take that into account by providing broad penalty ranges or different penalty levels with

[60] BE, EE, ES, FR, GR, HU, IT, LU, LV, MT and RO.
[61] AT, CY, CZ, DE, DK, IE, LT, NL, PL, PT, SI, SK and UK.

generally low minima or no minimum at all. Additionally, fines, suspended sentences or diversionary measures are provided for. Taking into account the different functions of penalty frames and punishment levels, national legal systems have developed multi-tier structures and scales of penalty frames – some systems preferring more general and broad frames, others rather sophisticated multiple tiers. The sentences actually imposed depend on so many factors that sentencing practice often deviates from the prescribed scales for a variety of reasons and can also change over time, independently of activities by the legislator.

The consequence of these different developments are quite different sanctioning systems in the MSs which are in all consistent, but difficult to combine with other systems. Approximation of penalties always requires some flexibility for the national legislation and for national courts to avoid unsolvable conflicts and imbalances within the national sanctioning systems. Considering these aspects of sentencing, the question must be answered as to why more approximation of penalties is necessary. It is not sufficient to approximate penalties only with the aim of raising penalties in the MSs. The punitive tendency alone is not a sufficient reason for an approximation because there is no evidence that higher levels of penalties act as more of a deterrent [62]. An obligation to introduce higher penalties can only be justified by additional goals, as for example to facilitate cooperation and legal assistance between MSs. Otherwise the introduction of minimum-maximum penalties is of quite limited value since it generates, on the one hand, problems with the implementation and conflicts with sanctioning systems for some MSs, and on the other hand does not really change sentencing practice, which is more related to the specific national sanctioning systems. When introducing (higher) penalties the proportionality principle (Article 49(3) Charter of Fundamental Rights) must always be kept in mind.

E. General Rules

1. Incitement, aiding and abetting and attempt

Rules on criminalising incitement to commit and the aiding and abetting of offences referred to in Article 2 FD are part of the general criminal law provisions in all MSs and not specifically designed for drug trafficking offences. In principle there are two different systems. Some MSs differentiate between principal offenders and accomplices [63] while others treat all participants to a criminal offence equally as perpetrators [64]. In order to comply with Article 3 FD, it is sufficient that MSs apply their own systems of incitement and aiding and abetting to drug trafficking offences. Thus all MSs comply with the FD in this regard.

Concerning the criminalisation of the attempt to carry out offences referred to in Article 2 FD MSs' approaches vary. This is again not a specific problem of drug

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[62] A. Kreuzer, "Mehr Sicherheit durch strengeres Strafen?", *KrimPäd*, 43, 2004, p. 4 (8 f.); A. Harrel and J. Roman, "Reducing Drug Use and Crime among Offenders: The Impact of Graduated Sanctions ", *Journal of Drug Issues*, 31/1, 2001, p. 210; S. Snacken and D. van Zyl Smit, "Europäische Standards zu langen Freiheitsstrafen: Aspekte des Strafrechts, der Strafvollzugsforschung und der Menschrechte", *Neue Kriminalpolitik*, 2/2009, p. 58.

[63] *E.g.* DE, EE and LU.

[64] *E.g.* AT, DK, FI, IE, IT and SE.

trafficking law, but in most MSs' laws [65] a question of the general part which applies to all criminal offences. Just over half of the MSs [66] provide that their rules on attempt are automatically applicable to all criminal offences. Other States have slightly different approaches to the conditions for the criminalisation of attempt. Generally speaking, they foresee that the attempt to commit a felony is always punishable, but in cases of misdemeanours the law has to explicitly foresee the criminalisation of the attempt. Such an approach may cause problems in terms of full compliance with the FD if a State does not, for example, explicitly criminalise the attempt to carry out a drug trafficking offence which is of lesser gravity and does not constitute a felony. Therefore three MSs [67] do not completely fulfil the prerequisites of the FD regarding the criminalisation of the attempt to carry out drug trafficking offences.

2. Liability of and sanctions for legal persons

All MSs contain provisions on the liability of legal persons. Since this obligation was already part of previous EU legal acts, rules on the liability of legal persons already pre-existed or were not introduced specifically because of the FD on illicit drug trafficking. There are many differences between the systems of corporate liability and sanctions foreseen for legal persons. Twenty-two States provide for a criminal liability for legal persons and five States [68] an administrative or civil liability, which in principle is admissible according to the FD. The main sanction is the imposition of fines, which is foreseen in almost all MSs [69]. Further sanctions include dissolution, banning business activities, disqualification of directors, exclusion from tenders, bans on advertising, bans from grants or public subsidies, confiscation or publication of the sentence. In conclusion, it can be said that eighteen MSs [70] are in overall compliance with Articles 6 and 7 FD.

3. Jurisdiction

All national laws provide for provisions on the establishment of jurisdiction where the offence has been committed in whole or in part within the MSs' territories.

On the contrary, there is considerable variety between the MSs under which prerequisites they have established the exercise of jurisdiction if the offence has been committed outside their national territories. As already mentioned, the FD requires that a MS has to establish extra-territorial jurisdiction in two cases: where the offender is one of its nationals (Article 8(1) (b) FD) and where the offence is committed for the benefit of a legal person established in the territory of that MS (Article 8(1) (c) FD). Most MSs foresee extra-territorial jurisdiction in these two cases but require additional prerequisites in order to establish jurisdiction. Examples of additional prerequisites

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[65] Note that in CY, IE, SE and UK punishability of the attempt of drug trafficking offences is foreseen in the drug laws.

[66] AT, BG, CZ, DK, EE, ES, GR, HU, LT, LU, LV, MT, NL, PL and SK.

[67] BE, PT and RO.

[68] BG, DE, IT, GR and SE.

[69] Fines are not foreseen in GR and not for all offences according to Article 2 FD in CY and PT.

[70] AT, CY, DE, DK, ES, FI, FR, HU, IE, LT, LU, LV, MT, NL, PL, RO, SI and UK.

are that the act has to be criminalised in the MS establishing jurisdiction and in the MS where the offence has been committed (principle of double criminality), the offence must be punishable with a certain minimum penalty or the alleged offender has to be present in the country. As such prerequisites are not foreseen in the FD, this leads to the consequence that many States do not provide sufficient rules for the establishment of extra-territorial jurisdiction in the sense of the FD. Sixteen MSs [71] foresee extra-territorial jurisdiction for offences where the offender is one of their nationals without any further requirements and therefore fully comply with Article 8(1) (b) FD. Another 16 MSs [72] fully comply with Article 8(1) (c) FD as they establish extra-territorial jurisdiction when the offence is committed for the benefit of a legal person established in the territory of the MS. However, as also mentioned above, the States may decide that they will not apply, or apply only in specific cases, the rules on extra-territorial jurisdiction set out in the FD. Up to now three MSs [73] have informed the Council and the Commission that they will waive or limit the jurisdiction rules set out in Article 8(1) (b) FD and seven MSs [74] have informed them that they will waive or limit the jurisdiction rules set out in Article 8(1) (c) FD.

Due to the mobility of people in Europe, nationality is not the only ground to establish extra-territorial jurisdiction. The study showed that several MSs foresee jurisdiction also for habitual residents, if the offence has been committed outside their territory, either without any further requirements [75] or under certain conditions [76].

F. Summary of results

As an overall conclusion it can be said that there were no major changes in legislation in any of the twenty-seven MSs because of the FD and that therefore the added value of the FD has been limited. Approximately half of the MSs [77] did not amend their drug trafficking legislation at all and the other half made only minor amendments. The reason behind this is that most MSs regarded their laws as being in line with the FD. Although nearly all national laws are largely compliant with the FD, only five MSs [78] are in overall compliance. The question is whether this is a real problem since, despite this fact, cooperation between national authorities, which is seen as essential in drug trafficking cases, in general works well, although the degree of cooperation certainly varies.

4. Future perspectives for drug trafficking law

What could a new directive under the Lisbon Treaty regulate in another way than the FD to enhance the fight against illicit drug trafficking? The following examples

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[71] BE, BG, CZ, EE, ES, FI, GR, HU, LT, LV, MT, PL, RO, SI, SK and UK.
[72] BE, BG, CZ, ES, FI, GR, LT, LU, LV, MT, PL, PT, RO, SI, SK and UK.
[73] AT, DE and FR.
[74] AT, DE, DK, EE, HU, FR and SE.
[75] BE, FI, GR, LV, LT, MT, NL and SK.
[76] AT, BG, CY, DK, ES, IE, SE and UK.
[77] BE, DE, EE, FR, IE, IT, LU, LV, MT, PT, SI and UK.
[78] DE, ES, FI, GR and LV.

are only initial thoughts of the authors which could be directly drawn from the results of the study. They are not political options from the European Commission.

The legal basis for a directive on illicit drug trafficking would be Article 83(1) TFEU. Illicit drug trafficking is a particularly serious crime as enumerated in Article 83(1) TFEU ('Euro-Crime').

MS level research shows that MSs have different approaches in how they deal with low level drug trafficking offences. Whereas some MSs have decriminalised some of these acts or provide for diversionary measures (*e.g.* therapy instead of penalties), others provide for severe criminal sanctions even where only personal consumption is involved [79]. An approximation of offences on this low level is neither necessary nor useful, since in principle the cross-border dimension which would require cooperation between the MSs is missing. Therefore the scope of the FD should only comprise major drug trafficking and be narrower than the one in the current FD which excludes only conduct when it is committed exclusively for the perpetrators' own personal consumption. This could increase the acceptability of a new instrument in the various MSs, since it would allow them to choose their own specific models of how to deal with street dealers, petty sellers or couriers.

The question of approximation (*e.g.* increasing) of penalties is – as pointed out above – a quite difficult one and needs to be looked at with care and sensitivity. As already pointed out, it is not clear what the added value of higher penalties would be and there are also doubts that increasing penalties would overcome all the existing disparities between national laws. It can also be seen that States which provide for harsh penalties for drug trafficking have not as yet solved their problems concerning drug abuse and crime [80]. In order to reduce these problems more effectively, money should be spent on drug treatment rather than simply introducing higher penalties [81]. Portugal offers a good example in showing that even the decriminalisation of the use and possession of all illicit drugs combined with the use of alternative therapeutic responses did not lead to an increase in drug use but that use remained at a level consistent with other countries with similar situations [82].

As regards aggravating and mitigating circumstances, the introduction of a core set of additional aggravating and mitigating circumstances could be considered. Possible aggravating circumstances could be: the use of illegal weapons or other dangerous means; the commission of the offence for the purpose of commercial gain; a material link to the commission of other criminal acts; the fact that the offender holds a public office and that the offence is connected with the office in question. These circumstances can be found in the UN Convention 1988 and/or the MS laws. All these circumstances (except the commission for the purpose of commercial gain)

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[79] See also European Monitoring Centre for Drugs and Drug Addiction, Annual Report 2011, p. 23 f.

[80] See *e.g.* S. N. Herman, "Measuring culpability by measuring drugs? Three reasons to reevaluate the Rockefeller Drug Laws", *Albany Law Review*, 63/777, 2000.

[81] See J. P. Caulkins *et al.*, "Mandatory Minimum Drug Sentences – Throwing away the Key or the Taxpayers' Money?", *RAND,* 1997, p. 75 f.

[82] C.E. Hughes and A. Stevens, "What Can We Learn from the Portuguese Decriminalization of illicit Drugs?", *British Journal of Criminology*, 50/6, 2010, p. 999.

had also initially been included in the proposal for the FD by the Commission from 2001 [83]. The so called leniency notice, as stipulated in Article 5 FD, could be considered as a mandatory provision in a new directive. Such a provision could enhance the fight against drug trafficking effectively and – as already mentioned – there are big discrepancies between the national provisions.

In order to raise the standard of the provisions on jurisdiction, the territoriality principle could be extended to offences committed on aircrafts and vessels. This rule is obligatorily foreseen in the UN Convention 1988. In order to avoid negative conflicts of jurisdictions – meaning situations where no State establishes jurisdiction over a specific case – the existing provisions on extra-territorial jurisdiction should be made binding and it should be considered if the active personality principle, meaning if the offender is one of its nationals, shall be extended to habitual residents. Other new instruments under the Lisbon Treaty, such as Directive 2011/629/JHA on preventing and combating trafficking in human beings and protecting its victims, stipulate mandatory jurisdiction rules for extra-territorial offences where the offender is one of the MSs' nationals.

5. Conclusions for the future approximation of criminal law drawn from the experience with the FD on drug trafficking

The FD on illicit drug trafficking and its transposition into the MSs' laws show several important aspects of approximation. Some of them are typical examples of the old legal system of the FD. Others are still relevant for the new regime under the Lisbon Treaty.

In some respects, the FD did not bring new elements, but adopted – as shown *supra* – provisions from the relevant UN conventions. With regard to these aspects, approximation through EU instruments was not really necessary since most MS had already transposed the UN conventions which they had ratified. Concerning these matters, it is no wonder that the FD had no approximating effect since MSs' laws were already in line with the FD. The added value of the EU instrument was therefore very limited.

In some other respects, the FD went further than existing international instruments. In particular the provisions on penalties and partly the ones on jurisdiction brought new aspects. However, even in these respects the impact of the FD was very limited.

Inter alia, the limited impact of the FD was caused by the 'Framework Decision' instrument. The adoption of a FD required unanimity in the Council on the one hand, and on the other hand the implementation was not under the control of the European Court of Justice. What was the consequence of these characteristics of this instrument? The content of the FD was in large parts the lowest common denominator. Regarding the development of the text from the proposal to the final legal act, a drop in standards, particularly of the new content compared to other international instruments, could be observed. In the end, standards were adopted that were so low

[83] Proposal for a Council framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, COM (2001) 259 final, *OJ*, no. C 304 E, 30 October 2001, p. 172.

that they had been fulfilled by most of the MSs before the adoption [84]. The proposal by the Commission from 2001 [85], for example, contained a significantly longer list of aggravating circumstances which were subsequently deleted although most of them had also been in the UN conventions but had not been implemented into national laws. Only those aggravating circumstances were adopted in the FD where no problems regarding the implementation in the MSs had been expected. Also the penalties, which were adopted in most MSs did not require an amendment of national legislation since the levels of national laws were already in line with the provisions. The MSs agreed on levels which did not require too many changes in their national laws.

On the other hand new provisions, which had required changes in national laws, were not made mandatory and the decision to implement them was left to the MSs. The provisions on mitigating circumstances or on extra-territorial jurisdiction were only introduced as facultative provisions. The consequence was that no MS amended its legal provisions on mitigating circumstances (leniency provisions) and that several MSs' provisions on extra-territorial jurisdiction are still not in accordance with the FD.

The change from the Framework Decision instrument in the former third pillar to directives made it possible to introduce provisions without the consent of all MSs. This makes it possible to establish higher common standards, since individual MSs cannot block the adoption of new instruments to reach lower standards and less severe provisions.

Besides these problems, which are linked with the legal instrument of the FD, the more general question emerges as to when and under what circumstances an approximation is useful and can bring added value. As a conclusion from the case of the FD on illicit drug trafficking, the following key aspects should be observed:

– The adoption of an instrument of approximation has only limited or no added value if it only takes over the content of international conventions which have already been implemented in the MSs' laws and does not set specific (higher) EU standards. Only if provisions of international conventions have not been implemented yet does an additional EU legal instrument make sense. The same is true if provisions are introduced by an EU instrument, which have already been foreseen in the MSs' laws (independently of the implementation of international instruments). The use of such EU legislation has only symbolic value.
– Before the approximation of criminal law by EU legal instruments political leaders need to answer the question about what the use of criminal law and the use of approximation in a certain field will be. Specific goals to be reached with approximation must be identified before the adoption of new EU legal instruments approximating national criminal laws. Adopting an instrument without a specific

[84] See *e.g.* Report by the European Parliament on the proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking, A5-0095/2004.

[85] Proposal for a Council framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, COM (2001) 259 final, *OJ*, no. C 304 E, 30 October 2001, p. 172.

goal and therefore without a clearly defined scope of application results in an instrument which does not bring any added value, as the FD on drug trafficking shows. Approximation only for approximation's sake is not sufficient as MSs will not easily accept and subsequently not implement such an instrument.

- Grounds for an approximation of national laws can be, for example, better means to fight trans-border and organised crime, particularly to facilitate cooperation between MSs. Harmonised definitions of offences, penalties and rules of jurisdiction are justified if they particularly enable the application of mutual recognition instruments and instruments of mutual legal assistance.
- The approximation of criminal penalties requires particular sensitivity and justification. The introduction of minimum maximum penalties in areas where all MS themselves have already foreseen high penalties does not have an added value, as the FD on drug trafficking shows. An approximation of penalties only makes sense if existing (low) penalties in the MS make the application of instruments of mutual recognition or mutual assistance difficult or impossible.

The content and impact of approximation: The case of trafficking in human beings

Francesca Galli[1]

1. Introduction

A. The phenomenon of trafficking in human beings within the European Union

Trafficking in human beings[2] is a problem that is prevalent throughout Europe. Several hundred thousand people are trafficked into the EU or within the EU every year[3].

As a result, academic and legislative interest in this subject has risen markedly in the last two decades. However, the scale and nature of this criminal phenomenon is

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[2] The concept must be distinguished from that of human smuggling. A.A. Aronowitz, "Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets that Drive It and the Organisations that Promote It", *European Journal on Criminal Policy and Research*, 9/2, 2001, p. 263 f. ; J. Salt, "Trafficking and human smuggling : a European perspective", *International Migration*, 38/3, 2001, p. 31 f. ; H.M. Ali, "Data Collection on victims of human trafficking : an analysis of various sources", *Journal of Human Security*, 6/1, 2010, p. 55 f.

