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Has the European Union a Criminal Policy for the Enforcement of its Harmonised Policies?

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1. Introduction

The impact of Union Law on domestic criminal law goes hand in hand with the European integration process itself.[1] Professor Paul Demaret understood, at the eve of the coming into force of the Maastricht Treaty, very well the importance and included a course in the *curriculum* of the College on "*Le droit de l'Union et le droit répressif européen. Vers une justice repressive européenne, respecteuse des droits procéduraux fondamentaux*", combining European criminal law and human rights. In landmark rulings in the environmental case C-176/03[2] and in the ship source pollution case C-440/05[3] on the criminal law competence in the first pillar the ECJ clearly established a functional criminal law competence for the enforcement of community policies. Their importance was not limited to issues of competence, as they had consequences for the interactions with the Member States' legal order (community method versus third pillar method). Thanks to the rulings the first directives with criminal law substance were voted 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. We cannot state that the rulings have resulted in a well-thought criminal policy for the enforcement of the harmonised EC policies, even in

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1 Vervaele, J.A.E., "The Europeanisation of criminal law and the criminal law dimension of European integration", College Research Papers, 2005, http://www.coleurope.eu/sites/default/files/researchpaper/researchpaper_3_2005_vervaele.pdf.

2 Case C-176/03, Judgment of 15 September 2005.

3 Case C-440/05, Judgment of 23 October 2007.

policy areas of far-reaching integration, such as the internal market, the customs union, the monetary union or financial services. Why, for instance, does the Commission press for the criminal law harmonization of environmental law and criminal law protection of the financial interests of the EC, but fails 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 harmonization of terrorism, xenophobia, the protection of victims of crime, but not for the criminal law harmonization of serious violations of food safety rules, intellectual property infringements, or the financial management of businesses? Does this mean that there have been no thoughts at all about the constitutive elements of criminal policy at the Union before the entry into force of the Lisbon Treaty?

2. Council's Criminal Legislative Policy under the Amsterdam Treaty

From the Amsterdam Treaty on the Council/European Council were elaborating policy programmes (the Tampere Programme, the Hague Programme and the Stockholm Programme) for the area of freedom, security and justice. These Programmes did include criminal legislative policy. The Council did already accept in its Tampere Conclusions of 1999 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 relevance"*,[4] but the Tampere Programme[5] has clearly provided insufficient direction. Both Member States and the Council did feel the need to streamline the content of their legislative work in the criminal law field. Already in 2002 the Council does agree on an approach regarding approximation of penalties. In some cases, the Council states, that it may be sufficient to stipulate that the 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.[6] In other cases, the Council accepts the need for going further and agrees to establish a system of four penalty levels to be used in legislation:

Level 1: Penalties of a maximum of at least between 1 and 3 years of imprisonment

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[4] Conclusion No. 48.

[5] Most recently updated by COM(2004)0401.

[6] Doc. 914/02 DROIPEN 33, http://eurocrim.jura.unituebingen.de/cms/en/doc/1304.pdf.

Level 2: Penalties of a maximum of at least between 2 and 5 years of imprisonment

Level 3: Penalties of a maximum of at least between 5 and 10 years of imprisonment

Level 4: Penalties of a maximum of at least 10 years of imprisonment (cases where very serious penalties are required)

In practice the streamlining of the criminal law harmonization 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 insufficient to elaborate a common approach of criminal law enforcement in the EU legislation.

This is certainly the reason why the Council adopted in 2009 conclusions on model provisions,[7] guiding the Council's criminal law deliberations. The Council was aiming at 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 was however that the model provisions should guide future work of the Council on legislative initiatives that may include criminal provisions. The Council's model provisions do integrate the 2002 conclusion on penalties. Moreover the model provisions do refer explicitly 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 are dealing with both the need for criminal provisions and the structure of criminal provisions itself. Concerning the necessity test, the conclusions insist that criminal law enforcement should be introduced only when it is considered essential for the protection of the 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 further concretized be insisting on proportionality and subsidiarity. Criminal law provisions should address 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:

7 http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1156.pdf.

– 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 criminal provisions compared to other enforcement measures, the 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 within the EU. It is clear that these criteria of assessment of the need for criminal provisions contain general principles of criminal law and criminal policy issues and are addressed at the two substantive areas under Article 83 TFEU, the euro-offences under Article 83(1) TFEU and the criminal law enforcement of harmonised EU policies (annexe-competence) under Article 83(2) TFEU.

The second part of the model provisions is dealing with the structure of criminal provisions as such. The model provision's scheme is adressing *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. Concerning the definition of the *actus reus*, the following criteria are 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 or 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 excluded explicitly. Concerning inciting, aiding and abetting, the model provisions impose the criminalization, following the criminalization of the main offence. When dealing with attempt the model rules are rather cautious. They refer to a necessity and proportionality test and to consideration of the different regimes under national law.

