

CONCLUSION

The way forward

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The field of approximation of substantive criminal law has clearly evolved following the entry into force of the new EU Treaty and the ensuing communitarisation of policies within the EU. Major decision-making and institutional changes (especially the new decision-making role of the European Parliament), an increase in the number of actors, the insertion of new legal bases and the greater efficiency of EU texts in this area are among the fundamental changes that are having and will continue to have an impact on the area of substantive criminal law.

However, it is as yet too early to assess all the effects and consequences of the changes introduced.

As seen previously in the introductory contribution and in the article by Francesca Galli on trafficking in human beings, the first lessons to be learned come from the first two new directives adopted since the entry into force of the new Treaty, namely Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/629/JHA¹, and Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA².

Interesting lessons will certainly emerge also from the on-going negotiations relating to the five proposals for directives in the field – *i.e.* the proposal for a directive on attacks against information systems, which is designed to replace Council Framework Decision 2005/222/JHA³, the proposal for a directive on criminal

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

² *OJ*, no. L 335, 17 December 2011, p. 1 f.

³ COM (2010) 517 final, 30 September 2010.

sanctions for insider dealing and market manipulation (the Market Abuse Directive (MAD))⁴, the proposal for a directive on the freezing and confiscation of proceeds of crime in the European Union⁵, the proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law (the PIF Directive)⁶ and the proposal for a directive on the protection of the euro and other currencies against counterfeiting by criminal law, replacing Council Framework Decision 2000/383/JHA⁷ – and their final results. The evolution of discussions on the following issues should be kept under particularly close scrutiny: the legal bases (and for instance the choice of Article 325 TFEU as the legal basis for the aforementioned proposal for a directive on the fight against fraud relating to the Union's financial interests by means of criminal law), the clauses relating to the approximation of sanctions (and, *inter alia*, the introduction of minimum thresholds for minimum sanctions in the last two proposals) and the insertion of provisions relating to general criminal law such as prescription.

Among the short-term prospects, the potential introduction of new initiatives should be mentioned as well. In this respect, some ideas have been set out in the Stockholm programme, the Commission's action plan and the Commission's communication entitled 'Towards an EU criminal policy', which lists some harmonised EU policies where the approximation of substantive criminal law could be developed on the basis of Article 83, para. 2 (the so-called 'annex competence'). Yet it remains to be seen whether the ideas will lead to any concrete outcome and/or whether other initiatives will be put forward.

The implementation by EU Member States of the new directives and future new directives should be observed carefully. It will, for instance, be interesting to see whether the new decision-making and institutional framework will result in a higher rate of correct transposition than for the approximating acts adopted under the former third pillar of the Treaty on the European Union (TEU). In this regard, as Francesca Galli has demonstrated, the case of the Directive on trafficking in human beings does not augur well: in May 2013, only six out of twenty-seven Member States had transposed it fully and three partially. It also remains to be seen if the new instruments will have a stronger approximating effect than the 'old' framework decisions. Indeed, as Robert Kert and Andrea Lehner clearly show concerning the Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking⁸ and as Pedro Caeiro and Miguel Ângelo Lemos underline in the field of terrorist offences, the approximating impact of the related framework decisions has been limited.

Besides the evaluation of the transpositions by EU Member States, both the *ex ante* assessment of the new proposals and the *ex post* evaluation of the new directives and of their impact should be given particular attention. The importance of such an exercise has been clearly underlined in this book by several authors and especially by

⁴ COM (2011) 654 final, 20 October 2011.

⁵ COM (2012) 85 final, 12 March 2012.

⁶ COM (2012) 363 final, 11 July 2012.

⁷ COM (2013) 42 final, 5 February 2013.

⁸ *OJ*, L 335, 11 November 2004, p. 8.

Gisèle Vernimmen-Van Tiggelen, Robert Kert and Andrea Lehner. Such assessments should in particular represent an opportunity to check if fundamental principles of criminal law are being respected. These principles, such as *ultima ratio*, proportionality and legality, are at the core of Maria Kaiafa-Gbandi's contribution. The disregard for these principles in the previous framework decisions has often been criticised. Pedro Caeiro and Miguel Ângelo Lemos confirm these criticisms in the field of terrorism. It is an open question as to whether there will be improvements in this respect stemming from the new institutional framework and from the adoption of the 2009 Council's 'Conclusions on model provisions, guiding the Council's criminal law deliberations', of the 2011 Commission Communication 'Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law' and of the European Parliament resolution of 22 May 2012 'on an EU approach to criminal law', which all underlined the importance of these principles or of some of them⁹. The case of the directive on trafficking in human beings is not encouraging since the disregard for several of these principles has already been pointed out¹⁰.