[3] See Centre pour l'égalité des chances et la lutte contre le racisme, *La traite et le trafic des êtres humains: rapport annuel 2011. L'argent qui compte: Traite des êtres humains et flux financiers criminels*, Bruxelles 2012 ; F. Carchedi and I. Orfano (eds.), *La tratta di persone in Italia. Evoluzione del fenomeno e ambiti di sfruttamento*, Milano, Franco Angeli, 2008; G. Wylie and P. McRedmond, *Human trafficking in Europe. Character, causes and consequences*, New York, Palgrave and McMillan, 2010.

not easy to define or to study because trafficking is often investigated or recorded as other forms of crime (such as prostitution, illegal immigration and labour disputes).

In addition, for a long time there were no standardised guidelines for data collection at the EU level [4]. The issue has been partially addressed with the recent publication of an Eurostat Report on human trafficking [5], based on the data collected and provided by national rapporteurs (or equivalent mechanisms). Many victims are however still not identified nor reported and they constitute the so-called "dark number" which is yet a significant problem.

Europol updates a report every year in which it provides a general overview of trafficking in human beings, with a specific focus on the EU situation [6]. According to this report, social vulnerability is a major root cause of the phenomenon, with people from diverse backgrounds becoming victims of trafficking because they are deceived by promises of employment, good working conditions and a salary. Recruiting individuals has become easier thanks to greater freedom of movement and travel, low cost international transport and global communication links combined with opportunities to work that had not previously been available and self-confidence. Besides, thanks to the perceived anonymity and mass audience of online services, the use of the Internet is growing fast. It is being used both to recruit victims (*e.g.* via online employment agencies or marriage agencies or via chat forums, spam emails and internet dating) and to advertise the traffickers' services [7].

At the international level, the most common form of trafficking is trafficking for sexual exploitation (43%). Most trafficked victims are women (56%, and 98% in the case of sexual exploitation) and children. Some victims are knowingly recruited into prostitution. However, through deception or coercion, they have sometimes ended up in situations where they have been exploited. When it comes to children, parents themselves are sometimes complicit with traffickers [8]. Labour exploitation is also an extremely relevant dimension of the phenomenon. According to the International Labour Organisation (ILO), there are at least 2,45 million people in the world who are in forced labour situations as a result of having been trafficked [9]. Another form of

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[4] A.A. Aronowitz, "Overcoming the challenges to accurately measuring the phenomenon of human trafficking", *Revue Internationale de Droit Pénal*, 3/4, 2010, p. 493 f.; S. Stefanizzi, "Measuring the unmeasurable: towards the development of indicators for measuring human trafficking", *in* E. Savona and S. Stefanizzi (eds.), *Measuring human trafficking. Complexities and pitfalls*, New York, Springer, 2007.

[5] Eurostat, *Trafficking in human beings,* 2013.

[6] See *e.g.* Europol, *Trafficking in human beings in the European Union*, The Hague, 2011. Data on trafficking are also available within a more general Europol Report, *EU serious and organised crime threat assessment* (*SOCTA*), last published in 2013.

[7] A.P. Sykiotou, *Trafficking in human beings: Internet recruitment. Misuse of the Internet for the recruitment of victims of trafficking in human beings*, Strasbourg, Council of Europe Publishing, 2007.

[8] *ILO action against trafficking in human beings*, Geneva, 2008. In the EU 68% of victims are women and 62% are trafficked for sexual exploitation purposes. For key findings concerning the EU specifically please see Eurostat, *Trafficking in human beings*, 2013.

[9] *ILO action against trafficking in human beings*.

trafficking that is growing fast and is a lucrative area of criminal activity is trafficking in humans to use their organs, in particular kidneys [10].

EU enlargement and the gradual lifting of restrictions on employment in many EU Member States (MS) has led to an increase in the number of instances of human trafficking where people have subsequently been exploited in work situations.

Organised crime groups, often acting in small groups that operate both independently and in cooperation with other criminal groups, are involved in human trafficking. The trafficking generates massive profits (of up to 125,000 euro per month, the third biggest source of illicit profits after drug trafficking and trafficking in weapons). The most frequently reported criminal groups in the EU area are, in descending order, ethnic Roma, Nigerian, Romanian, Albanian speaking, Russian, Chinese, Hungarian, Bulgarian and Turkish organised crime groups [11].

Trafficking in the EU used to be a criminal phenomenon that mainly came from outside the EU. However, successive enlargements of the EU and the dismantling of internal borders have led to flows of human trafficking within the EU area [12]. Most Member States are destination countries but some are also countries of origin or transit. A number of criminal hubs exists on the continent: the Iberian peninsula is both a region of exploitation (Chinese people working in the textile industry and shops, Eastern Europeans in agriculture, South Americans in the sex industry and Roma children being used as beggars and thieves) and of transit where victims of trafficking are redistributed throughout the EU according to market demand (*e.g.* domestic servants in Portugal). West and North Africans, Eastern Europeans, Balkan people and Chinese people are used as prostitutes and exploited in the agricultural, construction, textile and healthcare sectors and as domestic servants in the southern criminal hub. Victims also move to other countries. The north-east and south-east criminal hub provide wealthier Member States with victims that they can exploit and facilitate the transit and distribution of victims from outside Europe. The north-west criminal hub manages trafficking from other Member States and from outside Europe [13].

The complexity of the phenomenon described above is mirrored by the plethora of measures adopted at the international and European level to cope with it.

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[10] A. Chaplan *et al.*, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, Strasbourg, Council of Europe Publishing, 2009; S. Meyer, "Trafficking in human organs in Europe", *Eur. J. Crime Crim. L. & Crim. Just.*, 2006, p. 208 f.

[11] Europol, *op. cit.,* p. 10-14; UNODC, *Trafficking in persons to Europe for sexual exploitation,* 2010; Eurostat, *Trafficking in human beings*, 2013.

[12] J. Vocks and J. Nijboer, "The Promised Land: A Study of Trafficking in Women from Central and Eastern Europe to the Netherlands", *European Journal on Criminal Policy and Research*, 8, 2000, p. 383 f.

[13] UNODC, *Global report on trafficking in persons 2012*, Vienna, 2012.

B. The plethora of international measures on combating trafficking in human beings

Action has been taken to tackle the phenomenon at the international level ever since the 1940-50s [14]. Hence the European Union's instruments to combat trafficking in human beings have not developed in a complete legal vacuum. The existence of the international measures can be traced back to a number of key international and regional initiatives in the years leading up to the adoption of the EU's instruments [15]. In fact, in terms of both speed and substance, the development of trafficking-related norms and standards in the past few years has been almost unprecedented in international law. As explained below, this plethora of international measures has had a major impact on both the shape and effectiveness of the 2002 FD.

The most important instrument at the international level is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the Trafficking Protocol) adopted by the UN in 2000 (supplementing the UN Convention against Transnational Organised Crime (TOC)). The Protocol has been in force since 25 December 2003 [16].

The stated purpose of the protocol is threefold: first, to prevent and combat trafficking in persons, with a particular focus on the protection of women and children; second to protect and assist victims of trafficking; third to promote and facilitate cooperation among states parties [17].

This instrument encompassed, for the first time, a clear definition of the phenomenon and established minimum obligations for states. Indeed its Article 3 provides that trafficking comprises three separate elements: an action (recruitment,

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[14] See for instance the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

[15] S. Farrior, "The international law on trafficking in women and children for prostitution: making it live up to its potential", *Harvard Human Rights Journal*, 1997, p. 213 f.; M.Y. Mattar, "Incorporating the five basic elements of a model anti-trafficking in persons legislation in domestic laws: from the UN Protocol to the European Convention", *Tulane Journal of International & Comparative Law*, 2006, p. 357 f.; S. Scarpa, *Trafficking in human beings: modern slavery*, Oxford, OUP, 2008; A. Gallagher and P. Holmes, "Developing an Effective Criminal Justice Response to Human Trafficking. Lessons From the Front Line", *International Criminal Justice Review*, 18, 2008, p. 318 f.

[16] Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime, 2000. M. Ditmore and M. Wijers, "The negotiations on the UN Protocol on trafficking in persons", *Nemesis*, 2003, p. 79 f.; H. Abramson, "Beyond consent, towards safeguarding human rights: implementing the UN Trafficking protocol", *Harvard International Law Journal*, 2003, p. 473 f. ; J. Doezema, "Who gets to choose? Coercion, consent and the UN Trafficking Protocol", *Gender and Development*, 10, 2002, p. 20 f.; A. Gallagher, "Human rights and the new UN protocols on trafficking and migrant smuggling", *Human rights quarterly*, 2001, p. 975 f.; D. Mc Lean, *Transnational organized crime: a commentary on the UN Convention and its protocols*, Oxford, OUP, 2007; L.G. Potts, "Global trafficking in human beings: assessing the success of the United Nations Protocol to prevent trafficking in persons", *Geo. Wash. Int'l L. rev*, 35, 2003, p. 227 f.

[17] Article 2 2000 Trafficking Protocol.

transportation, transfer, harbouring or receipt of persons); means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having the control over another person); and a purpose (exploitation). Exploitation is defined as including, as a minimum, exploitation via prostitution, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Remarkably, the definition includes a provision to the effect that the consent of a victim to the intended exploitation is irrelevant and cannot be used as a defence, when the means described above have been used [18].

Article 5 requires state parties to establish as a criminal offence the conduct set forth in Article 3 of the protocol, when committed intentionally. Article 4, however, specifies that the protocol applies only where those offences are transnational in nature and involve an organized crime group.

In the absence of a specific provision on penalties for trafficking, the relevant provisions of the 2000 TOC convention apply: State parties are required to ensure that sanctions adopted within domestic law take into account the gravity of the offence [19].

Special provisions are included to address the problem of victims' assistance and support [20]. A number of provisions address the issue of prevention, requesting state parties to: establish policies, programmes and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimisation (*e.g.* cooperation with NGOs, relevant organisations and other elements of civil society); adopt legislation to discourage the demand (*e.g.* for prostitutes or slaves) that fosters all forms of exploitation of persons and that leads to trafficking [21].

At the European level, the Council of Europe Convention on Action against Trafficking in Human Beings was opened for accession in Warsaw on 16 May 2005 [22].

The Council of Europe's work on trafficking can be traced back to the late 1980s when the issue was still marginally relevant for international organisations and national governments. The proposal for a convention on trafficking first emerged in 2002 and was limited to the trafficking of women for sexual exploitation [23]. The 2005 Convention was clearly intended to bring an added value to the Palermo Protocol, and to address its deficiencies. Trafficking in human beings was recognized as a

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[18] Article 3(b) 2000 Trafficking Protocol.

[19] Article 11 2000 TOC Convention.

[20] Articles 6-8 2000 Trafficking Protocol. See for a comment A. Gallagher, "Using International human rights law to better protect victims of trafficking: the prohibitions on slavery, servitude, forced labour and debt bondage", *in* L.N. Sadat and M.P. Scharf (eds.), *Essays in honor of M.C. Bassiouni*, Leiden, Martinus Nijhoff, 2008, p. 397.

[21] Article 9 2000 Trafficking Protocol.

[22] Council of Europe Convention on action against trafficking in human beings and its explanatory report, Warsaw, 16 May 2005, Council of Europe Treaty Series, no. 197.

[23] See Council of Europe Recommendation 1542 (2002) on a campaign against trafficking in women.

human rights' violation, and the guidelines provided insisted on the need to focus on assistance to and protection of victims [24].

In the end, the 2005 Convention relates to all forms of trafficking. It applies to both national and transnational trafficking, whether or not related to organized crime [25]; as a consequence the 2005 Convention is wider in scope than the 2000 Trafficking Protocol.

Its stated purposes are: to prevent and combat trafficking; to protect the human rights of victims; to ensure effective investigation and prosecution; and to promote international cooperation [26]. The Convention contains several provisions on victims' protection and assistance, going well beyond the Protocol's provisions [27]. Remarkably, these provisions do not require victims to cooperate with law enforcement authorities in order to obtain support and protection. Finally, the convention provides for the setting up of an effective and independent monitoring mechanism capable of controlling the implementation of the obligations contained in the convention [28]. This is described as its added value and one of its main strengths [29]. The Council of Europe thus established a Group of Experts on Action against Trafficking in Human Beings (GRETA) with recognised competences in the field, which monitors the implementation of the convention through country reports evaluating the measures taken by the parties.

C. The EU response

Alongside the international instruments described above, the European Union has, over the years, adopted a number of measures that are related to human trafficking in the framework of the third pillar [30]. As many human trafficking cases have a cross-

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[24] A. Gallagher, "Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments", *European Journal of Migration and Law*, 8, 2006, p. 163 f.

[25] Article 2 2005 Convention.

[26] Article 1 2005 Convention.

[27] Articles 10-16 2005 Convention.

[28] Article 36 2005 Convention.

[29] See the Explanatory Report to the 2005 Convention, points 59 and 354.

[30] A. Weyembergh, "La lutte contre la traite des êtres humains dans le cadre du 3e pilier du traité sur l'Union européenne", *Cahiers de droit européen*, 1-2, 2000, p. 215 f. ; H. Askola, *Legal responses to the trafficking in women for sexual exploitation in the EU*, Oxford, Hart, 2007; C. Rijken, *Trafficking in persons – prosecution from a European prospective*, The Hague, T.M.C. Asser Press, 2003; E. Guild, "Immigration and criminal law in the European Union: the legal measures and social consequences of criminal law in Member States on trafficking and smuggling in human beings" and T. Obokata, "EU action against trafficking in human beings: past, present and the future", *in* E. Guild and P. Minderhoud (eds.), *Immigration and criminal law in the European Union*, Leiden, Martinus Nijhoff Publishers, 2006, p. 1 and p. 387; A. Middelburg and C. Rijken, "The EU legal framework on combating trafficking in human beings for labour exploitation", *in* C. Rijken (ed.), *Combating trafficking in human beings for labour exploitation*, Nijmegen, Wolf Legal Publisher, 2011, p. 355; T. Obokata, "Trafficking of human beings from a human rights perspective: towards holistic approach", *International Studies in Human Rights*, 2006, p. 89 f.; S.H. Krieg, "Trafficking in human beings: The EU

border dimension, requiring intensive cross-border cooperation for the investigation and prosecution of traffickers, there is a need to harmonise national offences and sanctions. Thus, trafficking in human beings has been mentioned in the treaties since the origins of the cooperation in the field of Justice and Home Affairs field. The Union started taking initiatives in the 1990s, with the first major study conducted by the Commission in 1996 [31].

The EU's Joint Action of 24 February 1997 was the first EU approximating instrument in the EU's fight against human trafficking and smuggling [32]. Of particular importance is the fact that trafficking in human beings for sexual exploitation has been made a criminal offence within the EU context. Through the Joint Action, EU Member States agreed to review relevant national laws and practices with a view to improving judicial cooperation and ensuring appropriate penalties (including confiscation of the proceeds of trafficking, investigations and technical assistance). Member States were also to ensure protection for witnesses and assistance for victims and their families but, in this regard, no specific obligations were detailed.

This Joint Action was followed by Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [33].

The Framework Decision 2002/629/JHA was an additional step towards addressing the crime of trafficking in human beings at the EU level [34]. As set out in detail below, it was based on three key elements: a common definition of Trafficking in Human Beings (Article 1); a uniform threshold for minimum penalties to be imposed (Article 3(2)); and (limited) protection and assistance to victims (Article 7). According to the Commission, as the Framework Decision focuses on criminal law provisions, implementation of a comprehensive anti-trafficking policy in Member States is still unsatisfactory, particularly as regards the effectiveness of law enforcement activities to detect and prosecute trafficking, victim protection and assistance and the monitoring of trends and anti-trafficking policies. In 2004 the EU also enacted the Directive 2004/81/EC on the possibility to introduce a residence permit for victims of human trafficking, who cooperate with law enforcement authorities in their investigations [35]. However, as explained below, this text did not manage to fully address the lack of

approach between border control, law enforcement and human rights", *European Law Journal*, 15/6, 2009, p. 775 f.

[31] Commission Communication to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation, COM (96) 567 final, 20 November 1996.

[32] Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children, *OJ*, no. L 63, 4 March 1997, p. 2. Its legal basis was Article K.3 TUE.

[33] Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, *OJ*, no. L 203, 1 August 2002, p. 1.

[34] Its legal basis was Article 29 TEU.

[35] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, *OJ*, no. L 261, 6 August 2004, p. 19.

protection granted to trafficking victims. The situation called for a substantive improvement in the EU's rules [36].

In March 2009, increased awareness of the limited repressive approach of the 2002 Framework Decision on trafficking in human beings led the Commission to issue a proposal to repeal and replace it. When the Lisbon Treaty came into force on 1 December 2009, the proposal was put to one side as the new legal basis provided by this Treaty offered considerable advantages for new legislation to be adopted in the field of justice and home affairs from then on [37]. As a consequence, an EU directive on preventing and combating trafficking in human beings was proposed by the Commission, negotiated rapidly and adopted in April 2011 [38]. Member States had to implement it by April 2013. But to date, only six out of the twenty-seven Member States have fully transposed it, and three countries have reported only partial transposition [39].

The 2011 Directive has been supplemented by the adoption by the EU Commission of an EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016) on 19 June 2012 [40]. The strategy lists a number of measures to be implemented over the next five years and is based on five key priorities: identifying, protecting and assisting victims of trafficking; stepping up the prevention of trafficking in human beings; more prosecution of traffickers; boosting coordination and cooperation among key actors and policy coherence; increasing knowledge of and effectively responding to emerging concerns relating to all forms of trafficking in human beings. The Council has welcomed the strategy and invited Member States and the relevant EU agencies to further develop and strengthen existing action on the basis of the Commission's guidelines [41].