When it comes to penalties, the model rules provide for two regimes (let us call them model A and B). In some cases it can 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 for going further in the

approximation of the levels of penalties (model B). In these cases the Council conclusions of 2002 on penalties do 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 the harmonization to deprivation of liberty.

Finally, the model provisions contain extended provisions on liability of legal persons and penalties against legal persons. They introduce the obligation to ensure that a legal person can be held liable for criminal offences, but without imposing a criminal liability scheme. Attribution of liability is based on benefit for the legal person and attribution of (vicarious) liability of natural persons to the legal persons. A specific provision is dealing with the liability for lack of supervision or control, but also in this case there must be benefit for the legal person. The liability of legal persons shall not exclude criminal liability of the 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 organizations. When it comes to penalties against legal persons, the model provisions do 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 liability of legal persons, but stick to the practice under the Maastricht Treaty and Amsterdam Treaty 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 a systematization of the past performance, than a prospective criminal policy document. They do no take fully into account the substantive changes under the Treaty of Lisbon. The Lisbon Treaty does provide for a new legal framework for criminal legislation with the aim to prevent and punish crime in the common area of freedom, security and justice. Not only has the substance of criminal law harmonization and the applicable rules been changed by the Treaty of Lisbon, but also the objective of harmonization. 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 rights and duties of citizens, not only related to free movement of persons. Seen the wording of Article 82 TFEU, harmonization 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. Which legal interests deserve criminal protection and to which extent? This is certainly the case for Article 83(2) TFEU, for which only very little *acquis* had been build up in the past, neither under the former third pillar, nor under the former first pillar. The criminal law protection directives in the environmental field are the exceptions to the rule. In 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 know for which areas and to which extent the EU is willing to fill in 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 thoroughly discussed and adopted by the Member States in the Council, and the Member States do have legislative initiative.

3. A Criminal (Legislative) Policy under the Lisbon Treaty?

Since the coming into force of the Lisbon Treaty the European Commission has taken a proactive stand on the topic. On its website[8] 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 particularly 10 serious areas of crime with a cross-border 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 Articles 310(6), 325, 85 and 86 TFEU, which might

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

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.

The Commission published moreover in September 2011 a Communication entitled "*Towards an EU Criminal Policy – ensuring the effective implementation of EU policies through criminal law*",[9] dealing specifically with the competence under Article 83(2) TFEU. The Commission is aware of the fact that, for what is called 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. In a first part the Commission elaborates on the scope for EU criminal legislation. The Commission underlines that Article 83 (2) TFEU aims at strengthening mutual trust, ensuring effective enforcement and coherence and consistency in European criminal law itself. Article 83(2) TFEU does not list specific offences or areas of crime. For that reason the Commission elaborates this Communication as guidance for the policy choices of whether to use or not to use criminal law as an enforcement tool, also in relation to other enforcement tools, such as the administrative one. The Commission also adds Article 235(4) 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.

However, the Commission is not making any explicit reference to directives or regulations with a criminal law substance. However, inserting it under the scope of criminal legislation in this document is considering the possibility to do so. Second, the Commission is dealing 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 form the constitutional traditions common to the Member States*". It seems to me impossible to elaborate a criminal policy that would not take into account the

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[9] COM(2011)573 final http://ec.europa.eu/justice/criminal/files/act_en.pdf.

constitutional traditions common to the Member States, and I do underline common, 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 on 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 is dealing witch 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 at the same time the need for legal certainty. 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 is not further elaborating 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 cross-border 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 the sanctions the Commission is referring 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. Interesting is 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 for criminal liability of legal persons. It thus becomes clear that the Commission does not exclude criminal liability of legal persons and criminal sanctions for legal persons of the competence under Article 83(2) TFEU. Finally, the minimum rules can also include provisions on jurisdiction, as well other aspects that are considered an essential part for the effective application of the legal provision.

Third, the Commission is dealing with the choice of policy areas where EU criminal law might be needed. 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 case-by-case the specific enforcement problems and the choice for administrative and/or criminal enforcement. However, the Commission is already indicating in this Communication priority fields

for criminal law harmonisation under Article 83(2) TFEU. Mentioned are three selected areas:

– The financial sector, e.g. concerning market manipulation and insider trading[10]

– The fight against fraud affecting the financial interest of the EU

– The protection of the euro against counterfeiting

The Commission mentions furthermore a set of areas (no exclusive list) in which criminal law enforcement might play a role:

– Illegal economy and financial criminality

– Road transport[11]

– Data protection[12]

– 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 seriousness and character of the breach and the efficiency of the enforcement system. The choice for 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 prior list of already selected areas. There is already criminal law *acquis* for corruption.[13] The Commission had already submitted in 1995 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.[14] The Commission had already tried in 2003,[15] in vain, to get

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[10] See "Communication on reinforcing sanctioning regimes in the financial sector", COM(2010)716 final of 08 December 2010.

