

CRIMINAL LAW COMPETENCES OF THE EUROPEAN UNION BEFORE AND AFTER THE TREATY OF LISBON

BENCE UDVARHELYI
Senior Lecturer, Department of International Law
University of Miskolc
jogbence@uni-miskolc.hu

1. Introduction

For a long time, criminal law was regarded as the symbol and last rampart of national sovereignty, therefore the European Communities originally did not have the legal competence in criminal matters. However, the development of the European integration demonstrated that it is difficult to disassociate Community action in the main areas of Community competence from criminal justice policy.

There are two main justifications for Union action in the field of criminal law: the need to combat against serious cross-border criminality and the need to safeguard interests, policies and objectives of the European Union by means of criminal law.¹ For these reasons, the Treaty of Maastricht extended the European integration to the justice and home affairs, and created the three pillar system of the European Union. Cooperation in criminal matters was placed in the third pillar of the EU. Since then the European Union's activity in criminal law gradually broadened. The Treaty of Lisbon, which was an important turning point in the history of EU criminal law, placed the cooperation in criminal matters on a new contractual basis, abolished the pillar structure and empowered the European Union with a wide legislative competence.

This paper aims to analyse the development of the European Union's competences in the area of criminal law. The paper is divided into two main sections: the first part deals with the criminal competences before the Treaty of Lisbon and the second part examines the reformed regulation introduced by the Treaty of Lisbon.

2. Criminal competences before the Treaty of Lisbon

2.1. Cooperation in criminal matters within the framework of the third pillar

Initially the third pillar provisions did not explicitly grant the Union legal competence to adopt measures in the field of substantive criminal law.² The *Treaty of*

¹ MITSILEGAS, Valsamis: EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation. In: ARCARAZO, Diego Acosta–MURPHY, Cian C. (eds.): *EU Security and Justice Law. After Lisbon and Stockholm*. Hart Publishing, Oxford–Portland, 2014, 111.

² PEERS, Steve: *EU Justice and Home Affairs Law*. Oxford University Press, Oxford–New York, 2011, 755.

Maastricht only listed some items, e.g. combatting fraud on an international scale, preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime which shall be regarded as matters of ‘*common interest*’.³ In these areas the Union was entitled to adopt joint positions, joint actions and draw up conventions.⁴

The *Treaty of Amsterdam* significantly modified the area of the third pillar. Article 29 of the Treaty on European Union (TEU) defined the main objective of the cooperation in criminal matters, which is the provision of ‘a high level of safety within an area of freedom, security and justice’. This involves ‘developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia’ and ‘crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud’. The objective has to be achieved through closer cooperation between police forces, customs and judicial authorities and other competent authorities in the Member States, and *if necessary through approximation of rules on criminal matters in the Member States*.⁵ The Treaty of Amsterdam empowered the legislator of the Union with an express *legal harmonization competence*, when allowed the EU to adopt ‘measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’.⁶ The main instrument of the legal harmonization were framework decisions, which were binding upon the Member States as to the result to be achieved but left to the national authorities the choice of form and methods.⁷ Although the Treaty expressly specified that framework decisions do not entail direct effect, the Court of Justice ruled that they have ‘indirect effect’, because the national laws of the Member States have to be interpreted in conformity with the provisions of the framework decisions.⁸

The extent of the EU harmonization competence established by the Treaty of Amsterdam was highly debated. Although the Treaty only listed three criminal offences – organised crime, terrorism and illicit drug trafficking – relating to which minimum rules could be established, the Union interpreted its legislative competence

³ Article K1 Maastricht Treaty.

⁴ Article K3 Maastricht Treaty. See further: PEERS: Op. cit. 12–15; MIETTINEN, Samuli: *Criminal Law and Policy in the European Union*. Routledge, London–New York, 2013, 25–29.

⁵ MIETTINEN: Op. cit. 30.

⁶ Article 31(e) TEU.

⁷ Article 34(2)(b) TEU.