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[36] See Proposal for a Directive on preventing and combating trafficking in human beings and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2010) 95 final, 29 March 2010.

[37] Legislation will no longer need to be approved unanimously by the EU Council of Ministers (*i.e.* national governments). Instead, it will be adopted by a majority of Member States at the Council together with the European Parliament. A single country will not be able to block a proposal. Implementation at national level will also be improved. The Commission will be able to monitor how Member States apply EU legislation. If it finds that EU countries violate the rules, it will be in a position to refer the case to the European Court of Justice.

[38] Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ*, no. L 101, 15 April 2011, p. 1.

[39] Commission, Press Release, Trafficking in human beings: more victims but Member States are slow to respond, 15 April 2013, IP/13/322, available at http://europa.eu/rapid/press-release_IP-13-322_en.htm.

[40] Communication from the Commission, The new EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, COM (2012) 286 final, 19 June 2012.

[41] Council conclusions on the new EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, 3195th Justice and Home Affairs Council meeting Luxembourg, 25 October 2012.

D. Research purpose and scope of the contribution

This contribution will assess the content and impact of the approximation of the EU's instruments on preventing and combating trafficking in human beings on Member States' national legislation.

Considering the insufficient transposition of the 2011 Directive, and the short time elapsed since the expiration of the transposition period, it is not yet possible to wholly evaluate the impact of this directive. As a consequence, this contribution will first focus on the approximation resulting from the 2002 Framework Decision [42]. It will analyse to what extent the 2002 Framework Decision has managed to achieve its objective of enhancing the approximation of the legislation of Member States, thereby strengthening mutual trust. In particular, an assessment will be made of the shortcomings of such approximation. For the purpose of this analysis, both the EU instruments and national legislation are being taken into account.

The contribution will then discuss to what extent the evaluation of the 2002 Framework Decision has been taken into account in the drafting of the 2011 directive. It will first describe what exactly is required of Member States under the new directive in terms of specific actions and responses. It will then assess how these obligations compare to those contained in the 2002 Framework Decision and how they relate to other agreements developed at the international level. Finally it will evaluate to what extent the new EU directive has remedied weaknesses in the previous legal regime, especially those related to protection of victims of trafficking and prevention measures.

In conclusion, some hypotheses will be elaborated on the potential impact of the new instrument on the basis of its more effective nature as well as the scope and content of the new provisions. The author will identify the main challenges ahead and evaluate whether the directive and its various implementing mechanisms can meet these challenges and thereby contribute to a more effective European law on the issue of trafficking in human beings.

2. The content and impact of approximation: the Framework Decision 2002/629/JHA

The aim of this Framework Decision is to "reduce disparities among different judicial approaches of Member States and contribute to the development of police and judicial cooperation against trafficking in human beings" [43]. In fact, the approximation of criminal law boosts the protection of legal interests via criminal law because it makes it harder for perpetrators of human trafficking crimes to take advantage of legal diversity by choosing the most convenient legal system [44]. It facilitates cooperation in criminal matters by ensuring that cooperation is based on parallel (or at least similar)

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[42] See also T. Obokata, "EU Council Framework Decision on combating trafficking in human beings: a critical appraisal", *Common Market Law Review*, 40, 2003, p. 917 f.

[43] Report from the Commission based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM (2006) 187 final, 2 May 2006.

[44] K. Ambos, "Is the development of a common substantive criminal law for Europe possible? Some preliminary reflection", *Maastricht Journal of European and Comparative Law*, 12, 2005, p. 173 f.

criminal law provisions. This is attempted via the adoption of minimum standards with regard to criminal offences and penalties [45].

The 2002 Framework Decision aimed at promoting a harmonised EU response to human trafficking. Although it marked a significant improvement in the EU provisions for combating the phenomenon (A), the instrument has a number of limitations (B).

A. A significant improvement in the EU provisions for combating trafficking in human beings

As things stand, there is no reliable data from which safe conclusions can be drawn regarding the degree of cooperation between law enforcement or prosecuting authorities subsequent to the adoption of the 2002 Framework Decision but this instrument does constitute a major change both in practical and symbolic terms [46].

1. The symbolic value of the 2002 Framework Decision: raising awareness about the phenomenon

Some national legislation already contained provisions that could be used for combating trafficking even before the 2002 Framework Decision and can still be used [47].

The real problem faced by those seeking to combat trafficking was not the presumed dearth of criminal law provisions. Instead, what was lacking was a complete awareness of the contours of the problem. The changes introduced by the Framework Decision contributed to drawing attention to the issue of trafficking at a symbolic level, leading to increased awareness of the phenomenon and stimulating the political will needed to combat it. Although not completely successful, the 2002 Framework Decision constitutes a timid attempt to shift the attention and interest of the criminal justice system from controlling flows of migrants – which used to be understood as the legal interest at stake [48] – to considering also the need to protect and assist victims [49].

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[45] See Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final, 20 September 2011.

[46] A. Weyembergh and V. Santamaria, *The evaluation of European Criminal Law. The example of the Framework Decision on combating trafficking in human beings*, Bruxelles, Editions de l'Université de Bruxelles, 2009.

[47] For instance, in Belgium detailed provisions already existed in relation to the extraterritoriality and liability of legal persons.

[48] J. Salt and J. Stein, "Migration as a business: the case of trafficking", *International Migration*, 35/4, 1997, p. 467 f.; M.V. McCreight, "Smuggling of migrants, trafficking in human beings and irregular migration on a comparative perspective", *European Law Journal*, 12/1, 2006, p. 106 f.

[49] C. Rijken and E. de Volder, "The European Union's struggle to realize a human rights' based approach to trafficking in human beings", *Connecticut Journal of International Law*, 25, 2009, p. 49 f.

2. Approximation of offences and penalties

The Treaty of Amsterdam introduced a new legal basis (Article 31 TUE) allowing for the progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field or organised crime.

In this context, the 2002 Framework Decision has certainly been a step forward with regard to the approximation of EU criminal law in the field and the creation of a common EU approach to trafficking in human beings as it provides a common definition as well as an approximation of the level of punishment for perpetrators of trafficking. The provision on the protection of victims included in the Framework Decision, although limited in scope, contributes to this aim as the ways in which victims are protected used to vary considerably from one Member State to another.

The definition of trafficking included in the 1997 Joint Action was rather narrow [50]: it placed considerable emphasis on the migration aspects and envisaged the sexual exploitation of women and children outside their country of origin as the only possible result of trafficking [51].

By comparison, it is worth noting that the changes in content of the 2002 Framework Decision have to be seen in the context of other international instruments and especially of the 2000 Trafficking Protocol, which has influenced its scope.

The EU 2002 Framework Decision, in its Article 1, makes human trafficking an explicit and specific criminal offence, [52] thus encouraging effective investigations and the prosecution of suspects. In addition, it provides for additional clarity as it avoids the previous situation in which numerous offences overlapped. It also brings

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[50] Article I.A. – In the context of this Joint Action: (i) 'trafficking' [is understood] as any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of a Member State, for the purposes set out in point B (b) and (d); (ii) 'sexual exploitation' in relation to a child, as the following behaviour: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of a child in prostitution or other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials, including the production, sale and distribution or other forms of trafficking in such materials, and the possession of such materials; (iii) 'sexual exploitation' in relation to an adult, as at least the exploitative use of the adult in prostitution.

[51] See 1997 Joint Action but also the Hague Ministerial declaration on European guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation (1997).

[52] Article 1 – Offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation – "1. Each Member State shall take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography. "

together the treatment of trafficking-related activities into one EU legal act. Under the 2002 FD, the scope of the offence has been extended to cover not only sex-related trafficking but also forced labour. Thus, the EU seems to have acknowledged that trafficking is not only related to prostitution and sexual exploitation. Hence, the definition enshrined in the 2002 FD is broader than the definition within the 1997 Joint Action with regards to the means of exploitation. However, whereas the 1997 Joint Action made no difference between trafficking in human beings and smuggling, the 2002 FD follows the approach of the 2000 Trafficking Protocol and concerns only trafficking in human beings. As a consequence, its scope of application is narrower and more specific than the scope of the preceding EU instrument.

Although the initial idea was to improve the implementation of the protocol and go beyond its provisions, differences in the definition of trafficking were smoothed out over time and the final version reflected the definition set out in the protocol in relation to all but a few minor elements[53]. For instance, the definition left out the removal of organs, which was included in the 2000 Trafficking Protocol definition. The three elements of the definition have been in any case retained: material acts, means and aims.

The inclusion of a rule with regard to penalties (Article 3), as well as their broad application to legal persons (Article 5), constituted a general strengthening of the relevant provisions of the 2000 Trafficking Protocol. For example, in addition to establishing a standard of "effective, proportionate and dissuasive" criminal penalties (Article 3(1)), the 2002 Framework Decision introduced the concept of aggravated offences in relation to which the stated minimum penalties are to apply (Article 3(2)). The aim of approximating the level of penalties is to prevent situations in which some traffickers receive lower punishment than others depending on the Member State in which they are convicted.

As all Framework Decisions on the approximation of national legislation, the 2002 Framework Decision on trafficking encompasses also provisions on the liability of legal persons (Article 4) and sanctions on legal persons (Article 5) as well as on Member States' jurisdiction.

The jurisdiction clause is broader than that of the protocol[54]: for instance, establishing jurisdiction when the offender is a Member State's national becomes an obligation, whereas it remains in the discretion of the State Party in the case of the

[53] See with the 2000 Trafficking Protocol's definition: Article 3 – "For the purposes of this Protocol: (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

[54] In the absence of a specific provision, Article 15 TOC Convention applies to the Trafficking Protocol as well.

Trafficking Protocol. However, Member States partially retain the right to opt out of these innovative aspects [55].

3. First steps towards providing effective assistance for and protection of victims

Most national legislation used to have shortcomings in terms of assistance to victims and victim protection [56]. Asymmetries in national legislation created situations where some of those trafficked were protected more than others depending on where they were trafficked to. For instance, only a few Member States provided, in 2002, for the issuance of temporary residence permits as a basis for long-term protection. Moreover, a difficulty in providing protection is the fact that many of those trafficked into or through Member States are illegal immigrants who are likely to be arrested, detained or deported in accordance with national immigration laws and regulations.

The 2002 Framework Decision provisions and the corresponding implementing legislation constitute an improvement (although timid) in this respect.

The victim's consent is rendered irrelevant if elements of force, coercion or abuse of authority are present [57]. There is also an acknowledgement that differences between trafficking in adults and children should be reflected in the definition itself. In fact child exploitation does not require the use of violent means to be identified as trafficking [58].

Moreover, Member States are required to ensure that, at least for offences committed on their territory, investigations and prosecutions do not rely on victims' complaints (all Member States' implementing legislation are compliant with these requirements) [59]. The stipulation that investigations and prosecutions can proceed *ex officio* is clearly intended to address the problem of intimidation of victims, which compromises efforts to come up with an effective criminal justice response to trafficking [60].

B. Areas of concern hindering the added value of the 2002 Framework Decision

The potential of the 2002 Framework Decision has been recognised as it has proven influential in promoting approximation. However, it is difficult to say whether any perceived degree of the approximation process can be attributed solely to the implementation of the 2002 Framework Decision or should also be attributed to

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[55] Article 6(2) 2002 FD "A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) as far as the offence is committed outside its territory."

[56] V. Roth, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings*, Leiden, Martinus Nijhoff, 2012.

[57] Article 1(2) 2002 FD. The issue of consent was not mention in the 1997 Joint Action whereas the provision already existed in the 2000 Protocol (Article 3(b)).

[58] Article 1(3) 2002 FD.

[59] Article 7(1) 2002 FD.

[60] A. Confalonieri, "The role of the victim in administrative and judicial proceedings", *Revue Internationale de droit pénal*, 81/3-4, 2010, p. 529 f.

the impact of the aforementioned international instruments [61]. All these instruments contribute to a certain extent to the approximation of national legislation in this field. The impact of the 2002 Framework Decision cannot be analysed in isolation from that of other international instruments. Besides, there are areas of concern, which may limit its contribution because of what has been left out of its scope.

1. *Implementation* à géometrie variable *and over-criminalisation of the phenomenon*

Firstly, the "harmonising effect" is limited because the 2002 Framework Decision only sets out minimum standards of criminal protection. As a consequence, the implementation at the national level has been "*à géométrie variable*" and has led to a general over-criminalisation of the phenomenon, *i.e.* implementation at the national level has been accurate but more severe than the FD itself.

National legislation has, in many cases, exceeded the 2002 Framework Decision requirements on a number of issues, such as the definition of the offence (wider when implemented into national law), the penalties prescribed (which go beyond those envisaged by the Framework Decision and can even go as far as life imprisonment if aggravating circumstances apply) as well as the jurisdiction over trafficking [62].

As regards the definition of the offence, the 2002 Framework Decision establishes only minimum standards. Many Member States have decided to go beyond the requirements of the 2002 Framework Decision defining the criminal offences more broadly.

Some states have reduced the number of constituent elements of the criminal offence.

In Belgium there are only two main constituent elements of the offence, namely the action of exploitation and its purpose. The means of exploitation are aggravating circumstances. As a consequence the scope of the offence is much broader. Hungary [63] and Spain [64] incriminate all forms of trafficking without there being any need an underlying purpose of concrete exploitation (exploitation is considered as an aggravating circumstance).

Some states have expanded the aims of exploitation. For example, in France, human trafficking is very broadly defined as the exploitation of a person for the purpose of committing any serious offence (*crime* or *délit*). Such a broad definition is meant to cover any possible practice that could develop in the future but also has serious implications for the principle of legality and could create major difficulties

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[61] A. Weyembergh and V. Santamaria, *op. cit.*

[62] For details on the national legislation of Belgium, France, Germany, Greece, Italy, Spain, Lithuania, Poland, The Netherlands, Slovenia and the United Kingdom see A. Weyembergh and V. Santamaria, *op. cit.*

[63] Article 175B Criminal Code. See K. Ligeti, "Trafficking in human beings in Hungary", *ibid*., p. 197 f., at p. 205-207.

[64] Article 318*bis*, para. 1 Criminal Code. See F.J. de Leon, M. Maroto and M.A. Rodriguez, "Spanish legislation on combating trafficking in human beings", *ibid*., p. 315 f., at p. 320-321.

when it comes to interpreting it in practice.[65] Italian legislation refers to any kind of activity implying victim exploitation – the list is left open in order to cover forms of exploitation that may appear in the future[66].

In addition to the introduction of a common definition of the phenomenon, the 2002 Framework Decision provides for a minimum threshold for maximum penalties applicable to trafficking in human beings. The threshold only applies to offences involving aggravated circumstances. In relation to ordinary offences, Article 3(1) 2002 FD only refers to effective, appropriate and dissuasive penalties. The 2002 Framework Decision did not require Member States to prescribe the same penalty for each type of circumstance of trafficking, leaving this matter to their discretion. These choices run the risk of promoting divergence rather than approximation of national laws. In fact, penalties in the Member States vary significantly. Moreover, it has favoured the development of a particularly repressive approach[67].

Implementing legislation has led to a rigorously punitive framework. For countries where trafficking was already criminalised, the implementing legislation has increased the lengths of prison sentences compared to the situation beforehand. Trafficking in human beings is, at the national level, one of the most severely punishable offences in criminal codes. As a general rule, the punishment is exclusively imprisonment[68]. Maximum sentences provided by national legislation are much higher than what is required by the 2002 Framework Decision, in some cases even when aggravated circumstances are not present[69]. A maximum penalty of no less than eight years – as required by the 2002 FD – is often simply a medium range of the sanctions envisaged for trafficking at the national level.

Because of the Member States' perceived need to strengthen their arsenal of repressive measures in order to stop crimes from being committed, the severity of

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[65] Article 225(4)(1) *Code Pénal*. See M. Poelemans, "La transposition en France de la Décision-cadre 2002/629/JAI du 19 juillet 2002 sur la traite des êtres humains", *ibid*., p. 85 f., at p. 90-93.

[66] Articles 600 *Codice Penale*. G. Grasso and A. Lucifora, "Evaluation of the impact in Italy of the 19th July 2002 Framework Decision against trafficking in human beings"*, ibid.* p. 219 f., at p. 221-227.

[67] Remarkably, in the 2002 Framework Decision the minimum required as maximum penalty for aggravated offences is eight years whereas it was ten years in the original proposal. The original proposal contained also a minimum for non-aggravated offences, which is not included in the final 2002 Framework Decision. Was there maybe a concern during the negotiations that the approach retained could be too repressive?

[68] Specific sanctions are however provided for legal persons (see Article 5 2002 FD).

[69] The maximum sentence in Belgium is of 10 years (15 years in the case of aggravated circumstances); in France the maximum sentence is 10 years, in the case of organized crime involvement it is brought to 20 years, torture or inhuman treatments lead to the applicability of life imprisonment and other complementary penalties; in Germany the maximum sentence is 10 years without any aggravating circumstance; in Greece the maximum sentence is 5 to10 years, brought to 10-20 in the case of aggravated offence, if the victim dies life imprisonment becomes applicable. Certain aggravated circumstances included in Greek law were not even in the text of the 2002 Framework Decision. A. Weyembergh and V. Santamaria, *op. cit.*

penalties has dramatically increased the use of deterrence as the main instrument to combat the problem.