[11] See Commission Staff Working Paper SEC (2011) 391 of 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 of 28 March 2011.

[12] See the Communication "A comprehensive approach on personal data protection in the European Union", COM(2010)609 of 04 November 2010.

[13] Framework Decision 2003/568/JHA on combating corruption in the private sector.

[14] COM(2005)276 final, http://eurlex.europa.eu/LexUriServ/site/en/com/2005/com-2005_0276en01.pdf.

[15] COM(2003)52 final.

adopted a regulation containing criminal law enforcement obligations in the area of feed and food safety.

The Committee on Civil Liberties, Justice and Home Affairs of the EP adopted in May 2012 a "*Report on an EU approach on Criminal Law*" of rapporteur C. de Jong.[16] The report 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 does correspond fully to the 2011 Communication of the Commission. It does not contain any reference to the choice of policy areas that should deserve criminal law protection. More interesting is the procedural approach. It calls for an inter-institutional 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 inter-institutional working group in which these institutions and Parliament can draw up such an agreement and discuss general matters with a view to ensuring coherence in EU criminal law. As it stands there is a Council Working Party on substantive criminal law (DROIPEN) and a new inter-service coordination group on criminal law at the Commission. Furthermore the Commission has decided in February 2012 to set up a formal expert group on EU criminal policy.[17] At the EP there is no formal structure at all.

4. Criminal Harmonisation under the Lisbon Treaty in Practice

The directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims[18] is the first directive that has been adopted under Article 83(1) TFEU. It contains the classic content as foreseen under the Council's model provisions and includes specific harmonization 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[19] on combating the sexual abuse and sexual exploitation of children and child pornography

[16] http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0144&language=EN.

[17] http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:053:0009:00-10:EN:PDF.

[18] Directive 2011/36 of 5 April 2011, http://eurlex.europa.eu/LexUriServ/Lex-UriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF.

[19] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:00-14:EN:PDF.

follows completely the same pattern. Meanwhile the Council did also reach a general agreement[20] on a proposal for a directive on attacks against information systems, replacing framework decision 2005/222/JHA. Also in this directive it has been opted for the harmonization of type and level of criminal sanctions (the B model). However, these directives do not always follow the four type levels of harmonization 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 sanction levels.

The first initiative under Article 83(2) TFEU is indeed 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 the Communication of September 2011 for its assessment and has even produced in 2010 a Communication on "*Reinforcing sanctioning regimes in the financial service sector*",[21] based on comparative research by the three Committees of Supervisors (Committee of European Banking Supervisors-CEBS, Committee of European Insurance and Occupational Pensions Supervisors-CEIOPS and Committee of European Securities Regulators-CESR) on the equivalence of 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 at their disposal important types of sanctioning powers for certain violations

– 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

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[20] http://register.consilium.europa.eu/pdf/en/11/st11/st11566.en11.pdf.

[21] COM(2010)716 final.

might include criminal sanctions for the most serious violations. The proposed directive on criminal sanctions for insider dealing and market manipulation,[22] submitted in October 2011, is part of a legislative double text package, which includes also a proposal for a regulation on insider dealing and market manipulation (market abuse).[23] In fact the proposed regulation, based on Article 114 TFEU and aiming at replacing directive 2003/6/EC,[24] is the basic regulatory framework. The regulation proposal contains all definitions, obligations and prohibitions and does also regulate the applicable administrative enforcement regime, including administrative sanctions of a non-punitive and punitive character. 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 (like for instance withdrawal of the authorisation or pecuniary sanctions for legal persons up to 10% of its total annual turnover in the preceding business year).[25] The proposed directive is the result of the assessment of the Commission 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 some cross-references, the proposed directive refers only to the definitions of financial instruments and inside information in the proposed regulation, but strange 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. Second, seen the assessment of the necessity of criminal law harmonisation to ensure effective enforcement of Union policy against market abuse, it is also surprising that the proposed directive is choosing for what we have called model A of the Council's model provisions, this means that it is in this area 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 harmonization was already possible under the 1st pillar of the Amsterdam Treaty, even after the ruling of the Court of Justice in

[22] COM(2011)654 final, 20 October 2011.

[23] COM(2011)651 final, 20 October 2011.

[24] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF.