⁸ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, para 38. See further: NASCIBENE, Bruno: European judicial cooperation in criminal matters: what protection for individuals under the Lisbon Treaty? *ERA Forum*, Vol. 10/3, 2009, 400–401.

broadly and adopted framework decisions harmonizing other offences, mostly those which were enumerated in Article 29 TEU.⁹

2.2. Criminal law in the first pillar?

According to Articles 29 and 47 TEU the provisions of the Treaty on European Union do not affect the Treaties establishing the European Communities and the powers of the European Community, which means that the first pillar had priority over the third pillar. Because cooperation in criminal matters was placed in the third pillar, there were no legal base in the EC-Treaty which contained an express reference to criminal law; therefore it was a general opinion, that the European Communities did not have criminal competences. However, the case-law of the European Court of Justice gradually breached this general approach. In its rulings the Court dealt with the Member States' duty to adopt criminal sanctions for breaches of Community law and with the European Union's legislative competence in criminal matters.¹⁰

1. *The Member States' obligation to adopt sanctions for breaches of Criminal law.* The case-law of the European Court of Justice recognized that the Member States are obliged to enforce Community rules by means of criminal law as well.¹¹ This obligation arise from the *principle of sincere cooperation*,¹² according to which Member States are ordered to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union, to facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives. Already in 1977 (15 years before the Treaty of Maastricht) the Court of Justice declared that the principle of sincere cooperation allows the Member States to 'choose the measures which they consider appropriate, including sanctions which may even be criminal in nature' in order to ensure the fulfilment of an obligation resulting from a Community rule. Therefore, 'in the absence of any provision in the Community rules providing for specific sanctions to be imposed on individuals for a failure to observe those rules, the Member States are competent to adopt such sanctions as appear to them to be appropriate'.¹³

In the famous *Greek Maize case*, the Court gave a more precise and detailed analysis of the Member States' duties arising from the principle of sincere cooperation. According to this principle Member States are required to 'penalize the infringement of Community law in the same way as they penalize the infringement

⁹ See further: PEERS: Op. cit. 25–29, 756–758; MIETTINEN: Op. cit. 35–37.

¹⁰ HUGGER, H.: The European Communities' Competence to Prescribe National Criminal Sanctions. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 3/3, 1995, 243–245.

¹¹ PEERS: Op. cit. 770.

¹² Article 4(3) TEU (originally Article 5, then Article 10 EC-Treaty).

¹³ Case 50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR 137, paras 32–33.

of national law'. The choice of penalties remains within the discretion of the Member States, but they have to be 'effective, proportionate and dissuasive'. Furthermore, Member States must ensure that infringements of Community law are penalized under procedural and substantive conditions, which are 'analogous to those applicable to infringements of national law of a similar nature and importance'. Moreover, 'the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws'.¹⁴

The judgements of the European Court of Justice in these cases made it clear that, when the Community legislation provides no specific sanction for an infringement of Community rules, Member States are not only competent, but because of the principle of sincere cooperation, are obliged to take all measures necessary to ensure the application and effectiveness of Community law.¹⁵ These measures could contain criminal law measures as well.

2. *The Union's criminal legislative competence.* Apart from the sanctioning duty of the Member States, the European Court of Justice scrutinized the criminal legislative competences of the European Union. However, for a long time the Court held that the Community does not have criminal competences, because 'criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible'.¹⁶

In 1992 the Court took the first step towards the breakthrough of this rule. In the judgement *Germany v. Commission*, the Court recognized the Community's power to 'impose penalties necessary for the effective application of the rules in the sphere of the common agricultural policy' based on Articles 40(3) and 43(2) EC-Treaty. When determining the most appropriate form of sanction the Community can also provide for penalties which 'go beyond the mere refund of a benefit improperly paid', for example the refund of a benefit unduly received with interest, the forfeiture of a security, the payment of surcharges and the exclusion from the benefit of the aid system. Although Germany asserted that exclusions are criminal penalties and therefore the Community does not have the competence to impose them, the Court held that they 'do not constitute penal sanctions'.¹⁷ However, because these penalties go beyond the mere compensation for the damage caused or the payment of an amount equal to that wrongfully obtained, it can be argued that they have to be regarded as non-reparatory but punitive sanctions. Therefore, although the Court failed to express a view on the Community's power in the penal

¹⁴ Case 68/88 *Commission v. Greece* [1989] ECR 2965, paras 22–25. These rules were repeated in Case 326/88 *Hansen* [1990] ECR I-2911, para 17.

¹⁵ HUGGER: Op. cit. 247.

¹⁶ Case 203/80 *Casati* [1981] ECR 2595, para 27, Case 226/97 *Lemmens* [1998] ECR I-3711, para 19.