Compared to national scales of criminal penalties, as provided for other serious offences, the penalties for trafficking in human beings are certainly effective and dissuasive. However, implementation raises doubts about whether the proportionality requirement of the new provisions is being met. In fact, the prescribed penalties do not always reflect the harm inflicted by the proscribed conduct, especially in view of the fact that mere intent of exploitation is enough for a charge under the relevant provisions [70].

In certain cases, the criminal sanctions provided at the national level are patently disproportionate and legal scholars are highly critical of their disproportionately punitive nature [71].

2. Weak and narrow provision on the protection of victims

Secondly, approximation is limited due to the limited content of the 2002 Framework Decision in certain respects.

The provision concerning respect to victims is both weak and narrow in scope. Regrettably, the measures identified in the victim protection provision are limited to children, who are considered to be particularly vulnerable victims when it comes to EU standards on the standing of victims in criminal proceedings. By contrast, the 2002 FD says nothing about the protection of adult victims (except that investigations should not be dependent on their report or accusation) [72]. Member States are required to take measures to ensure that child victims and their families receive appropriate assistance [73]. Besides, there are no provisions on victims' repatriation or remedies (such as compensation). This limited approach to victims' rights and interests appears to be a backward step by comparison with both the 1997 Joint Action's provisions (Article II.F) and the 2000 Trafficking Protocol's provisions (Articles 6-8).

The EU argued that some of the more obvious weaknesses would be addressed at a later stage. For example, the EU made use of the competences granted by the EC Treaty with regard to irregular migration to further address the question of victims' assistance and support in the EU Directive 2004/81/EC on short term residence permits, which is meant to enable victims of trafficking to cooperate with law enforcement authorities by providing assistance [74]. Trafficked victims are given a reflection period during which they cannot be subject to any expulsion order and Member States are required to give them access to subsistence and medication, translation services, etc. First, this directive has been criticised as a minimum standards' version of existing national regimes [75].

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[70] The act of trafficking must have occurred but the exploitation in itself must not necessarily have taken place.

[71] See A. Weyembergh and V. Santamaria, "Conclusions", *op. cit.*, p. 379.

[72] This avoids the need for victims to testify at trial and thus protects them for a re-victimisation process.

[73] Article 7(3) 2002 FD.

[74] Legal basis: Article 63(3) TEC (measures on immigration).

[75] R. Piotrowicz, "European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers", *Int. J. Refugee Law*, 14/2-3, 2002, p. 263 f.

Member States are only requested to "consider" granting a residence permit. Secondly, victims' assistance and protection is disappointingly only provided if they cooperate with the judicial authorities. This is not a desirable approach. Victims who are outside criminal proceedings are unable to benefit from the process. This may be a reasonable and justified response from the point of view of a Member State. Moreover, problems arise when criminal proceedings are terminated, for example due to lack of sufficient evidence, or come to an end when traffickers are convicted or acquitted. In these circumstances, Member States can withdraw their support to victims, as they have no further value from a criminal justice point of view. Another issue is that those who do not cooperate may face enforcement action such as deportation. Finally, residence permits may not be invoked by victims who are nationals of another Member State, which may result in a problem given that some of the new states after the last round of enlargement may still be considered as countries of origin. In the end, the main aim of the 2004 Directive was to combat illegal immigration, including trafficking. It was not designed to create a victim protection scheme.

Connecting the protection of victims to the prosecution of specific defendants demonstrates the problem engendered by viewing trafficking as nothing but a problem of criminal law. The trade-off between protection and cooperation proves that the EU's main concern is not (yet) the protection of fundamental rights.

Instead, the provisions on protection and assistance should be considered from a human rights perspective. Victims should benefit from an unconditional right to protection. Protection should be given to all victims equally, even when they are not willing to participate in criminal proceedings for example because of fear of reprisals from the traffickers. A victim of trafficking who cannot or will not assist authorities in the prosecution of traffickers deserves no less protection than any other victim! The protection of the victim needs to be dissociated from the prosecution of the offender.

In the end, and in spite of the adoption of the 2003 Directive, we can say that the protection of victims is not sufficiently covered by the 2002 Framework Decision. The EU has not sought to implement comprehensive policies aiming at protecting victims along with its simple rationalisation of existing criminal law provisions (the 2005 Council of Europe Convention is much more advanced in this respect) [76]. During the drafting stages, the UN High Commissioners for human rights and refugees jointly expressed concern that the provision on victims' protection was minimal [77].

Many Member States have no specific provisions relating to the protection of victims of human trafficking and they simply rely on the general provisions in their criminal codes. In most states there is no systematic catalogue of the rights and duties of the victims and assistance to the children's families is not provided [78].

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[76] Article 12(6) of the 2005 Convention states that "Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness".

[77] UN High Commissioner for Refugees, *Observations by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees on the Proposal for an EU Council Framework Decision on Combating Trafficking in Human Beings*, 27 June 2001.

[78] A. Weyembergh and V. Santamaria, *op. cit.*

Besides, regrettably, many Member States have no specific provisions on victim's consent as a reason for excusing the offender of his/her responsibility. The general appreciation of victims' consent differs broadly according to each Member State's general criminal law. In some Member States, victim's consent excuses the offender from liability except for serious crimes whereas in others it does not do so unless the offence involves the recourse to mental or physical violence [79].

3. Specific measures on prevention missing

The 2002 Framework Decision may have had an indirect impact on the development of prevention measures in some Member States. However, although they had already been introduced in the 2000 Trafficking Protocol, there are no specific provisions on the prevention of trafficking by addressing its root causes and the demand feeding the phenomenon.

The 2002 Framework Decision is merely a criminal law response to the trafficking of human beings in that its aim is to prohibit trafficking and to punish traffickers. This could hinder the effectiveness of the instrument. The balance between prevention and repression needs to be improved. For action to be successful, it needs to go beyond criminalisation of the act and punishment of traffickers and address a range of issues [80].

The causes of trafficking must be taken into account as the demand for cheap labour forces or for sexual services is an important factor in the development of the phenomenon.

On the one hand, national legislators must strengthen law to punish forced labour as a deterrent to potential employers but also establish a good working relationship with states of origin to control the supply side. On the other hand, they should open channels for legal migration for employment purposes. Immigration law is sometimes so strict that it encourages trafficking to move into illegal labour markets.

3. To what extent has the evaluation of the 2002 Framework Decision been taken into account in the elaboration of the directive?

Research and consultations pinpointed a number of shortcomings of the existing legal framework. First, there has not been a net increase in investigations and in the prosecution of trafficking in Member States following the implementation of the 2002 Framework Decision compared to the estimated scale and the gravity of the offence. Secondly, the 2002 Framework Decision focused on criminal law provisions as the implementation of a comprehensive anti-trafficking policy in Member States was still unsatisfactory. Victims are not receiving adequate assistance; protection or compensation and prevention measures are insufficient. Thirdly, the situation has been poorly monitored, leading to a lack of knowledge and coordination [81].

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[79] *Ibid*., p. 384.

[80] *Opinion no. 7/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission Proposal for a European Strategy and Priority Actions on combating and preventing trafficking in human beings (THB) and protecting the rights of trafficked and exploited persons*, 2010.

[81] See Report from the Commission based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM (2006) 187 final, 2

The impact assessment identified a number of options, eventually coming out in favour of the most expansive one: new legislation on prosecution, victim support, prevention and monitoring, accompanied by a series of non-legislative options (such as training, preventative measures in countries of origin and destination and victim support schemes) that would support the effective implementation of the Framework Decision [82].

Thus, in March 2009, the Commission submitted a proposal for a Framework Decision on preventing and combating trafficking in human beings [83], aiming at strengthening the provisions of the previous instrument. The proposed Framework Decision was not adopted before the entry into force of the Treaty on the Functioning of the European Union. Under the new decision-making process, the draft was scrapped.

However the parts that are relevant to the discussion have received general support and the substance of them has been resubmitted for further negotiation. A new proposal for a directive on preventing and combating human trafficking was tabled in March 2010 [84]. Its content is essentially the same as the previous 2009 proposal for a Framework Decision.

A new instrument was considered necessary because, according to the Commission, the existing framework suffered from insufficient or erratic implementation in Member States [85]. Moreover, there was a willingness to introduce a more effective instrument after the Lisbon Treaty had come into force. The reforms introduced by the new treaty allow the European Parliament to be more involved and therefore to deal with previous doubts about the democratic legitimacy of the instrument and would include the possibility of launching infringement proceedings at the European Court of Justice [86].

The Directive on preventing and combating trafficking in human beings and protecting victims was formally adopted in April 2011. Member States had to implement it by 6 April 2013. It is one of the first instruments adopted in the Area of Freedom, Security and Justice under the Treaty on the Functioning of the EU (TFEU), it replaces the 2002 Framework Decision and its legal bases are articles 82(2) and 83(1) TFEU.

May 2006; Commission working document – Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, COM (2008) 657 final, 17 October 2008; 2009 Proposal for a Framework Decision on preventing and combating human trafficking.

[82] Commission Staff Working Document – Accompanying document to the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA – Impact Assessment, SEC (2009) 358, 25 March 2009.

[83] Proposal for a Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2009) 136 final, 25 March 2009.

[84] Proposal for a Directive on preventing and combating trafficking in human beings, 2010.

[85] *Ibid*.

[86] See Anne Weyembergh's contribution in this same publication.

The Council of Europe Convention signed in 2005 had a profound impact on the partial shift in the EU policy against trafficking from the adoption of purely law enforcement measures to a more careful consideration of victim protection and assistance. The renewed EU attention on implementation and monitoring mechanisms has also been influenced by the relevant Council of Europe convention provisions as well as the work done in the framework of GRETA.

The evaluation of the 2002 Framework Decision has been partially taken into account and in many respects the 2011 Directive is considerably better than its predecessor, although ameliorations have some limits (A). However, concerns have still been raised and the new instrument has been sharply criticised (B) [87].

A. Major improvements by comparison with the 2002 Framework Decision

In the Preamble trafficking in human being is identified as a gross violation of fundamental rights [88]. In addition, the Preamble highlights that the Directive "adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings".

These constitute very significant elements witnessing the shift from a criminal justice approach to a human rights-based approach in the EU approach to trafficking in human beings, finally combined within an integrated and multidisciplinary approach to the phenomenon [89]. This approach is meant to address the phenomenon of human trafficking in all its dimensions (protection, prevention, prosecution). In addition, it aims at the coordination of actions conducted and measures adopted within different fields that have an impact on trafficking in human beings, such as criminal law, migration law, labour law or external relations.

Such development has been deeply influenced by the drafting of the 2005 Council of Europe Convention as well as the case-law of the Strasbourg Court on the matter [90].

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[87] For a detailed commentary of the 2011 Directive see T. Obokata and B. Payne, "Implementing action against trafficking of human beings under the TFUE: a preliminary analysis", *New Journal of European Criminal Law*, 3/3-4, 2012, p. 298 f. See also *Joint UN Commentary on the EU Directive – A Human rights-based approach*, 2011.

[88] "Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union" (recital 1).

[89] On this shift see T. Obokata, "A human rights framework to address trafficking of human beings", *Netherlands Quarterly of Human Rights*, 24/3, 2006, p. 379 f.

[90] In the *Siliadin* case the Strasbourg Court mentioned trafficking in human beings, and explicitly recognised that Article 4 ECHR (prohibition of servitude) entails positive obligations for states to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude and forced or compulsory labour. In the *Rantsev* case, the ECtHR better specified the constituent elements and means of such a positive obligation highlighting that trafficking in human beings falls within the scope of Article 4 ECHR. As a consequence, states must estasblish a legal framework to prevent and prosecute the phenomenon, take protective measures, investigate situations of trafficking (cooperating with foreign authorities in the context of transnational cases). See Eur. Court HR, 26 July 2005, *Siliadin v France*, Application no. 73316/01 and Eur. Court HR, 7 January 2010, *Rantsev v. Cyprus and Russia,* 7 January 2010, Application no. 25965/04. For academic comments see H. Cullen, "Siliadin v

1. Extended definition of trafficking in human beings

Article 1 introduces a comprehensive statement of purpose by which the directive clearly defines its objectives: establishing minimum rules concerning the definition of criminal offences and sanctions and strengthening prevention aspects and the protection of victims.

In order to enhance the approximation of legislation, the directive provided a definition of trafficking identical to the one set out in the 2000 Trafficking Protocol [91] except that it extended the open-ended list of practices that are to be included as "exploitation" to "exploitation of activities associated with begging or of criminal activities". This choice promotes consistency and legal certainty and facilitates the tasks of both national legislators and judicial authorities that will have to interpret the law. Broadening the understanding of the concept of exploitation is also of great importance. In fact, this allows to encompass different situations and to adapt EU instruments to the evolving threat with the consequent emergence of new forms of trafficking (diversification of activities of exploitation). In addition, exploitation now includes begging and removal of organs and an open formulation of the forms of force is used [92]. Following the position of the Experts Group on its predecessor [93], the definition of human trafficking is more comprehensive than both the 2002 FD and the 2000 Trafficking Protocol.

2. Deeper approximation of sanctions and broader jurisdiction

With regard to sanctions and reflecting the European Commission's view that penalties had to be strengthened, the 2011 directive introduces a minimum common threshold of five years for the maximum penalty for all trafficking related offences, regardless of aggravated circumstances [94]. The minimum common threshold for the

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France: Positive Obligations under Article 4 of the European Convention on Human Rights", *Human Rights Law Review*, 23, 2006, p. 592 f.; V. Stoyanova, "Dancing on the borders of Article 4: Human trafficking and the European Court of Human Rights in the Rantsev case", *Netherlands Quarterly of Human Rights*, 30/2, 2012, p. 164 f.

[91] Article 2(1) – "Member States shall take the necessary measures to ensure that the following intentional acts are punishable: The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

[92] Article 2(1) – "… by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

[93] Opinion no. 1/2008 of the Expert Group on Trafficking in Human Beings of the European Commission, on the Revision of the Council Framework Decision of 19 July 2002 on Combating trafficking in human beings.

[94] Article 4(1). Remarkably, the 2009 Framework Decision proposal suggested 6 years.

maximum penalty in the case of aggravated circumstances has been raised from the eight years of the 2002 Framework Decision to ten years [95].

The introduction of a common threshold for all trafficking related offences is a significant novelty because the 2002 FD only provided such threshold for aggravated offences. This choice certainly has a beneficial impact in deepening the approximation process at the EU level. The impact on the approximation of legislation is however limited because the 2011 directive (as the 2002 FD) only defines minimum common thresholds for the maximum penalty (and not also a minimum for the minimum penalty), leaving a wide discretion in the hands of the national legislator to go beyond the minimum provided for. In addition, as further explained in the upcoming pages, the increased level of sanctions is a negative element.

For offences of incitement, aiding and abetting and attempt (as defined in Article 3), the 2011 directive simply reaffirms the need for penalties to be "effective, dissuasive and proportionate to the gravity of the crime" and to contribute to a more effective investigation and prosecution and international cooperation [96].

Besides, a new provision on penalties completes the existing framework, requiring Member States to ensure that competent authorities are entitled to seize and confiscate the instruments and proceeds of trafficking [97].

The provisions on jurisdiction have been partially amended.

Firstly, whereas the 2002 FD provided that a Member State may have decided not to establish its jurisdiction over an offence where the offender was one of its nationals (derogating from its Article 6(1)), the exercise of the active nationality principle has been made mandatory by the 2011 Directive.

Secondly, in relation to offences committed outside their territory, Member States is required to ensure that the principle of double criminality is not used to hamper the establishment of jurisdiction [98]. The establishment of jurisdiction does not depend on the complaint of the victim in the state where the offence occurred or on a positive action of that state with regard to the offence [99]. The 2002 FD did not encompass such a two-fold provision on offences committed outside the state's territory. The need not to rely on the victim's complaint was then mentioned not in a provision on "jurisdiction" but in a provision on "protection of and assistance to victims" and the requirement was limited to cases where the offence had been committed at least partially on the territory of the MS.

With regard to prosecution, a problem may be that, in certain states, periods of limitations are placed on trafficking and related offences so that prosecution may not be instituted after a certain amount of time has elapsed. This can lead to legal loopholes and the impunity of traffickers [100]. In this context, Member States are also

[95] Article 4(2).
[96] Article 4.
[97] Article 7.
[98] Article 10(3)(a).
[99] Article 10(3)(b).
[100] T. Obokata and B. Payne, *op. cit.*, p. 316.

required to allow the prosecution of the offence for a sufficient period of time even after child victims have reached the age of majority [101].

3. Increased protection and assistance of victims

The most radical departure from the 2002 Framework Decision concerns victims' protection and assistance [102].

First, a number of measures provide the protection of victims in the context of investigations and prosecutions.

The 2002 Framework Decision's requirement that investigations and prosecutions should not be dependent on victims' complaints has been retained. In addition, the 2011 directive provides that criminal proceedings might continue even if the victim withdraws their complaint [103].

Investigators and prosecutors must be trained and a full range of effective investigative tools made available to them [104]. According to the impact assessment, this provision was prompted by a concern that trafficking investigations were carried out at an inappropriately low level and Member States required encouragement to ensure that investigations were tackled in the same way as serious and organised crimes, by especially trained law enforcement officials who have appropriate investigative means at their disposal [105]. The appropriate training of officials ensures a better identification of trafficking victims and consideration of their specific needs at an early stage.

Member States are required to establish appropriate measures aimed at the early identification of and providing support for victims [106].

Another major improvement of the 2011 directive is a general de-criminalisation provision requiring Member States to provide for the possibility of not prosecuting and not imposing penalties on victims for their involvement in unlawful activities that they have been compelled to commit as a direct consequence of their having been trafficked [107]. This claim is a reaction to a problem in relation to victims of human trafficking, which is that they are often detained, prosecuted or punished for minor offences typically associated with the victimisation process, such as violation of immigration laws and involvement in unlawful activities such as prostitution (status-related offences) [108].