[25] Article 26 of the proposal.

the ship source pollution case.[26] And this brings me to the third point. The choice of Article 83(2) TFEU as 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 substantial policy area (financial services). The consequence of the choice for Article 83(2) TFEU is at least that Denmark is not taking part in the adoption of this Directive[27] and that the UK and Ireland have an opting in choice, but no obligation to become part of and bound by the Directive.[28] In other words it is under Article 83(2) TFEU 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 of 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 from the Maastricht Treaty, being the 1995 regulation on administrative enforcement[29] and the 1995 Convention and two protocols[30] on criminal enforcement. The Commission did already submit in 2001 a proposal for a directive on the criminal-law protection of the Community's financial interests,[31] but the proposal was never thoroughly discussed at the Council. This file concerns not only the "*Lisbonisation*" of the Maastricht-*acquis*, but also some substantial new points, as the broadening of the material scope of the substantive offences, redefinition of jurisdiction criteria and the eventual criminal liability of legal persons. It is clear, in the light of the *acquis*, that this proposal will be a B model for the harmonisation of sanctions, so including harmonisation of type and level of the mandatory sanctions. The Commission has chosen for Article 325(4) TFEU instead of Article 83(2) TFEU as a legal basis, which means that it will be binding for all Member States, including Denmark, Ireland and the UK. However the Commission will elaborate a draft directive and not a regulation under Article 325(4) TFEU.

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[26] See Case C-176/03, Judgment of 15 September 2005.

[27] In accordance with Articles 1 and 2 of Protocol No. 22.

[28] In accordance with Articles 1, 2, 3, and 4 of Protocol 21.

[29] Regulation 2988/95 on the protection of the EC's financial interest, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995R2988:EN:HTML.

[30] Convention on the protection of the European Communities' financial interests of 26 July 1995, OJ C 316, 27.11.1995; First Protocol of 27.09.1996 to the Convention, OJ C 313, 23.10.1996 and Second Protocol to the Convention, OJ C 221, 19.07.1997.

[31] COM(2001)272 final.

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 of 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro.[32] For the moment being there is no legislative initiative in the pipeline yet. Concerning the other areas for which the Commission still has to decide if and to which extent harmonisation of criminal enforcement is necessary (like customs policy, illegal economy and financial criminality, 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*",[33] dealing also with enhanced fight against counterfeiting and piracy. However, until now there is no legislative proposal in the pipeline, although the Commission submitted already in 1995 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.[34] Concerning corruption the Commission has published a communication on fighting corruption in the EU.[35] In some of the mentioned policy areas the Commission has tendered a study, like the one on sanctions in the field of commercial road transport.

5. Conclusion

Seen the shared competence[36] in the field of criminal law, based on shared sovereignty and common goals between the Member States and the EU, it is logic that both the EU and the Member States elaborate criminal policies, also in the area of European criminal law. But the shared competence also means that both European and national criminal policies must and should have a double dimension, 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 of their

[32] http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_counterfeiting/l33090_en.htm.

[33] COM(2011)287 final, http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf.

[34] COM(2005)276 final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0276en01.pdf.

[35] COM(2011)308 final http://ec.europa.eu/home-affairs/news/intro/docs/110606/308/1_EN_ACT_part1_v12[1].pdf.

[36] Article 2 TFEU.

national criminal law enforcement. The prevention and punishment of market abuse, the commercialisation of dangerous food stuffs 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 that EU criminal policy and national criminal policies should set the goals, taking into account the objectives of the EU Treaty. What is needed to offer EU citizens an area of freedom, security and justice in which free movement of persons is ensured in conjunction with prevention and combating of crime? It is quite clear that we cannot address only serious cross-border crime, but have to deal also with the criminal law enforcement of EU policies, if necessary. What type of legal interests do need and deserve criminal law protection? I think that we still can make a difference between

– 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 as national criminal policy documents should deal with this 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 do deserve and do need criminal law protection. This criminal law protection has to be defined in relation with other enforcement regimes, especially the punitive administrative enforcement. Criminal policy includes also the elaboration of instruments of integrated enforcement of EU policies, including prevention, administrative enforcement and criminal enforcement. Red flags to functional harmonisation were traditionally: prosecutorial discretion, criminal liability of legal persons, minimum penalties, 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 flags can have only sense if they do not obstruct the European common goals in the area of freedom, security and justice.

Prevention and punishment of crime has become an objective that is related to rights and duties of citizens in the area of freedom, security and justice (Article 3 TEU). Seen the wording of Article 82 TFEU, harmonization 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 report 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) TFEU, for which no or very little *acquis* had been build up in the past, neither under the former third pillar, nor under the first pillar. The Commission Communication of 2011 is going a step further and deals with the policy choices. This is clearly of added value, but it remains unclear on which basis and by which criteria policy areas have been selected or could be selected for criminal law protection.

The EU is sure about its competence, but still does not now when and how to deal with it: *certus an, incertus quando*.