¹⁷ Case C-240/90 *Germany v. Commission* [1992] ECR I-5383, paras 8, 11–12, 20, 25, 29.

sphere, it enabled the Community to adopt administrative sanctions which disguise criminal penalties.¹⁸

The European Court of Justice went even further in the landmark *Environmental Crimes Case*. In the case the European Commission asked the Court to annul Framework Decision 2003/80/JHA of 27th January 2003 on the protection of the environment through criminal law¹⁹ adopted by the Council based on Title VI, in particular Articles 29, 31(e) and 34(2)(b) TEU. According to the Commission the legislative act was adopted referring to a wrong legal basis, because the correct legal basis would have been Article 175(1) EC-Treaty, under which the Union legislator is competent to require the Member States to ‘prescribe criminal penalties for infringements of Community environmental-protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective’. The Council however argued that criminal law belongs to area of the third pillar. There is a specific title to judicial cooperation in criminal matters (Title VI), which expressly confers on the European Union competence in criminal matters; therefore the Community does not have power to require the Member States to impose criminal penalties.²⁰

In its judgement the European Court of Justice upheld the Commission’s arguments and annulled the framework decision. The argument of the Court was based on Articles 29 and 47 TEU which provide the priority of the EC-Treaty (first pillar) over the Treaty on European Union (third pillar). It is the ‘task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC-Treaty’. Therefore the Court had to ascertain whether the provisions of the framework decision affect the powers of the Community under Article 175 EC-Treaty. Examining its provision the Court found, that the objective of the framework decision is the protection of the environment, which is one of the Community’s objective under Articles 3(1)(l) and 174-176 EC-Treaty and it entails partial harmonization of the criminal laws of the Member States. In connection with this the Court ruled, that ‘generally neither criminal law nor the rules of criminal procedure fall within the Community’s competence’, but it ‘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 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’. According to the case-law of the Court, the ‘choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure’.

¹⁸ CORSTENS, Geert–PRADEL, Jean: *European Criminal Law*. Kluwer Law International, The Hague– London–New York, 2002, 552–553.

¹⁹ *OJ L*, 29, 5. 2. 2003, 55–58.

²⁰ Case C-176/03 *Commission v. Council* [2005] ECR I-7879, paras 11, 18–19, 26–29.

The Court concluded that on account of both its aim and its content, the main purpose of the framework decision is the protection of the environment; therefore it could have been properly adopted on the basis of Article 175 EC-Treaty. That means that the framework decision violated Article 47 TEU because it encroaches on the powers which Article 175 EC-Treaty confers on the Community, hence it must be annulled.²¹

The *Environmental Crimes Case* was an important milestone, because it acknowledged that the European Communities (first pillar) also have criminal legislative competence. In this judgement the Community was considered functionally competent to harmonize the criminal law enforcement of a Community policy.²² The threshold of the establishment of a competence to take measures relating to criminal law is the *effectiveness*.²³ That means criminal measure can only be used if it is essential to the effective implementation of the environmental policy.

However, the scope of the judgement was also highly questionable: it was controversial whether it only applies to issues within the scope of the environmental law, or to other areas of Community law as well?²⁴ The question was answered by the Commission, which issued a Communication analysing the consequences of the judgement.²⁵ Pursuant to the Commission, the judgment of the Court clarified the distribution of powers between the first and third pillars as regards the provisions of criminal law and laid down principles going far beyond the environmental policy, because the same arguments can be applied to the other common policies and to the four freedoms. The Commission emphasized, that criminal law still does not constitute a Community policy, since Community action in criminal matters may be based only on implicit powers associated with a specific legal basis. Hence, appropriate measures of criminal law can be adopted on a Community basis only at sectorial level and only on condition that there is a clear need to combat serious shortcomings in the implementation of the Community's objectives and to provide for criminal law measures to ensure the full effectiveness of a Community policy or the proper functioning of a freedom.

In the Annex of its Communication, the Commission listed several framework decisions and pending proposals, which are entirely or partly incorrect, since they

²¹ Case C-176/03 paras 38–40, 45–48, 51, 53, 55.

²² VERVAELE, John A. E.: The European Community and Harmonization of the Criminal Law Enforcement of Community Policy. *Eucrim. The European Criminal Law Associations' Forum*, 3–4/2006, 87.