This clause clarifies the position of the victim in criminal proceedings, recognising that the victim was not free to choose between committing or participating in unlawful activities that are a direct consequence of being trafficked. However, it attracted criticism during scrutiny of the draft proposal in the Council, with some delegations expressing the view that introduction of non-punishment clauses entails certain risks.

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[101] Article 9(2).

[102] Articles 11, 12 and 13. See the EU Commission publication, *The EU rights of victims of trafficking in human beings*, 2013.

[103] Article 9(1).

[104] Preamble, considerant 15.

[105] Impact Assessment, SEC (2009) 358.

[106] Article 11(4).

[107] Article 8.

[108] See *Joint UN Commentary on the EU Directive.*

As a consequence, the provision only requires Member States to provide for the possibility of non-punishment. The ultimate decision rests with national authorities! The provision is rather weak in the end and has merely symbolic value. However, it has the merit to draw attention to the problem.

A very significant novelty in respect of both the 2002 Framework Decision and the 2009 Framework Decision proposal is that Member States are required to ensure that victim support and assistance is not made conditional on their willingness to cooperate in the criminal investigation, prosecution or trial of traffickers. However, the 2011 directive highlights that this provision should not prejudice the 2004 Directive, which makes a link between victim protection and their cooperation with authorities [109]. Thus the granting of a residence permit is still made conditional on victim's cooperation with law enforcement.

Secondly, detailed measures provide for a "hard-core" protection to victims beyond the context of investigations and prosecutions, granting them substantial rights.

A victim will be treated as such as soon as there is an indication that she/he has been trafficked and will be provided with assistance before, during and after criminal proceedings [110].

Minimum assistance and support measures are listed and special attention is required for victims with special needs [111]. A major improvement is certainly that all victims of trafficking, and not only vulnerable victims as in the 2009 Framework Decision proposal, must have access to legal counselling and legal representation, including for the purpose of claiming compensation. This should be free of charge when the victim does not have sufficient financial resources [112].

Member States are also required to ensure that victims receive appropriate protection on the basis of an individual risk assessment [113]. During criminal proceedings, identity protection measures and alternatives to direct testimony must be provided in order to avoid secondary victimisation.

Children are entitled to extensive protection. The directive's provisions are extremely detailed, both in relation to measures for their physical and psycho-social recovery and their participation in criminal investigations and proceedings [114]. For example, video recordings of interviews of a child victim may be used as evidence at trial.

Of particular relevance is also the fact that the directive requires states to ensure that victims of trafficking have access to existing compensation schemes [115].

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[109] Article 11(3).
[110] Articles 11(1) and 11(2).
[111] Article 11(7).
[112] Article 12(2).
[113] Article 12(3)
[114] Articles. 13, 14, 15 and 16.
[115] Article 17.

4. Introduction of prevention provisions

The 2011 directive also contains several detailed prevention provisions [116].

In an effort to promote rapid and accurate victim identification as well as the provision of immediate support to the most vulnerable, Member States are required to promote regular training for officials that are likely to come into contact with victims and potential victims of trafficking [117].

Member States are also required to take appropriate measures, such as education and training, to discourage the demand that fosters "all forms of exploitation related to trafficking" [118].

The 2011 directive includes a further provision requiring Member States to take appropriate action, including "information and awareness raising campaigns, research and education programmes, where appropriate in cooperation with civil society organisations and other stakeholders" in order to raise awareness and reduce the risk of people, especially children, becoming victims of trafficking [119].

Finally, and most controversially, Member States are required to "consider taking measures" to establish, as a criminal offence, the use of the services of a victim of trafficking with the knowledge that the individual is a victim of a trafficking-related offence [120]. It was not possible to find EU-wide consensus on this issue because legislation and policies on prostitution vary considerably from one Member State to another. The provision is the result of a compromise and has been seen by some authors as a missed opportunity to reduce the demand for human trafficking for the purposes of sexual exploitation [121].

5. New monitoring mechanisms

A major concern in relation to the 2002 Framework Decision was also that the implementation and monitoring arrangements for that instrument were rather quick and led to the drafting of a thin and rather inconclusive report [122].

As a substantial added value to the existing regime, the 2011 directive requires Member States to establish national rapporteurs or equivalent mechanisms to carry out assessments of trends in trafficking, measure the results of anti-trafficking actions, including the gathering of statistics in close cooperation with relevant civil society organisations and the related report [123].

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[116] Article 18.

[117] Article 18(3).

[118] Article 18(1).

[119] Article 18(2).

[120] Article 18(4).

[121] T. Obokata and B. Payne, *op. cit.*, p. 312-313.

[122] Report of the Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004.

[123] Article 19. In 2009 the Council had already invited all Member States to participate in an informal and flexible EU network of National Rapporteurs or equivalent mechanisms in order to improve the understanding of the phenomenon of trafficking in human beings and to provide the Union and its Member States with objective, reliable, comparable and up-to-date strategic information in the field of trafficking in human beings. The Council, however, did

The impact assessment (attached to the 2009 Framework Decision proposal) noted that this measure is crucial as "better knowledge of the situation of trafficking is the necessary starting point for the establishment of effective anti-trafficking policy" [124]. For the purpose of effective scrutiny, the national rapporteur should be established as an independent structure.

However, up to January 2013, only two Member States out of twenty-seven have appointed independent national rapporteurs (Finland and the Netherlands), whereas others only have non-independent specialised anti-trafficking bodies or coordinators who are attached to the relevant government departments [125].

The 2011 Directive also requires Member States to transmit to the EU anti-trafficking coordinator [126] information such as assessments of trends in trafficking or the results of anti-trafficking actions (*e.g.* gathering of statistics). On this basis the coordinator will contribute to the regular reporting carried out by the Commission [127]. The Commission has to prepare a consolidated report not only in the first four years but also every two years thereafter.

B. Major limitations of the improved instrument

As explained above, the 2002 Framework Decision had been strongly criticised for favouring a 'variable geometry' situation in EU Member States in the implementation of offences and sanctions. This has led to a lack of compliance with the principle of legality and the development of a repressive approach. The European legislator has not fully addressed this issue and the 2011 directive still adopts minimum standards for both the definition of offences and sanctions.

Firstly, the list of acts to be considered as purposes of exploitation is not exhaustive. They are to be seen as minimum standards. Member States are free to broaden the scope of the EU definition in the implementing legislation and go beyond the directive requirement, with the resulting negative impact on the level of approximation [128].

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not request at the time to establish a national rapporteur in Member States where it did not exist nor mentioned the criteria of independence. See Council conclusions on establishing an informal EU network of national Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings. 2946th Justice and Home Affairs Council meeting, Luxembourg, 4 June 2009.

[124] Impact Assessment, SEC (2009) 358, p. 29.

[125] For more details on the situation in each MS see the regularly updated Commission page: http://ec.europa.eu/antitrafficking/section.action?sectionPath=National+Rapporteurs&sectionType=MAP&page=1&resetBreadcrumb=false.

[126] The EU Anti-Trafficking Coordinator, is responsible for improving coordination and coherence among EU institutions, EU agencies, Member States and international actors and developing existing and new EU policies to address trafficking in human beings. The EU Anti-Trafficking Coordinator also monitors the implementation of the new and integrated "EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016)" and provides overall strategic policy orientation for the EU's external policy in this field. Its establishment was first foreseen by the Stockholm Programme and the first coordinator, Myria Vassiliadou (who still holds the role), has been appointed in December 2010.

[127] Article 20.

[128] For example, in Belgium the Bill which is under discussion in relation to the transposition of the 2011 Directive includes within the list of purposes of exploitation also illegal adoption

Secondly, as underlined above, the 2011 directive introduces a minimum common threshold of five years for the maximum penalty for all trafficking related offences, regardless of aggravated circumstances [129]. The minimum common threshold for the maximum penalty in the case of aggravated circumstances has been raised from the eight years of the 2002 Framework Decision to ten years [130]. The introduction of a minimum common threshold for all trafficking related offences and not only for aggravated offences (and the more severe minimum sanctions provided for aggravated offences) risks to favour even further the repressive approach described in relation to the implementation of the 2002 FD. In addition, penalty provisions may be severely criticised because of the severity of the penalties and the lack of differentiation in the level of penalties according to the types and gravity of the offences (as the principle of proportionality would require).

Disappointingly, "serious violence" or "serious harm" to the victim, listed as aggravated circumstances, are not defined. In addition, in the context of aggravating circumstances, only children are mentioned as "vulnerable victims" and not also adults, who may be considered vulnerable on the grounds of pregnancy, their health conditions and disability [131].

4. Concluding remarks: the potential impact on approximation of the 2011 directive

The limitations of the 2002 Framework Decision and its implementation in the assistance and protection of victims and in the over-criminalisation/over-sanctioning of the phenomenon witnessed a public order approach to tackling the phenomenon for a long time whereas the prevention of the phenomenon and the assistance and support of victims was treated as being outside the scope of states' interest.

The 2011 directive has been more ambitious and certainly constitutes a positive contribution to a more balanced and comprehensive anti-trafficking legal regime which, in several elements, goes beyond other international standards. The most innovative elements of the proposal attracted criticism, particularly from Member States. Some even queried whether the new instrument was necessary given the existing plethora of instruments and argued that the full implementation of the 2000 Trafficking Protocol, the 2002 EU Framework Decision and the 2005 Council of Europe Convention might be a more effective way to counter trafficking in human beings and help victims than creating new legislative requirements.

Member States were required to implement the directive's provisions by 6 April 2013, with the Commission's first report due in April 2015. A significant evaluation of the impact on approximation of the 2011 directive cannot yet be established because of the short period of time since it has entered into force. The new instrument still

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and forced marriages. See Projet de loi visant à modifier l'article *433quinquies* du Code pénal en vue de clarifier et d'étendre la définition de la traite des êtres humains, 5-711/1.

[129] Article 4(1). Remarkably, the 2009 Framework Decision proposal suggested 6 years.

[130] Article 4(2).

[131] See Commission Proposal, p. 10.

has to prove its worth [132]. In May 2013, only six out of twenty-seven countries have fully transposed the 2011 directive and three countries have reported only partial transposition! Despite the fact that the deadline has expired, much still depends on the way in which individual states interpret and apply their legal obligations.

Possible future results of the implementation of the 2011 directive would be of interest for further research. However, the difference in content and in nature of the 2011 directive with respect to the 2002 Framework Decision does not make it possible to come up with many hypotheses on future impacts.

First, it has now become accepted at the EU level that trafficking is a gross violation of human rights. By comparison with the 2002 Framework Decision, the 2011 directive constitutes a significant improvement in terms of recognition of the rights of victims and of the connection between the protection of those rights and improved criminal justice responses to trafficking. Except for the granting of residence permits, support and assistance are provided irrespective of the vicitms' willingness to cooperate with the criminal justice authority.

However, some fear the extensive provisions on assistance to victims could be subject to fraudulent claims by economic migrants. During the negotiations, Member States have thus been cautious and drafted provisions in a manner that could not lead victims to claim specific rights [133]. De facto, victims who participate in criminal proceedings are probably more likely to receive substantial assistance and support and to be provided with a long-term residence permit [134]. Moreover, despite the inclusion of a non-punishment clause, there is still nothing to stop states from treating victims of trafficking as criminals and from arresting and prosecuting them for violations of labour and migration laws.

The 2011 directive has also attempted to create a consistent and complete system of prevention and control of trafficking in human beings to influence the demand side. The willingness to find a balance between prevention and repression is clear from the title of the instrument, which is now "on preventing and combating trafficking". The 2011 directive adopts the so-called "3Ps obligations", focusing on prosecution, protection and prevention [135]. In this context, it thus aims at facilitating a more joined up approach through cooperation among Member States as well as other stakeholders such as civil society organisations.

With regard to implementation and monitoring, the establishment of national rapporteurs and their contribution to the work of the EU anti-trafficking coordinator, which we have mentioned above, could partly offset the weak implementation

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[132] K. Gromek-Broc, "EU Directive on preventing and combating trafficking in human beings and protecting victims: will it be effective?", *Nova et Vetera*, 20, 2011, p. 227 f.

[133] T. Obokata and B. Payne, *op. cit.*

[134] Member States are strongly reluctant to issue residence permits on humanitarian grounds and, despite many being eligible, only few have been issued. See Report from the Commission to the European Parliament and the Council on the application of Directive 2004/81 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, MIGR 103, 15197/10, 19 October 2010.

[135] T. Obokata and B. Payne, *op. cit.*

structure around the 2002 FD. Moreover since the entry into force of the Lisbon Treaty, the European Court of Justice is fully competent for measures adopted in the areas of police cooperation and judicial cooperation for criminal matters and it is thus possible for the European Commission to launch infringement proceedings in cases of non-compliance and non-implementation of a directive. These are both welcome developments in strengthening the enforcement of the anti-human trafficking legal framework.

Regrettably, the choice of the EU legislator to keep the minimum standards' approach stands in the way of an in-depth harmonisation of criminal offences and sanctions as Member States are free to go beyond the required limits and, as underlined, this leads to a more repressive approach. The wide margin of appreciation left to Member States may make an effective response to human trafficking under the TFUE more difficult.

Implementing legislation is still likely to broadly define the offences disregarding the principle of legality. The EU has failed to develop comprehensive frameworks to correlate the proscribed conduct to the proscribed penalties in a proportionate fashion and Member States will continue to sanction all trafficking-related offences (aggravated or simple) heavily. The much criticised severity of the legislation implementing the 2002 Framework Decision will not be subject to revision and will instead be legitimated and encouraged by the introduction of a minimum threshold for maximum penalties in all trafficking offences and an increase in the penalty for aggravated offences.

The tendency towards more repressive action encouraged by the minimum standards' provisions encompassed in the EU instruments analysed contrasts with the idea that the introduction of criminal sanctions should be conceived as a last resort when all other alternatives have proven inadequate to address a given problem. In this view, criminal sanctions ought to be confined to the minimum extent possible and coexist with other welfare policy tools.

An important step would be to create, within the systems of legislative evaluations, a control mechanism not only of transposition gaps but also of its excesses. Otherwise we run the risk of turning EU criminal law into a scapegoat for the mistakes of national criminal policies.

CONCLUSION

The way forward

Anne Weyembergh

The field of approximation of substantive criminal law has clearly evolved following the entry into force of the new EU Treaty and the ensuing communitarisation of policies within the EU. Major decision-making and institutional changes (especially the new decision-making role of the European Parliament), an increase in the number of actors, the insertion of new legal bases and the greater efficiency of EU texts in this area are among the fundamental changes that are having and will continue to have an impact on the area of substantive criminal law.

However, it is as yet too early to assess all the effects and consequences of the changes introduced.

As seen previously in the introductory contribution and in the article by Francesca Galli on trafficking in human beings, the first lessons to be learned come from the first two new directives adopted since the entry into force of the new Treaty, namely Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA[1], and Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA[2].

Interesting lessons will certainly emerge also from the on-going negotiations relating to the five proposals for directives in the field – *i.e.* the proposal for a directive on attacks against information systems, which is designed to replace Council Framework Decision 2005/222/JHA[3], the proposal for a directive on criminal

[1] *OJ*, no. L 101, 15 April 2011, p. 1 f.
[2] *OJ*, no. L 335, 17 December 2011, p. 1 f.
[3] COM (2010) 517 final, 30 September 2010.

sanctions for insider dealing and market manipulation (the Market Abuse Directive (MAD))[4], the proposal for a directive on the freezing and confiscation of proceeds of crime in the European Union[5], the proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law (the PIF Directive)[6] and the proposal for a directive on the protection of the euro and other currencies against counterfeiting by criminal law, replacing Council Framework Decision 2000/383/JHA[7] – and their final results. The evolution of discussions on the following issues should be kept under particularly close scrutiny: the legal bases (and for instance the choice of Article 325 TFEU as the legal basis for the aforementioned proposal for a directive on the fight against fraud relating to the Union's financial interests by means of criminal law), the clauses relating to the approximation of sanctions (and, *inter alia*, the introduction of minimum thresholds for minimum sanctions in the last two proposals) and the insertion of provisions relating to general criminal law such as prescription.

Among the short-term prospects, the potential introduction of new initiatives should be mentioned as well. In this respect, some ideas have been set out in the Stockholm programme, the Commission's action plan and the Commission's communication entitled 'Towards an EU criminal policy', which lists some harmonised EU policies where the approximation of substantive criminal law could be developed on the basis of Article 83, para. 2 (the so-called 'annex competence'). Yet it remains to be seen whether the ideas will lead to any concrete outcome and/or whether other initiatives will be put forward.

The implementation by EU Member States of the new directives and future new directives should be observed carefully. It will, for instance, be interesting to see whether the new decision-making and institutional framework will result in a higher rate of correct transposition than for the approximating acts adopted under the former third pillar of the Treaty on the European Union (TEU). In this regard, as Francesca Galli has demonstrated, the case of the Directive on trafficking in human beings does not augur well: in May 2013, only six out of twenty-seven Member States had transposed it fully and three partially. It also remains to be seen if the new instruments will have a stronger approximating effect than the 'old' framework decisions. Indeed, as Robert Kert and Andrea Lehner clearly show concerning the Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking[8] and as Pedro Caeiro and Miguel Ângelo Lemos underline in the field of terrorist offences, the approximating impact of the related framework decisions has been limited.

