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

[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

[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

[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,

[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].

[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).
>
> 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 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.
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> 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.
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> 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".

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.

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].

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

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

[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

[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

[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

[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.

[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