²³ HERLIN-KARNELL, Esther: *The Constitutional Dimension of European Criminal Law*. Hart Publishing, Oxford–Portland, 2012, 30. See further: HERLIN-KARNELL, Ester: *Commission v. Council: some Reflections on Criminal Law in the First Pillar*. *European Public Law*, Vol. 13/1, 2007, 74–81.

²⁴ PEERS: *Op. cit.* 772.

²⁵ Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C 176/03 *Commission v Council*) [COM (2005) 583 final]

were adopted or submitted referring to a wrong legal basis.²⁶ For the correction of the legal basis of these acts, the Commission elaborated several methods; however, for reasons of procedural deadlines it could only introduce an appeal for annulment in connection with Council Framework Decision 2005/667/JHA of 12th July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.²⁷

In the *Ship-Source Pollution Case*, the Court supported the point of view of the Commission elaborated in its Communication and confirmed the Community's criminal law competence outside the area of environmental protection.²⁸ In its judgement the Court literally repeated the main principles laid down in the previous judgement and concluded that the Community has the competence, on the basis of Article 80(2) EC-Treaty, to require Member States to apply criminal penalties to certain forms of conduct in order to ensure the efficacy of the rules adopted in the field of maritime safety. However, the Court held that the Community's legislative competence is not unlimited. Apart from the requirement of the 'necessity of criminal sanctions for ensuring the effectiveness of a Community policy' laid down in the previous judgement as well, the Court also held that the 'determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence', as it remained within the competence of the Member States.²⁹ This regulation precludes the adoption of precise criminal law measures in the Community's level, because the Community only possesses the competence to require Member States to criminalize certain behaviour and to enact criminal penalties, but not to specify the type and the level of the penalties. Therefore the Community's competence is limited to the mere indication that criminal sanction should be provided for the effective implementation of the Community policy concerned. The Member States have the right to decide what modality of sanction (e. g. imprisonment, fine, confiscation) they regard as appropriate measures and to what degree (e. g. duration of the imprisonment, level of the fine)

²⁶ For example Framework Decisions on counterfeiting of euro and of non-cash means of payment, Framework Decision on combatting money laundering, Framework Decision on combating corruption in the private sector, Framework Decision on attacks against information systems, Proposal on the protection of the Community's financial interests, Proposal on combatting intellectual property offences. See further: WHITE, Simone: Case C-176/03 and Options for the Development of a Community Criminal Law. *Eu-crim. The European Criminal Law Associations' Forum*, 3-4/2006, 95-96.

²⁷ *OJ L*, 255, 30. 9. 2005, 164-167.

²⁸ VERVAELE, John A. E.: Harmonised Union policies and the harmonisation of substantive criminal law. In: GALLI, Francesca-WEYEMBERGH, Anne (eds.): *Approximation of substantive criminal law in the EU. The way forward*. Editions de l'Université de Bruxelles, Brussels, 2013, 56.

²⁹ Case 440/05 *Commission v. Council* [2007] ECR I-9097, paras 66, 69-70.

they would impose it on the criminal offenders. These limitations enable the Member States to maintain the fundamental character of their criminal justice system.³⁰

Because the Court annulled the two framework decisions, the Commission submitted two proposals for a *directive on the protection of the environment through criminal law* and *on ship-source pollution* based on Article 175(1) and Article 80(2) EC-Treaty. The proposals were adopted in 2008 and in 2009.³¹ Another first pillar instrument containing criminal provisions was adopted in 2009 *on sanctions against employers of illegally staying third-country nationals* on the legal basis of Article 63(3)(b) EC-Treaty.³² Furthermore the Commission also submitted a *proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights*, but it was later withdrawn by the Commission.³³ It can be seen, that based on the general rules laid down by the aforementioned judgements an intensive legislative process began within the framework of the first pillar. However, the amendment of the other existing framework decisions listed in the Commission's Communication in the light of the Court's judgement did not occur, partly because of the entry into force of the Treaty of Lisbon.

3. New criminal competences of the European Union after the Treaty of Lisbon

The Treaty of Lisbon entered into force on the 1st December 2009 introduced significant changes in EU criminal law. The new legal framework of the European Union consists of two Treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The main change of the Treaty of Lisbon is the abolishment the pillar system, on account of which the former third pillar was transformed into the Community legal order. The areas of the previous third pillar can now be found in Title V TFEU (Area of Freedom, Security and Justice), which contains five chapters: general provisions; policies on border checks, asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; and police cooperation. The area of freedom, security and justice became one of the basic objectives of the European Union. Accord-

³⁰ KLIP, André: *European Criminal Law. An Integrative Approach*. Intersentia Publishing, Cambridge–Antwerpen–Portland, 2012, 175; MIETTINEN: Op. cit. 40–41.