Besides the evaluation of the transpositions by EU Member States, both the *ex ante* assessment of the new proposals and the *ex post* evaluation of the new directives and of their impact should be given particular attention. The importance of such an exercise has been clearly underlined in this book by several authors and especially by

[4] COM (2011) 654 final, 20 October 2011.
[5] COM (2012) 85 final, 12 March 2012.
[6] COM (2012) 363 final, 11 July 2012.
[7] COM (2013) 42 final, 5 February 2013.
[8] *OJ*, L 335, 11 November 2004, p. 8.

Gisèle Vernimmen-Van Tiggelen, Robert Kert and Andrea Lehner. Such assessments should in particular represent an opportunity to check if fundamental principles of criminal law are being respected. These principles, such as *ultima ratio*, proportionality and legality, are at the core of Maria Kaiafa-Gbandi's contribution. The disregard for these principles in the previous framework decisions has often been criticised. Pedro Caeiro and Miguel Ângelo Lemos confirm these criticisms in the field of terrorism. It is an open question as to whether there will be improvements in this respect stemming from the new institutional framework and from the adoption of the 2009 Council's 'Conclusions on model provisions, guiding the Council's criminal law deliberations', of the 2011 Commission Communication 'Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law' and of the European Parliament resolution of 22 May 2012 'on an EU approach to criminal law', which all underlined the importance of these principles or of some of them [9]. The case of the directive on trafficking in human beings is not encouraging since the disregard for several of these principles has already been pointed out [10].

In addition, and more fundamentally, the following four questions should be closely followed in the next few years.

The first question is to find out whether the approximation of substantive criminal law will benefit from an effective contribution by the Court of Justice of the EU (CJ) and, in case it does, what form this contribution will take. Such a question is all the more topical as, following the communitarisation of policies within the EU that has been set in stone by the Lisbon Treaty, the jurisdiction of the CJ has been considerably strengthened for new acts (*i.e.* those adopted after the entry into force of the Lisbon Treaty) and will soon be reinforced for the old acts (*i.e.* those adopted before the entry into force of the Lisbon Treaty), namely after the expiry of the transitional period *(i.e.* 1st Dec. 2014). The CJ intervention could be essential for this EU field of action in three respects:

– in order to guarantee the effectiveness of the EU's approximating texts through infringement proceedings against EU Member States that did not transpose at all or did not correctly transpose provisions of the new directives or, after 1st Dec. 2014, provisions of the old instruments.
– in order to clarify the exact meaning of the relevant provisions of the Treaty. As seen in the introductory contribution, the wording of both para. 1 and 2 of Article 83 is vague in many respects. The CJ could, for instance, clarify the exact scope of the general requirements of the first indent of para. 1 and their link

[9] See especially the conclusions of the Council of 25 and 26 April 2002, doc. 9141/03; Council document, Council Conclusions on model provisions, guiding the Council's criminal law deliberations, adopted by the JHA Council on 30 November 2009; "Towards an EU criminal policy?: Ensuring the effective implementation of EU policies through criminal law", Commission Communication of 20 September 2011, COM (2011) 573 and European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310 (INI)) (see Annex to the present book).

[10] H. Satzger, F. Zimmermann and G. Langheld, "The Directive on preventing and combatting trafficking in human beings and the principles governing European Criminal policy – A critical evaluation", *EUCLR*, 3, 2013, p. 114.

with the second indent. It could also specify the meaning of some expressions in para. 1, such as "from a special need to combat them on a common basis", "minimum rules", "concerning the definition of criminal offences and sanctions" and "areas of particularly serious crime". Concerning para. 2, it could remove the existing uncertainties related to the expression "essential to ensure the effective implementation of a Union policy which has been subject to harmonisation measures". The CJ could, moreover, answer the sensitive question as to whether Article 325 TFEU can be interpreted as containing additional substantive criminal law competence in the field of fraud affecting the Union's financial interests.

– in order to give a uniform interpretation of the provisions of the EU approximating texts. In this regard, it would, for instance, be interesting to see what would be its interpretation of the non-punishment/non-prosecution clause of both the Directive on trafficking in human beings and the Directive on sexual exploitation of children. It would also be quite interesting to see whether the CJ will consider that some of the "protective" provisions of these directives meet the requirements to be able to produce any vertical ascending direct effect. Whatever form it could take, such a contribution by the CJ will of course depend on the actions or questions referred to it. In other words, to be able to "deploy" itself in the field of substantive criminal law, the CJ needs to receive the opportunity to do so.

The second question is about establishing whether the scope of approximation of substantive criminal law will be further extended towards the general part of criminal law. As Jeroen Blomsma and Christina Peristeridou explain in their joint contribution, EU legislation has so far dealt predominantly with the special part of criminal law and more precisely with the definitions of and penalties for specific offences. Up until now, there has been no common understanding of basic legal concepts such as the notions of *actus reus*, of *mens rea*, of criminal liability, of participation, of defences etc. Although the CJ has established some general principles of EU law, there are, so far, only fragments of a general part of European criminal law. Irrespective of whether such an evolution is desirable and would satisfy the subsidiarity and proportionality requirements, any evolution in this respect will of course be highly dependent on the interpretation of the existing legal basis. This is true whether the adoption of hard law acts or soft law instruments is envisaged. There does not appear to be a legal basis in the Treaty (as currently phrased) for an approximation or codification of common concepts in a separate directive or regulation by the European legislator (a sort of 'general part directive or regulation'). The approximation of common concepts in every sectorial directive that deals with the criminalisation of specific offences would perhaps constitute a more realistic approach but it is not easily justifiable on the basis of Article 83 para. 1 and 2 as currently worded. As seen in the introductory contribution, although most of the approximating EU acts have gone further than the strict definition of constituent elements of offences and levels of sanctions, it is important to understand how extensive the interpretation of the scope of Article 83 can be in this regard. The discussions relating to the insertion of requirements related to prescription in the proposal for a directive on the protection of the euro and

other currencies against counterfeiting by criminal law [11] will surely yield interesting lessons. The same is true for the interpretation of the limits of Articles 86 and 325 TFEU because their scope is not explicitly restricted to minimum rules concerning the definition of criminal offences and sanctions.

A third question is about determining whether we will witness the establishment of a real 'EU criminal law', in other words whether there will be a move from the *approximation* of substantive criminal law towards the *unification* of criminal law. So far, there has only been an embryonic EU substantive criminal law, which is mainly made up of all the sources of approximation of substantive criminal law. So far, there has been no real EU substantive criminal law in the strict sense of the word: there is no EU criminal code as we understand it at the national level, no EU supranational, unified criminal law adopted via regulations directly applicable in all the EU Member States [12].

Yet, in the current version of the TFEU, two main provisions could open the door to such a "unification" trend [13].

On the one hand, there is Article 86 TFEU, which allows for the adoption of regulation(s) aiming at establishing an European Public Prosecutor Office (EPPO). As Katalin Ligeti underlines in her contribution to this book, the question is to establish whether it would be sufficient for the future regulation establishing an EPPO to make reference to the upcoming PIF Directive and to the national implementing provisions or whether Article 86 TFEU requires that the regulation itself defines the offences falling within the competence of the EPPO. She opts for the second alternative and considers that Article 86 grants the EU a genuine competence to adopt common offence definitions but also to adopt common provisions in relation to the concepts of the general part of criminal law. We shall see what the European Commission's position is in this respect in its upcoming proposal on the establishment of an EPPO, which is scheduled to come out in June or early July 2013.

On the other hand, there is Article 325 TFEU in the field of fraud affecting the Union's financial interests. If it is interpreted as containing additional criminal law competence in this field, it would allow for the adoption of regulations and for the possibility to go beyond the establishment "of minimum rules concerning the definition of criminal offences and sanctions"... However, as explained in the introductory contribution to this book, it remains to be seen whether the choice of this provision as the legal basis for the proposal for a PIF Directive will be confirmed during the negotiations. For the time being, it seems that it will not secure a qualified majority within the Council.

A fourth and essential question is to determine whether the approximation of substantive criminal law will follow or be guided by a real EU criminal policy. As things stand, the EU lacks a genuine criminal policy. The EU's interventions in the

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[11] See its Article 12.

[12] See H. Satzger, *International and European Criminal Law*, München, C.H. Beck, Hart , Nomos, 2012, p. 43 f.

[13] See also Article 33 TFEU on measures to strengthen customs cooperation (V. Mitsilegas, *EU Criminal Law*, Oxford and Portland, Hart Publishing, 2009, p. 109 and S. Miettinen, *Criminal law and Policy in the EU*, London – New York, Routledge, 2013, p. 52).

criminal field are more or less guided by programmes, action plans etc. but they do not follow a consistent line of policy or strategy and they do not implement a 'vision'. As John Vervaele states in this book, so far the approach has been events-driven, *ad hoc* and eclectic.

So far, some scholars have categorised the three aforementioned documents – the Council 'Conclusions on model provisions, guiding the Council's criminal law deliberations', the 2011 Commission Communication entitled 'Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law' and the European Parliament resolution of 22 May 2012 on an EU approach to criminal law - as 'European criminal policy documents'[14]. As stressed by Maria Kaiafa-Gbandi and Cornelis De Jong, these texts have merits – and especially the merit of recalling some basic principles of criminal law such as the *ultima ratio* principle which should make it possible to avoid "overcriminalisation" – which should not be underestimated. They are in that sense a good start. However, they can only be considered as a very embryonic EU criminal policy. Although the three documents contain important common features, it is strange to be confronted with three different texts emanating from three different EU institutions. Their purpose was, in any case, not to reflect on the bases of a global or inter-institutional EU criminal policy. As seen in the introduction to this book, instead they aimed at giving each relevant EU institution general guiding principles in their respective field of action and at positioning themselves in the context of the decision-making changes and the increasing number of actors introduced by the Lisbon Treaty. In addition, as seen in John Vervaele's contribution, there are significant limitations with regard to the contents of these documents[15]. According to this author, careful consideration of the process of criminalisation should be pursued. Among the questions to be examined closely is the question of which legal interests deserve criminal protection and to what extent. A deeper reflection on the functions of the approximation of criminal law and on the functions of criminal law itself is also particularly necessary. And elaborating a criminal policy implies more than answering the questions as to what should be criminalised, why and how. These are important aspects of a criminal policy but other aspects should be tackled as well, such as, for example, the whole issue of criminal sanctions and their enforcement. Besides, establishing a criminal policy is not limited to organising a repressive approach to crime but should also encompass the preventive and protective approaches. It also implies going further than just adopting a criminal law response to crime: it entails a deep reflection about the interaction between the different legal disciplines and especially between criminal law and administrative law.

The next multiannual programme which is due to succeed the Stockholm Programme and which is due to be adopted under the Italian Presidency of the EU – the future 'Rome programme' – could be an opportunity to launch a reflection and to take the first steps towards the elaboration of an EU criminal policy.

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[14] P. De Hert and I. Wieczorek, "Testing the principle of subsidiarity in EU criminal law", njecl, 3, 2012, p. 394 f.

[15] See also S. Miettinen, *op. cit*., p. 143.

Annexes

COUNCIL OF
THE EUROPEAN UNION

EN

Council Conclusions on model provisions, guiding the Council's criminal law deliberations

2979th JUSTICE and HOME AFFAIRS Council meeting
Brussels, 30 november 2009

The Council adopted the following conclusions:

"Since the entry into force of the Amsterdam Treaty, several Framework Decisions have been adopted on the basis of Articles 31 and 34 of the TEU, establishing minimum rules concerning the definition of criminal offences and sanctions in various areas, inter alia terrorism, computer crime and organised crime.

In addition, the European Court of Justice has clarified that criminal law provisions may under certain conditions be included in specific areas of Community law.

The Lisbon Treaty is likely to have the effect that criminal law provisions will be discussed within the Council to an even greater extent than at present. This may result in incoherent and inconsistent criminal provisions in EU legislation. Furthermore, provisions negotiated within the Council might unjustifiably deviate from wording that is normally used in EU criminal legislation, thus creating unnecessary difficulties when implementing and interpreting EU law.

While noting the understanding reached in the JHA Council on 21 February 2006[1] on the procedure for the future handling of legislative files containing proposals relevant to the development of criminal law policy, the Council acknowledges the need for further action and coordination to ensure coherent and consistent use of criminal law provisions in EU legislation.

[1] See doc. 7876/06.

P R E S S

Rue de la Loi 175 B – 1048 BRUSSELS Tel.: +32 (0)2 281 8239 / 6319 Fax: +32 (0)2 281 8026
press.office@consilium.europa.eu http://www.consilium.europa.eu/Newsroom

To this end, it would be useful if the Council were to agree on guidelines and model provisions for its work on criminal law.

Foreseeable advantages of guidelines and model provisions for criminal law include:

- Guidelines and model provisions would facilitate negotiations by leaving room to focus on the substance of the specific provisions;
- Increased coherence would facilitate the transposition of EU provisions in national law;
- Legal interpretation would be facilitated when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements.

The following guidelines should be conceived as a starting point for discussions in the Council. These guidelines do not introduce obligations or constraints that go beyond what is set out in the Treaties. On this basis, the Council suggests that the Presidency should conduct future discussions on criminal law within the EU, taking these conclusions into account. Furthermore, the Council should seek, together with the European Parliament and the Commission, as soon as possible after the entry into force of the Lisbon Treaty, to further develop and refine these conclusions, and it invites the Presidency to take the necessary measures to that end.

The Council adopts the following conclusions:

Assessment of the need for criminal provisions

(1) Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort.

(2) Criminal provisions should be adopted in accordance with the principles laid out in the Treaties, which include the principles of proportionality and of subsidiarity, to address clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures:
   a) in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, or
   b) if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures.

(3) When there seems to be a need for adopting new criminal provisions the following factors should be further considered, while taking fully into account the impact assessments that have been made:
   - the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to investigate and prosecute the crime through reasonable efforts, as well as its seriousness and implications;
   - how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU;
   - the possible impact on existing criminal provisions in EU legislation and on different legal systems within the EU.

Structure of criminal provisions

(4) The description of conduct which is identified as punishable under criminal law must be worded precisely in order to ensure predictability as regards its application, scope and meaning.

(5) The criminal provisions should focus on conduct causing actual harm or seriously threatening the right or essential interest which is the object of protection; that is, avoiding criminalisation of a conduct at an unwarrantably early stage. Conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate considering the particular importance of the right or interest which is the object of protection.

Intent

(6) EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally.

(7) Negligent conduct should be criminalised when a case-by-case assessment indicates that this is appropriate due to the particular relevance of the right or essential interest which is the object of protection, for example in cases of serious negligence which endangers human life or causes serious damage.

(8) The criminalisation of an act that has been committed without intention or negligence, i.e., strict liability, should not be prescribed in EU criminal legislation.

Inciting, aiding and abetting, and attempt

(9) The criminalisation of inciting, aiding and abetting of intentional offences should normally follow the criminalisation of the main offence. Attempts to commit an intentional offence should be criminalised if it is necessary and proportionate in relation to the main offence. Consideration should be given to the different regimes under national law.

Penalties

(10) When it has been established that criminal penalties for natural persons should be included it may in some cases be sufficient to provide for effective, proportionate and dissuasive criminal penalties and leave it to each Member State to determine the level of the penalties. In other cases there may be a need for going further in the approximation of the levels of penalties. In these cases the Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties should be kept in mind, in the light of the Lisbon Treaty.

Model provisions

(11) Once it has been established that criminal provisions should be adopted, either as the only option or as an alternative, there is a need to establish a range of concurrent rules, e.g., rules on liability of legal persons. There may also be a need to differentiate between conduct that should be prohibited but does not necessarily have to be established as a criminal offence and conduct that should be criminalised.

(12) The model provisions set out in Annex I should guide future work of the Council on legislative initiatives that may include criminal provisions."

ANNEX I

Model provisions

The following wording shall guide future legislative work in criminal and related matters within the EU. The aim is to achieve coherent and consistent criminal law provisions, and to avoid unnecessary difficulties in the interpretation of EU law and problems for national legislators in the process of implementation.[2]

A – Provision on infringements and penalties that do not necessarily have to be criminal

Infringements

Each Member State shall lay down the rules on penalties applicable to infringements of the provisions adopted pursuant to this Directive. The penalties provided for must be effective, proportionate and dissuasive.

B – Criminal law provisions and related provisions

Criminal Offences

Each Member State shall ensure that the following conduct constitutes a criminal offence, when [*unlawful and*] *committed intentionally* [*or with at least serious negligence*].

Inciting, aiding and abetting and attempt

1. *Each Member State shall ensure that inciting, aiding and abetting the intentional conduct referred to in Article* (*Article on Criminal Offences*) *is punishable as a criminal offence.*
2. *Each Member State shall ensure that attempting the intentional conduct referred to in Article* (*Article on Criminal Offences*) *is punishable as a criminal offence*.

Criminal Penalties (for natural persons, without approximation of levels)

Each Member State shall take the necessary measures to ensure that the offences referred to in Articles (*Article on Criminal Offences*) *are punishable by effective, proportionate and dissuasive criminal penalties.*

Criminal Penalties (for natural persons, with approximation of levels)

Each Member State shall take the necessary measures to ensure that an offence referred to in Article (*Article on Criminal Offences*) *is punishable by (penalty levels) of imprisonment.*[3]

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[2] Text within square brackets indicates that the inclusion of such text should be considered on a case by case basis.

[3] The Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties which indicates four levels of penalties (doc. 9141/02) should be kept in mind, in the light of the Lisbon Treaty. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has bee subject to harmonisation measures, as under Article 83.2 of the Lisbon Treaty, it should follow the practice of setting the minimum level of maximum penalty.