³¹ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [*OJ L*, 328, 6. 12. 2008, 28–37.], Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements [*OJ L*, 280, 27. 10. 2009, 52–55.]

³² Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [*OJ L*, 168, 30. 6. 2009, 24–32.]

³³ Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights [COM (2006) 168 final]

ing to Article 3(2) TEU 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’. This objective is reiterated in Article 67 TFEU, which states 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’.

In relation of criminal law, the Treaty of Lisbon put an end to the battle of competence between the first and the third pillars and defined clear legislative competences of the European Union. The criminal competences of the European Union can be divided into two categories: legal harmonization competences and supranational legislation competences.

3.1. Legal harmonization competence

The *legal harmonization competence* of the European Union in the field of substantive criminal law is regulated by Article 83 TFEU. According to *Article 83(1) TFEU* the European Parliament and the Council are entitled to establish *minimum rules* concerning the *definition of criminal offences and sanctions* by way of directives. They can be adopted ‘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’.

The Union’s legal harmonization competence under Article 83(1) can be used if two cumulative criteria meet: *the particularly seriousness* and *the cross-border dimension* of the crime. The meaning of these criteria is not precisely defined by the Treaty. The first requirement is the ‘*area of particular serious crime*’, which means that a certain level of graveness needs to be reached in order to justify EU’s legislative competence. Bagatelle criminality is excluded. The second requirement is the ‘*cross-border dimension*’ of the crime, which is defined by three alternative criteria: nature (e.g. economic offences requiring new technology), impact (e.g. environmental offences which go through borders), or special need to combat the areas of crime on a common basis.³⁴ This latter requirement means that criminal law on the level of the European Union has to have an added value function in the fight against serious transnational criminal offences.³⁵ The Treaty lists ten so-called ‘*eurocrimes*’, which meet the aforementioned criteria, therefore can be subject to harmonization. These 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, com-

³⁴ SIMON, Perrine: The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy. *New Journal of European Criminal Law*, Vol. 3/3–4, 2012, 247–248.

³⁵ MITSILEGAS: Op. cit. 116.

puter crime and organised crime.³⁶ However the Treaty does not provide an exhaustive list, because on the basis of developments in crime additional areas of crime can be adopted by the Council acting unanimously, with the consent of the European Parliament. The new criminal offences also have to meet the criteria specified by Article 83(1) (particular seriousness, cross-border dimension, special need to combat them on a common basis).

Article 83(2) TFEU regulates an *ancillary harmonization competence*, according to which, ‘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, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned’. With this provision the Treaty essentially incorporated the basic principles of the European Court of Justice formulated in the Environmental Crimes Case.

While Article 83(1) limits the criminal competence of the Union to certain areas of criminal offences where there is a special need to combat them on a common basis, Article 83(2) generally enables the use of criminal law if it is essential to the effective implementation of a Union policy.³⁷ The introduction of this competence in the Treaty of Lisbon confirms a *functionalist view of criminal law*. In this case, criminal law is considered as a mean to an end which is the effective implementation of other Union policies. Criminal law is thus used as a mere tool to achieve the effectiveness of the Union law.³⁸

For the use of the criminal harmonization competence under Article 83(2) two requirements have to be fulfilled. Firstly, there is a *need for previous harmonization measures* in the policy area which the Union legislator intends to criminalize. The Treaty does not specify what degree of harmonization (partial, minimum or total harmonization) is needed; it only requires that Union rules have to exist in the area concerned. It means that the Union, prior to the adoption of criminal sanctions, already has adopted harmonized (non-criminal) rules. Secondly, the criminal sanctions have to be *essential for the effective implementation of the aforementioned harmonized Union policy*. The criteria of ‘*essentiality*’ requires the Union legislator to prove that the current enforcement regime cannot achieve effective implementation of the policy concerned, that criminal law is more efficient than existing less restrictive measures to achieve the pursued objective and that the disadvantages caused by criminal law are not disproportionate in relation to the objective of en-

³⁶ In most of these areas several third pillar instruments already exist. See: PEERS: Op. cit. 783–791. According to Article 9 of the Protocol No. 36 on transitional provisions, these acts adopted prior to the entry into force of the Treaty of Lisbon preserve until they are repealed, annulled or amended in implementation of the Treaties.