Liability of legal persons

1. *Each Member State shall* [*take the necessary measures to*] *ensure that a legal person can be held liable for offences referred to in Articles* (*Article on Criminal Offences*) *where such offences have been committed for its benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on*
   (a) a power of representation of the legal person,
   (b) an authority to take decisions on behalf of the legal person, or
   (c) an authority to exercise control within the legal person.

[2. *Each Member State shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles* (*Article on Criminal Offences*) *for the benefit of that legal person by a person under its authority.*]

3. *Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences referred to in Articles* (*Article on Criminal Offences*).

4. [*For the purpose of this Directive*] *'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.* [NB: This paragraph is preferably included in an Article on definitions, if such a provision exists.]

Penalties against legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article (*Article on Liability of legal persons*) *is punishable by effective, proportionate and dissuasive penalties* [*which shall include criminal or non-criminal fines and may include other penalties, such as:*
   (a) exclusion from entitlement to public benefits or aid;
   (b) temporary or permanent disqualification from the practice of commercial activities;
   (c) placing under judicial supervision;
   (d) a judicial winding-up order;
   (e) temporary or permanent closure of establishments which have been used for committing the offence.]

ANNEX II

EUROPEAN COMMISSION

Brussels, 20.9.2011
COM(2011) 573 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law

Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law

This Communication aims to present a framework for the further development of an EU Criminal Policy under the Lisbon Treaty. The EU now has an explicit legal basis for the adoption of criminal law directives to ensure the effective implementation of EU policies which have been subject to harmonisation measures. An EU Criminal Policy should have as overall goal to foster citizens' confidence in the fact that they live in a Europe of freedom, security and justice, that EU law protecting their interests is fully implemented and enforced and that at the same time the EU will act in full respect of subsidiarity and proportionality and other basic Treaty principles.

A concern for EU citizens

EU citizens consider crime an important problem facing the Union. When asked to identify the issues on which the European institutions should focus action in the coming years to strengthen the European Union, citizens rank the fight against crime in the top four of areas of action.[1] The EU has been taking measures in the area of criminal law for more than a decade in order to better fight crime that has become increasingly international and ever more sophisticated. These measures have achieved some degree of approximation of definitions and sanction levels for certain particularly serious offences, such as terrorism, trafficking in human beings, drug trafficking, and fraud affecting the EU financial interests.[2] For lack of an explicit legal basis in this respect prior to the Lisbon Treaty[3], only very few measures have been taken for the purpose of strenghtening the enforcement of EU policies.[4] This Communication will focus on this aspect of EU criminal law.

The added value of EU criminal law

Certainly, criminal law is a sensitive policy field where differences amongst the national systems remain substantial, for example regarding sanction types and levels as well as the classification of certain conduct as an administrative or criminal offence. However, the EU

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1 See Eurobarometer 75, Spring 2011. The top four areas where EU action should focus are: economic and monetary policy, immigration policy, health policy and the fight against crime.

2 Framework Decision on combating terrorism (2002/475/JHA), OJ L 164/3 of 22.6.2002; Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (2004/757/JHA) of 11.11.2004; Directive on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA OJ L 101/1 of 15.4.2011; Convention on the protection of the European Communities' financial interests, OJ L 316/49 of 27.11.1995.

3 See, however, judgments of the European Court of Justice in Cases C-176/03 and C-440/05.

4 Directive 2008/99/EC on the protection of the environment through criminal law, OJ L 328/28 of 6.12.2008; Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ L 280/52 of 27.10.2009; and Directive 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24 of 30.6.2009; Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140/1 of 14.6.2000.

can tackle gaps and shortcomings wherever EU action adds value. In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes.

Strengthening mutual trust

Common minimum rules in certain crime areas are also essential to enhance the mutual trust between Member States and the national judiciaries. This high level of trust is indispensable for smooth cooperation among the judiciary in different Member States. The principle of mutual recognition of judicial measures, which is the cornerstone of judicial cooperation in criminal matters[5], can only work effectively on this basis.

Ensuring effective enforcement

Criminal law can play an important role to ensure the implementation of European Union policies. These policies depend on effective implementation by Member States. The Union alone cannot make sure that its rules, ranging from environmental protection and conservation of fisheries resources to road safety, financial services regulation, data protection and the protection of the financial interests of the EU, have the desired effect for the citizen.

Member States are obliged to ensure that Union policies are implemented and can usually decide themselves on the means of enforcement. In this respect, controls and inspections play a crucial role. In cases where the enforcement choices in the Member States do not yield the desired result and levels of enforcement remain uneven, the Union itself may set common rules on how to ensure implementation, including, if necessary, the requirement for criminal sanctions for breaches of EU law.

Coherence and consistency

While EU criminal law measures can play an important role as a complement to the national criminal law systems, it is clear that criminal law reflects the basic values, customs and choices of any given society. The Lisbon Treaty accepts this diversity.[6] For this reason, it is particularly important to ensure that EU legislation on criminal law, in order to have a real added value, is consistent and coherent.[7]

A new legal framework

The legal framework under the Lisbon Treaty provides fresh opportunities to develop EU criminal law legislation. The legal framework notably allows the EU institutions and Member

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5 See Article 82 (1) TFEU.

6 See Article 67 (1) TFEU: "The Union should constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

7 On the need for more coherence in the development of EU criminal law, see, as an example, the Manifesto on the EU Criminal Policy of 2009 (*http://www.crimpol.eu*), drafted by an academic group of 14 criminal law professors from ten Member States of the European Union.

States to work together on a clear basis towards a coherent and consistent EU criminal law which at the same time effectively protects the rights of suspected and accused persons and victims and promotes the quality of justice. Prior to the Lisbon Treaty, the legal framework applicable to most criminal law legislation[8] had a number of shortcomings. These included mainly the requirement for unanimous approval of all Member States, consultation only of the European Parliament and the absence of the possibility of infringement proceedings before the European Court of Justice to ensure the correct implementation by Member States.

The new legal set-up gives a strong role to the European Parliament through the co-decision process and full judicial control to the European Court of Justice. The Council can adopt a proposal if a qualified majority of Member States supports it. In addition, the Lisbon Treaty strengthens the role of national parliaments substantially. They can give their views on draft legislation and have an important voice in monitoring the respect of the principle of subsidiarity. In the field of criminal law, this role of national parliaments is stronger than in the context of other EU policies.[9]

Criminal law measures comprise intrusive rules, which can result in deprivation of liberty. This is why the Charter of Fundamental Rights – made legally binding by the Lisbon Treaty[10] – provides important limits for EU action in this field. The Charter, being the compass of all EU policies, provides for a binding core of rules that protects citizens.

When legislating on substantive criminal law or criminal procedure, Member States can pull the so-called “emergency brake”, if they consider that proposed legislation touches upon fundamental aspects of their national criminal justice system: in this case the proposal is referred to the European Council.

Denmark is not participating in newly adopted measures on substantive criminal law, while the United Kingdom and Ireland only participate in the adoption and application of specific instruments after a decision to "opt in".[11]

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8 Under the former EC Treaty while the usual instrument for criminal law legislation were Framework Decisions under the so-called "third pillar", some directives with criminal law measures have already been adopted: in order to ensure the enforcement of rules concerning the protection of the environment, against ship-source pollution and illegal employment (Directives 2008/99, 2009/123 and 2009/52), based on the jurisprudence of the Court of Justice (C-176/03). Approximation of sanction types and levels was only possible in Framework Decisions (C-440/5).

9 See Protocol No. 1 on "the role of national parliaments in the European Union" and No. 2 on "the application of the principles of subsidiarity and proportionality", in particular Article 7 (2).

10 See Communication from the Commission on a Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union – COM (2010) 573 of 19.10. 2010.

11 See Protocols No. 21 and 22.

Why the EU should act – the added value of EU criminal law legislation

The Lisbon Treaty grants the EU competence both in the field of criminal procedure and substantive criminal law. While it is not the role of the EU to replace national criminal codes, EU criminal law legislation can, however, add, within the limits of EU competence, important value to the existing national criminal law systems.

- EU criminal law fosters the confidence of citizens in using their right to free movement and to buy goods or services from providers from other Member States through a more effective fight against crime and the adoption of minimum standards for procedural rights in criminal proceedings as well as for victims of crime.
- Today, many serious crimes, including violations of harmonised EU legislation, occur across borders. There is thus an incentive and possibility for criminals to choose the Member State with the most lenient sanctioning system in certain crime areas unless a degree of approximation of the national laws prevents the existence of such "safe havens".
- Common rules strengthen mutual trust among the judiciaries and law enforcement authorities of the Member States. This facilitates the mutual recognition of judicial measures as national authorities feel more comfortable recognising decisions taken in another Member State if the definitions of the underlying criminal offences are compatible and there is a minimum approximation of sanction level. Common rules also facilitate cooperation with regard to the use of special investigative measures in cross-border cases.
- EU criminal law helps to prevent and sanction serious offences against EU law in important policy areas, such as the protection of the environment or illegal employment.

1. SCOPE FOR EU CRIMINAL LAW

The EU can adopt under Article 83 of the Treaty on the Functioning of the European Union (TFEU) directives with minimum rules on EU criminal law for different crimes.

First of all, measures can be adopted under Article 83(1) TFEU concerning a list of explicitly listed ten offences (the so-called **"Euro crimes")** which refers to terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug traficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.[12] These are crimes that merit, by definition, an EU approach due to their particularly serious nature and their cross-border dimension, according to the Treaty itself. Most of the crime areas are already covered by pre-Lisbon legislation, which has been or is in the process of being updated. Additional "Euro crimes" can only be defined by the Council acting unanimously, with the consent of the European Parliament.

[12] See the Framework Decisions and Directive cited above, in footnote 3. Several of those Framework Decisions will be reassessed in the light of the Lisbon Treaty in the coming years, including Framework Decision 2000/383, as amended by Framework Decision 2001/888, in 2012.

Secondly, Article 83(2) TFEU allows the European Parliament and the Council, on a proposal from the Commission, to establish "minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to a harmonisation measure". This clause does not list specific crimes, but makes the fulfillment of certain legal criteria a precondition for the adoption of criminal law measures at EU level. It is therefore notably in respect of Article 83(2) TFEU where an EU criminal policy is particularly warranted; and where this Communication intends to provide specific guidance. Most importantly, it is in this field where the EU institutions need to make policy choices whether to use or not to use criminal law (instead of other measures, such as administrative sanctions) as an enforcement tool; and to determine which EU policies require the use of criminal law as an additional enforcement tool.

Example: The EU's rules on financial market behaviour are a case in point where criminal law could be a useful additional tool to ensure effective enforcement. As the financial crisis has shown, financial market rules are not always respected and applied sufficiently. This can seriously undermine confidence in the financial sector. Greater convergence between legal regimes in the Member States, including in criminal law, can help to prevent the risk of improper functioning of financial markets and assist the development of a level playing field within the internal market.[13]

Apart from that, Article 325 (4) of the Treaty provides for the specific possibility to take measures in the field of the **prevention of and fight against fraud affecting the financial interests of the Union,** a field where some pre-Lisbon legislation already exists.[14] It is an area of great importance for EU taxpayers, who are funding the EU budget and who legitimately expect effective measures against illegal activities targeting EU public money, e.g. in the context of the EU's agricultural and regional funds or development aid.[15]

2. WHICH PRINCIPLES SHOULD GUIDE EU CRIMINAL LAW LEGISLATION?

As in national law, EU criminal law legislation must be carefully considered. Criminal law, whether national or European, consists of rules with a significant impact on individuals. For this reason, and because criminal law must always remain a measure of last resort, new legislation requires the respect of fundamental legal principles.

2.1. General principles to respect

The general **subsidiarity** requirement for EU legislation must be given special attention with regard to criminal law. This means that the EU can only legislate if the goal cannot be reached more effectively by measures at national or regional and local level but rather due to the scale or effects of the proposed measure can be better achieved at Union level.

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13 See 'Communication on reinforcing sanctioning regimes in the financial sector', COM (2010) 716 of 8.12. 2010.

14 See Convention of 1995 on the protection of financial interests of the EU and its protocols, and Council Regulation (EC, Euratom) No 2988/95 of 18.12.1995 on the protection of the European Communities' financial interests concerning administrative sanctions, OJ L 312/1 of 23.12.1995.

15 See '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', COM (2011) 293, of 26.5. 2011.

In addition, **fundamental rights**, as guaranteed in the EU Charter of Fundamental Rights and in the European Convention on the Protection on Human Rights and Fundamental Freedoms, must be respected in any policy field of the Union. Criminal law measures are fundamental rights-sensitive. They unavoidably interfere with individual rights, be it those of the suspect, of the victim or of witnesses. Ultimately, they can result in deprivation of liberty and therefore require particular attention by the legislator.

2.2. A two-step approach in criminal law legislation

The EU legislator should follow two steps when taking the decision on criminal law measures aimed at ensuring the effective implementation of EU policies which are the subject of hamonising measures.

2.2.1. Step 1: The decision on whether to adopt criminal law measures at all

- **Necessity and Proportionality – Criminal law as a means of last resort ("ultima ratio")**

Criminal investigations and sanctions may have a significant impact on citizens' rights and include a stigmatising effect. Therefore, criminal law must always remain a measure of last resort. This is reflected in the general principle of proportionality (as embodied in the Treaty on European Union[16] and, specifically for criminal penalties, in the EU Charter of Fundamental Rights[17]). For criminal law measures supporting the enforcement of EU policies,[18] the Treaty explicitly requires a test of whether criminal law measures are "essential" to achieve the goal of an effective policy implementation.

Therefore, the legislator needs to analyse whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation and whether criminal law could address the problems more effectively. This will require a thorough analysis in the Impact Assessments preceding any legislative proposal, including for instance and depending on the specificities of the policy area concerned, an assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground.

2.2.2. Step 2: Principles guiding the decision on what kind of criminal law measures to adopt

Should Step 1 demonstrate the need for criminal law, the next question is which concrete measures to take.

- **Minimum rules**

EU legislation regarding the **definition of criminal offences** and **sanctions** is limited to "**minimum rules"** under Article 83 of the Treaty**.** This limitation rules out a full harmonisation. At the same time, the principle of **legal certainty** requires that the conduct to be considered criminal must be defined clearly.

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16 Article 5 (4) TEU.
17 Article 49 (3) of the EU Charter of Fundamental Rights.
18 Article 83 (2) TFEU.

However, an EU directive on criminal law does not have any direct effect on a citizen; it will have to be implemented in national law first. Therefore, the requirements for legal certainty are not the same as for national criminal law legislation. The key is the clarity for the national legislator about the results to be achieved in implementing EU legislation.

Regarding **sanctions**, "minimum rules" can be requirements of certain sanction types (e.g. fines, imprisonment, disqualification), levels or the EU-wide definition of what are to be considered aggravating or mitigating circumstances. In each case, the EU instrument may only set out which sanctions have to be made "at least" available to the judges in each Member State.

- **Necessity and proportionality**

The condition of "necessity" set out above also applies on the level of deciding which criminal law measures to include in a particular legislative instrument. The "necessity test" becomes the more important the more detailed the envisaged rules are with regard to the type and level of sanctions to be required from Member States. The explicit requirement of the Charter of Fundamental Rights[19] that "the severity of the penalty must not be disproportionate to the criminal offence" applies.

- **Clear factual evidence**

To establish the necessity for minimum rules on criminal law, the EU institutions need to be able to rely on clear factual evidence about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardise the effective enforcement of an EU policy subject to harmonisation. This is why the EU needs to have at its disposal statistical data from the national authorities that allow it to assess the factual situation. As part of its follow up action, the Commission will develop plans to collect further statistical data and evidence to deal with the areas covered by Article 325 (4) and Article 83 (2).

- **Tailoring the sanctions to the crime**

The development of criminal law legislation, notably to underpin the effectiveness of EU policies requires also careful consideration of, for example, the following issues:

– whether to include types of sanctions other than imprisonment and fines to ensure a maximum level of effectiveness, proportionality and dissuasiveness, as well as the need for additional measures, such as confiscation; and

– whether to impose criminal or non-criminal liability on legal persons, in particular with regard to crime areas where legal entities play a particularly important role as perpetrators.

[19] Article 49 of the EU Charter of Fundamental Rights.

What is the possible content of EU minimum rules on criminal law?

The **definition** of the offences, i.e. the description of conduct considered to be criminal, always covers the conduct of the main perpetrator but also in most cases ancillary conduct such as instigating, aiding and abetting. In some cases, the attempt to commit the offence is also covered.

All EU criminal law instruments include in the definition intentional conduct, but in some cases also seriously negligent conduct. Some instruments further define what should be considered as "aggravating" or "mitigating" circumstances for the determination of the sanction in a particular case.

Generally, EU legislation covers offences committed by natural persons as well as by legal persons such as companies or associations. The latter can be important in many areas, e.g. concerning responsibility for oil spills. However, in existing legislation, Member States have always been left with the choice concerning the type of liability of legal persons for the commission of criminal offences, as the concept of criminal liability of legal persons does not exist in all national legal orders.

Furthermore, EU legislation can cover rules on **jurisdiction,** as well as other aspects that are considered part of the definition as necessary elements for the effective application of the legal provision.

Regarding sanctions, EU criminal law can require Member States to take effective, proportionate and dissuasive criminal **sanctions** for a specific conduct. *Effectiveness* requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules; *proportionality* requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and *dissuasiveness* requires that the sanctions constitute an adequate deterrent for potential future perpetrators.

Sometimes, EU criminal law determines more specifically, which types and/or levels of sanctions are to be made applicable. Provisions concerning confiscation can also be included. It is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and to ensure that the requirements of "effective, proportionate and dissuasive" sanctions are indeed met in all Member States.