³⁷ KLIP: Op. cit. 166.

³⁸ MITSILEGAS: Op. cit. 117.

sureing the effective implementation of a Union policy.³⁹ It can clearly be seen that the Treaty adopted a quite high threshold for EU intervention in the area of functional criminalization.⁴⁰

In 2011 the European Commission issued a Communication in which it listed a number of potential policy areas, which meet the criteria laid down in Article 83(2). These are primarily the financial sector (e.g. market manipulation or insider trading), the fight against fraud affecting the financial interests of the European Union and the protection of the euro against counterfeiting through criminal law. Furthermore, the necessity of criminal law could also be explored in other harmonized policies as well, e.g. in the field of road transport, data protection, customs rules, environmental protection, fisheries policy or internal market policies.⁴¹

Both Article 83(1) and 83(2) TFEU stipulate that the Union can establish minimum rules concerning *the definition of criminal offences and sanctions*. Regarding the *definition of offences*, directives can define the element of the crimes, i.e. the description of the prohibited conduct. Directives can also cover ancillary conducts (instigating, aiding and abetting) as well as the attempt to commit the offence. Apart from offences committed by natural persons EU legislation can also regulate the liability of legal persons for the committed crimes. As regards to *sanctions*, the legislative competence of the European Union include the determination of the type (e.g. imprisonment, fines, community service) and/or the level of the penalty (minimum penalties) which could be imposed to natural or legal persons having committed the criminal offences defined in the directives.⁴² However, the Treaty of Lisbon only prescribes '*minimum harmonization*', which means that Member States are entitled to introduce or maintain stricter rules than the regulation of the directives adopted by the Union.⁴³

According to Article 83 TFEU, directives can be adopted in accordance with the ordinary legislative procedure.⁴⁴ However, in order to protect the sovereignty and the different legal systems and traditions of the Member States, *Article 83(3) TFEU* provides for a special '*emergency brake*' procedure. This provision enables the

³⁹ ÖBERG, Jacob: Union Regulatory Criminal Law Competence after Lisbon Treaty. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19/4, 2011, 290–293, 313–314.

⁴⁰ MITSILEGAS: Op. cit. 117.

⁴¹ 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 [COM (2011) 573 final].

⁴² KLIP: Op. cit. 166.

⁴³ SATZGER, Helmut: *Internationales und Europäisches Strafrecht. Strafanwendungsrecht – Europäisches Straf- und Strafverfahrensrecht – Völkerstrafrecht*. Nomos Verlagsgesellschaft, Baden-Baden, 2013, 126; SAFFERLING, Christoph: *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht*. Springer Verlag, Heidelberg–Dordrecht–London–New York, 2011, 417.

⁴⁴ Articles 289 and 294 TFEU.

suspension of the ordinary legislative procedure if a Member State considers that a draft directive ‘would affect *fundamental aspects of its criminal justice system*’.⁴⁵ In this case the draft directive has to be referred to the European Council, which has four months to discuss it. In case of a consensus, the European Council refers the draft back to the Council, which terminates the suspension of the legislative procedure. In case of disagreement, the legislative process fails but at least nine Member States have the possibility to establish *enhanced cooperation* on the basis of the draft directive concerned if they notify the European Parliament, the Council and the Commission accordingly.

3.2. Supranational legislative competence

Apart from the legal harmonization competence under Article 83 TFEU, the Treaty of Lisbon also empowered the European Union with a supranational legislative competence in the field of *the protection of the financial interests of the Union*. This legislative competence is regulated in *Article 325(4) TFEU*. According to this provision of the Treaty, ‘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’.

While Article 83 lists several criminal offences which could be subject to harmonization, Article 325 regulates one specific category of crime: fraud and other illegal activities affecting the financial interests of the Union.⁴⁶ Further difference that Article 325 does not refer to the form of the legal act it only states that the Union legislator could adopt ‘*the necessary measures*’ in the field of the fight against fraud, including the criminal law measures.⁴⁷ Therefore the Union legislation is not restricted to directives as in Article 83, but the Treaty enables the Union to adopt *directly applicable, supranational criminal law norms* in the form of regulations as well.⁴⁸ Besides the form of the legislative act (directive or regulation) there are further distinctions between the legal harmonization and the supranational legislative competence of the EU. First of all, there are Member States which either

⁴⁵ The Treaty does not define what should be considered as fundamental aspects of the criminal justice system of a Member State. These include for example the principle of legality, the principle of guilt, the *ultima ratio* principle, the proportionality of the sanctions or the criminal liability of legal persons. See further: HECKER, Bernd: *Europäisches Strafrecht*. Springer Verlag, Berlin–Heidelberg, 2012, 285.

⁴⁶ KLIP: Op. cit. 172.

⁴⁷ SICURELLA, Rosaria: Some reflections on the need for a general theory of the competence of the European Union in criminal law. In: KLIP, André (ed.): *Substantive Criminal Law of the European Union*. Maklu Publishers, Antwerpen–Apeldoorn–Portland, 2011, 236–237.

⁴⁸ HECKER: Op. cit. 493; SAFFERLING: Op. cit. 409; SATZGER: Op. cit. 104.

do not participate in the adoption of measures pursuant to Title V (Denmark) or have an opting-in position (the United Kingdom and Ireland).⁴⁹ That means Denmark does not participate in the adopted measures on substantive criminal law under Article 83, the United Kingdom and Ireland only participate after a decision to ‘opt in’.⁵⁰ In relation of Article 325(4) there are no such special rules. Furthermore, the emergency brake procedure can also be used only in connection with a directive adopted on the basis of Article 83. That means, if a legislative proposal is adopted on the basis of Article 83, it is likely that it would not apply to every Member States, while an act adopted under Article 325 is legally binding to all Member States.

4. Conclusion

The Treaty of Lisbon empowered the Union with a broad legislative competence on the field of criminal law. Firstly, the Treaty of Lisbon created a secure legal basis of the harmonization of national criminal law. While Article 83(1) TFEU enables the European Union to combat specified areas of cross-border criminality, Article 83(2) TFEU provides the Union a mean to ensure the effective implementation of other Union policies. Secondly, the Treaty of Lisbon not only allows the European legislator to harmonize the national criminal law of the Member States, but to adopt directly applicable, supranational criminal law norms in connection with the protection of the financial interests according to Article 325(4) TFEU.

After the entry into force of the Treaty of Lisbon, an intensive criminal legislation began at the EU’s level. On the legal basis of Article 83(1) TFEU the European Union adopted *directives on the trafficking of human beings*,⁵¹ *on the sexual abuse and sexual exploitation of children and child pornography*,⁵² *on attacks against information systems*,⁵³ *on the protection of the euro against counterfeiting*⁵⁴

⁴⁹ VERVAELE, John A. E.: The material scope of competence of the European Public Prosecutor’s Office: Lex incerta and unpraevia. *ERA Forum*, Vol. 15/1, 2014, 91.

⁵⁰ See: Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol No. 22 on the position of Denmark.

⁵¹ Directive 2011/36/EU of the European Parliament and of the Council 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 L*, 101, 15. 4. 2011, 1–11.]

⁵² Directive 2011/92/EU of the European Parliament and of the Council 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 L*, 335, 17. 12. 2011, 1–14.]

⁵³ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [*OJ L*, 218, 14. 8. 2013, 8–14.]

⁵⁴ Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal

and on the freezing and confiscation of instrumentalities and proceeds of crime.⁵⁵ In 2014 the first directive was adopted based on the ancillary harmonization competence of the European Union laid down by Article 83(2) TFEU on market abuse.⁵⁶ Furthermore the Commission also submitted a proposal on the fight against fraud affecting the Union's financial interests,⁵⁷ whose legal basis and content is currently under negotiations between the institutions of the Union.

Therefore it can be said that the Union uses his legislative competences in the area of criminal law and we can expect the further increase of the Union's activity in this field, which results a more and more harmonized criminal law in the Member States.

law, and replacing Council Framework Decision 2000/383/JHA [*OJ L*, 151, 21. 5. 2014, 1–8.]

⁵⁵ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [*OJ L*, 127, 29. 4. 2014, 39–50.]

⁵⁶ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse [*OJ L*, 173, 12. 6. 2014, 179–189.]

⁵⁷ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law [COM (2012) 363 final]