3. WHICH ARE THE EU POLICY AREAS WHERE EU CRIMINAL LAW MIGHT BE NEEDED?

Criminal law measures can be considered as an element to ensure the effective enforcement of EU policies, as recognized by the Treaty on the Functioning of the European Union. EU policies cover a broad variety of subjects, where common rules have been developed over the last decades for the well-being of citizens. These policy areas range from the customs union and internal market rules to the protection of the environment.

In all these policy areas, Member States are obliged to ensure that breaches of EU law are to be sanctioned with effective, proportionate and dissuasive penalties. Member States can in

general choose the nature of the sanction which does not have to be criminal but could also be administrative.

Where the discretion of Member States in implementing EU law does not lead to the desired effective enforcement, it may be necessary to regulate, by means of minumum rules, at EU level which sanctions Member States have to foresee in their national legislation. Approximating sanction levels will in particular be a consideration if an analysis of the current sanction legislation of administrative or criminal nature reveals significant differences amongst the Member States and if those differences lead to an inconsistent application of EU rules.

If EU action is required, the EU legislator needs to decide whether criminal sanctions are necessary or whether common administrative sanctions are sufficient. This will depend on a case-by-case assessment of the specific enforcement problems in a policy area along the guiding principles set out above.

There are a number of policy areas which have been harmonised and where it has been established that criminal law measures at EU level are required. This concerns notably measures to fight serious damaging practices and illegal profits in some economic sectors in order to protect activities of legitimate businesses and safeguard the interest of taxpayers:

- **the financial sector,** e.g. concerning market manipulation or insider trading;[20]
- **the fight against fraud** affecting the financial interests of the European Union, to ensure that taxpayers' money is protected to an equivalent degree across the Union. In a recent Communication, the Commission set out a range of tools that should be considered to strengthen this protection,[21] including criminal procedure, common definitions of offences and rules on jurisdiction.
- **the protection of the euro against counterfeiting through criminal law** in order to strengthen the public's trust in the security of means of payment.

The Commission will **further reflect on ways how criminal law could contribute to the economic recovery by helping tackle the illegal economy** and **financial criminality**.

In other harmonised policy areas, the potential role of criminal law as a necessary tool to ensure effective enforcement could also be explored further. Indicative examples could be:

- **road transport,** concerning, e.g., serious infringements of EU social, technical, safety and market rules for professional transports;[22]
- **data protection,** for cases of serious breaches of existing EU rules;[23]

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20 See 'Communication on reinforcing sanctioning regimes in the financial sector', COM (2010) 716 final of 8.12. 2010, p.14.

21 See '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', COM (2011) 293, of 26.5.2011, p. 10.

22 Commission Staff Working Paper SEC (2011) 391 of 28.3.2011, accompanying the White Paper 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system', COM (2011) 144 of 28.3. 2011, paragraph 176.

- **customs rules** concerning the approximation of customs offences and penalties;[24]
- **environmental protection**, if the existing criminal law legislation in this area[25] requires further strengthening in the future in order to prevent and sanction environmental damage;
- **fisheries policy,** where the EU has adopted a "zero tolerance" campaign against illegal, unreported and unregulated fishing;
- **internal market policies** to fight serious illegal practices such as counterfeiting and corruption or undeclared conflict of interests in the context of public procurement.

These are areas which will require further assessment whether and in which areas minimum rules on the definition of criminal offences and sanctions may prove to be essential in order to ensure the effective implementation of EU legislation.

This analysis should take into account the following considerations:

The **seriousness** and **character** of the breach of law must be taken into account. For certain unlawful acts considered particularly grave, an administrative sanction may not be a sufficiently strong response. On the same line, criminal law sanctions may be chosen when it is considered important to stress **strong disapproval** in order to ensure deterrence. The entering of convictions in criminal records can have a particular **deterrent character**. At the same time, criminal proceedings provide often for stronger **protection of the rights of the accused**, reflecting the seriousness of the charge. The **efficiency of the sanction system** must be considered, as well as the extent to which and the reasons why existing sanctions do not achieve the desired enforcement level. The type of sanction that is considered to be the most appropriate to reach the global objective of being effective, proportionate and dissuasive should be chosen. An administrative sanction can often be decided and executed without delay, and lengthy and resource demanding procedures can thereby be avoided. Administrative sanctions may for this reason be considered in areas where, for example the offence is not particularly severe or occurs in large numbers as well as in areas where administrative sanctions and procedures are suitable and effective for other reasons (e.g. complex economic assessments). In many cases, administrative law also provides for a broader range of possible sanctions, from fines and suspension of licenses to exclusion from entitlement to public benefits, which can be tailored to the specific situation. In many cases, administrative sanctions may therefore be sufficient or even more effective than criminal sanctions.

4. CONCLUSION

Even though the new legal framework introduced by the Lisbon Treaty does not fundamentally alter the possible scope of EU criminal law, it considerably enhances the

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23 See the Communication 'A comprehensive approach on personal data protection in the European Union', COM (2010) 609 of 4.11. 2010, p. 9.

24 See Communication 'Delivering an area of freedom, security and justice for Europe's citizens – Action Plan implementing the Stockholm Programme', COM (2010) 171 of 20.4.2010, p. 22.

25 See Directive 2008/99/EC on the protection of the environment through criminal law, OJ L 328/28 of 6.12.2008; and Directive 2009/123/EC on ship-source pollution and on the introduction of penalties for infringements, OJ L 280/52 of 27.10.2009.

possibility to progress with the development of a coherent EU Criminal Policy which is based on considerations both of effective enforcement and a solid protection of fundamental rights. This communication represents a first step in the Commission's efforts to put in place a coherent and consistent EU Criminal Policy by setting out how the EU should use criminal law to ensure the effective implementation of EU policies. It needs to be designed focusing on the needs of EU citizens and the requirements of an EU area of freedom, security and justice, while fully respecting subsidiarity and the last-resort-character of criminal law.

For this purpose, the Commission will draft, in close cooperation with Parliament and Council, sample language. This should guide the EU legislator whenever drafting criminal law provisions setting minimum rules on offences and sanctions. This would contribute to ensure consistency, increase legal certainty and facilitate implementation of EU law. The Commission will also set up an expert group to assist the Commission in gathering factual evidence and in launching further discussions about important legal issues with a view to ensuring an efficient implementation of EU legislation into the national criminal law systems of Member States. This includes for example:

- the relationship between criminal and non-criminal sanction systems; and

- the interpretation of criminal law notions regularly used in EU legislation, such as the notion of "effective, proportionate and dissuasive sanctions", "minor cases" or "aiding and abetting".

Based on a thorough evaluation of existing EU criminal law measures and continuous consultation of Member States and independent experts, the Commission will continue to develop the EU criminal policy over the coming years.

Our vision for a coherent and consistent EU Criminal Policy by 2020:

- EU criminal law can be an important tool to better fight crime as a response to the concerns of citizens and to ensure the effective implementation of EU policies. .

- In fields of EU policy where there is an identified enforcement deficit, the Commission will assess the need for new criminal law measures based on an evaluation of the enforcement practice and in full respect of fundamental Treaty principles such as subsidiarity and proportionality. This concerns notably the protection of the functioning of the financial markets, the protection of the financial interests of the EU, the protection of the euro against counterfeiting, serious infringements of road transport rules, serious breaches of data protection rules, customs offences, environmental protection, fisheries policy and internal market policies to fight illegal practices such as counterfeiting and corruption or undeclared conflict of interests in the context of public procurement.

- There should be a common understanding on the guiding principles underlying EU criminal law legislation, such as the interpretation of basic legal concepts used in EU criminal law; and how criminal law sanctions can provide most added value at EU level.

- Criminal law measures should be firmly grounded in strong EU-wide standards for procedural rights and victims' rights in line with the EU Charter of Fundamental Rights.

ANNEX III

European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310 (INI))

The European Parliament,

– having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular to Part Three, Title V, Chapter 4 thereof, entitled 'Judicial cooperation in criminal matters',

– having regard to the Charter of Fundamental Rights of the European Union, and in particular to Title VI thereof on justice,

– having regard to the Commission Communication of 20 September 2011 entitled 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, (COM (2011) 0573),

– having regard to the Council conclusions of 30 November 2009 on model provisions, guiding the Council's criminal law deliberations,

– having regard to its resolution of 25 October 2011 on organised crime in the European Union [1],

– having regard to its recommendation of 7 May 2009 to the Council on development of an EU criminal justice area [2],

– having regard to its studies on 'Harmonization of criminal law in the EU' [3] and on 'Development of an EU criminal justice area' [4],

– having regard to Rule 48 of its Rules of Procedure,

– having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A7-0144/2012),

A. whereas in accordance with Article 3(2) of the Treaty on European Union (TEU) the Union shall offer its citizens an area of freedom, security and justice without internal borders, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to, *inter alia*, the prevention and combating of crime;

B. whereas Parliament and the Council may, in accordance with Article 83 TFEU, establish minimum rules concerning the definition of criminal offences and sanctions;

C. whereas at the same time Article 83(3) TFEU introduces an emergency brake procedure in the case of a member of the Council considering that the proposed legislative measure would affect fundamental aspects of its criminal justice system, thus recognising that criminal law often reflects the basic values, customs and choices of any given society, albeit in full respect of international human rights law;

D. whereas the principles of subsidiarity and proportionality, as mentioned in Article 5 TEU, are therefore particularly relevant in the case of legislative proposals governing criminal law;

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[1] Texts adopted, P7_TA(2011)0459.

[2] OJ C 212 E, 5.8.2010, p. 116.

[3] http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=30499

[4] http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=30168

E. whereas the criminal law and criminal proceedings systems of the Member States have evolved over centuries, whereas each Member State has its own characteristics and special features, and whereas, as a consequence, key areas of criminal law must be left to the Member States;

F. whereas the principle of mutual recognition is gaining acceptance in an increasing number of political fields, in particular in relation to judgments and judicial decisions, and whereas it is a principle based on mutual trust, which requires the establishment of minimum protection standards at the highest possible level;

G. whereas the harmonisation of criminal law in the EU should contribute to the development of a common EU legal culture in relation to fighting crime, which adds up to but does not substitute national legal traditions and has a positive impact on mutual trust amongst the legal systems of the Member States;

H. whereas criminal law must constitute a coherent legislative system governed by a set of fundamental principles and standards of good governance in full respect of the EU Charter of Fundamental Rights, the European Convention on Human Rights and other international human rights conventions to which the Member States are signatories;

I. whereas in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (*ultima ratio*) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals;

J. whereas EU criminal legislation should, as a general rule, only prescribe penalties for acts which have been committed intentionally or, in exceptional circumstances, for those involving serious negligence, and must be based on the principle of individual guilt *(nulla poena sine culpa*), although in certain instances it may be justified to provide for corporate liability for certain types of offence;

K. whereas in accordance with the *lex certa* requirement the elements of a criminal offence must be worded precisely in order to ensure predictability as regards its application, scope and meaning;

L. whereas in the case of directives, Member States retain a certain measure of discretion on how to transpose the provisions into their national legislation, which means that in order to meet the *lex certa* requirement, not only EU legislation itself, but also its transposition into national legislation must be of the highest quality;

M. whereas the introduction of EU criminal law provisions is not confined to the area of freedom, security and justice but can relate to many different policies;

N. whereas so far the European Union has often developed criminal law provisions on an *ad hoc* basis, thus creating the need for increased coherence;

O. whereas there is a need for Parliament to develop its own procedures in order to ensure, together with the co-legislator, a coherent criminal law system of the highest quality;

P. whereas in order to facilitate cooperation in the field of criminal law between the Commission, the Council and Parliament, an inter-institutional agreement is called for;

Q. whereas Article 67(1) TFEU provides that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States;

1. Stresses that proposals for EU substantive criminal law provisions must fully respect the principles of subsidiarity and proportionality;

2. Recalls that criminal law must fully respect the fundamental rights of suspected, accused or convicted persons;

3. Emphasises that in this respect it is not sufficient to refer to abstract notions or to symbolic effects, but that the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that:

- the criminal provisions focus on conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals;
- there are no other, less intrusive measures available for addressing such conduct,
- the crime involved is of a particularly serious nature with a cross-border dimension or has a direct negative impact on the effective implementation of a Union policy in an area which has been subject to harmonisation measures,
- there is a need to combat the criminal offence concerned on a common basis, *i.e.* that there is added practical value in a common EU approach, taking into account, *inter alia*, how widespread and frequent the offence is in the Member States, and
- in conformity with Article 49(3) of the EU Charter on Fundamental Rights, the severity of the proposed sanctions is not disproportionate to the criminal offence;

4. Recognises the importance of the other general principles governing criminal law, such as:

- the principle of individual guilt (*nulla poena sine culpa*), thus prescribing penalties only for acts which have been committed intentionally, or in exceptional cases, for acts involving serious negligence,
- the principle of legal certainty (*lex certa*): the description of the elements of a criminal offence must be worded precisely to the effect that an individual shall be able to predict actions that will make him/her criminally liable,
- the principle of non-retroactivity and of *lex mitior*: exceptions to the principle of retroactivity are only permissible if they benefit the offender,
- the principle of *ne bis in idem*, which means that a person who has been convicted or acquitted by a final judgment in one Member State cannot be prosecuted or punished for the same matter in criminal proceedings in another Member State,
- the principle of the presumption of innocence, which states that every person accused of a crime is deemed innocent until his or her guilt is established under law;

5. Welcomes the recognition by the Commission in its recent Communication on an EU criminal law policy that the first step in criminal law legislation should always be to decide whether to adopt substantive criminal law measures at all;

6. Encourages the Commission to put forward measures that facilitate more consistent and coherent enforcement at national level of existing provisions of substantive EU criminal law, without prejudice to the principles of necessity and subsidiarity;

7. Stresses that harmonisation measures should be proposed primarily with a view to supporting the application of the principle of mutual recognition in practice, rather than merely expanding the scope of harmonised EU criminal law;

8. Encourages the Commission to continue to include in its impact assessments the necessity and proportionality test, to draw on the best practices of those Member States with a high level of procedural rights guarantees, to include an evaluation based on its fundamental rights checklist and to introduce a test specifying how its proposals reflect the aforementioned general principles governing criminal law;

9. Stresses the need to establish uniform minimum standards of protection at the highest possible level for suspects and defendants in criminal proceedings in order to strengthen mutual trust;

10. Encourages the Commission and the Member States also to consider non-legislative measures that consolidate trust among the different legal systems in the Member States, enhance coherence and encourage the development of a common EU legal culture in relation to fighting crime;

11. Stresses the need for a more coherent and high-quality EU approach to criminal law and deplores the fragmented approach followed so far;

12. Welcomes the existence of an inter-service coordination group on criminal law within the Commission and asks the Commission to provide Parliament with more specific information on its mandate and functioning;

13. Calls for a clear, coordinating authority within the Commission for all proposals which contain criminal law provisions, in order to ensure a coherent approach;

14. Welcomes the existence of a Council Working Party on Substantive Criminal Law and asks the Council to provide Parliament with specific information on how it relates to other Council working groups dealing with criminal law provisions in policy areas other than justice and home affairs;

15. Calls for an inter-institutional agreement on the principles and working methods governing proposals for future EU substantive criminal law provisions and invites the Commission and the Council to establish an inter-institutional working group in which these institutions and Parliament can draw up such an agreement and discuss general matters, where appropriate consulting independent experts, with a view to ensuring coherence in EU criminal law;

16. Believes that this inter-institutional working group should help to define the proper scope and application of criminal-law sanctions at EU level, as well as examining existing legislation with a view to reducing the fragmentation and conflicts of jurisdiction characterising the current approach;

17. Resolves to examine how a coherent approach to EU legislation on substantive criminal law can best be ensured within Parliament, and points in this respect to the current lack of a coordinating committee and to the important role that its Legal Service could potentially play;

18. Emphasises the importance of establishing an information service for Parliament that can support the individual Members in their daily work, thus ensuring the quality of Parliament's work as a co-legislator;

19. Points out that a coherent approach requires Parliament, before adopting any legislative proposal on substantive criminal law, to have at its disposal a legal analysis of the proposal showing whether all the requirements mentioned in this Resolution have been fully met, or which improvements are still necessary;

20. Instructs its President to forward this resolution to the Council, the Commission, the national parliaments of the Member States and the Council of Europe

List of contributors

Jeroen Blomsma, Dr., European Commission

Pedro Caeiro, Dr., Assistant Professor, University of Coimbra

Serge de Biolley, Assistant, Institut d'Etudes Européennes, Université Libre de Bruxelles

Cornelis De Jong, Member of the European Parliament

Francesca Galli, Dr., FNRS Post-doctoral Researcher, Institut d'Etudes Européennes, Université Libre de Bruxelles

Maria Kaiafa Gbandi, Prof. Dr., Aristotle University of Thessaloniki

Robert Kert, Dr., Assistant Professor, Universität Wien

Andrea Lehner, PhD Candidate and Teaching/research assistant, Universität Wien

Miguel Ângelo Lemos, Assistant, University of Coimbra

Katalin Ligeti, Prof. Dr., University of Luxembourg

Christina Peristeridou, PhD Candidate, University of Maastricht

Gisele Vernimmen-Van Tiggelen, Collaborateur Scientifique, Institut d'Etudes Européennes, Université Libre de Bruxelles

John Vervaele, Prof. Dr., University of Utrecht

Anne Weyembergh, Prof. Dr., Institut d'Etudes Européennes, Université Libre de Bruxelles and Coordinator of ECLAN (European Criminal Law Academic Network)

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SECTORIAL APPROACH

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