In addition, and more fundamentally, the following four questions should be closely followed in the next few years.

The first question is to find out whether the approximation of substantive criminal law will benefit from an effective contribution by the Court of Justice of the EU (CJ) and, in case it does, what form this contribution will take. Such a question is all the more topical as, following the communitarisation of policies within the EU that has been set in stone by the Lisbon Treaty, the jurisdiction of the CJ has been considerably strengthened for new acts (*i.e.* those adopted after the entry into force of the Lisbon Treaty) and will soon be reinforced for the old acts (*i.e.* those adopted before the entry into force of the Lisbon Treaty), namely after the expiry of the transitional period (*i.e.* 1st Dec. 2014). The CJ intervention could be essential for this EU field of action in three respects:

- in order to guarantee the effectiveness of the EU's approximating texts through infringement proceedings against EU Member States that did not transpose at all or did not correctly transpose provisions of the new directives or, after 1st Dec. 2014, provisions of the old instruments.
- in order to clarify the exact meaning of the relevant provisions of the Treaty. As seen in the introductory contribution, the wording of both para. 1 and 2 of Article 83 is vague in many respects. The CJ could, for instance, clarify the exact scope of the general requirements of the first indent of para. 1 and their link

⁹ See especially the conclusions of the Council of 25 and 26 April 2002, doc. 9141/03; Council document, Council Conclusions on model provisions, guiding the Council's criminal law deliberations, adopted by the JHA Council on 30 November 2009; "Towards an EU criminal policy?: Ensuring the effective implementation of EU policies through criminal law", Commission Communication of 20 September 2011, COM (2011) 573 and European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310 (INI)) (see Annex to the present book).

¹⁰ H. SATZGER, F. ZIMMERMANN and G. LANGHELD, "The Directive on preventing and combatting trafficking in human beings and the principles governing European Criminal policy – A critical evaluation", *EUCLR*, 3, 2013, p. 114.

with the second indent. It could also specify the meaning of some expressions in para. 1, such as “from a special need to combat them on a common basis”, “minimum rules”, “concerning the definition of criminal offences and sanctions” and “areas of particularly serious crime”. Concerning para. 2, it could remove the existing uncertainties related to the expression “essential to ensure the effective implementation of a Union policy which has been subject to harmonisation measures”. The CJ could, moreover, answer the sensitive question as to whether Article 325 TFEU can be interpreted as containing additional substantive criminal law competence in the field of fraud affecting the Union’s financial interests.

- in order to give a uniform interpretation of the provisions of the EU approximating texts. In this regard, it would, for instance, be interesting to see what would be its interpretation of the non-punishment/non-prosecution clause of both the Directive on trafficking in human beings and the Directive on sexual exploitation of children. It would also be quite interesting to see whether the CJ will consider that some of the “protective” provisions of these directives meet the requirements to be able to produce any vertical ascending direct effect. Whatever form it could take, such a contribution by the CJ will of course depend on the actions or questions referred to it. In other words, to be able to “deploy” itself in the field of substantive criminal law, the CJ needs to receive the opportunity to do so.

The second question is about establishing whether the scope of approximation of substantive criminal law will be further extended towards the general part of criminal law. As Jeroen Blomsma and Christina Peristeridou explain in their joint contribution, EU legislation has so far dealt predominantly with the special part of criminal law and more precisely with the definitions of and penalties for specific offences. Up until now, there has been no common understanding of basic legal concepts such as the notions of *actus reus*, of *mens rea*, of criminal liability, of participation, of defences etc. Although the CJ has established some general principles of EU law, there are, so far, only fragments of a general part of European criminal law. Irrespective of whether such an evolution is desirable and would satisfy the subsidiarity and proportionality requirements, any evolution in this respect will of course be highly dependent on the interpretation of the existing legal basis. This is true whether the adoption of hard law acts or soft law instruments is envisaged. There does not appear to be a legal basis in the Treaty (as currently phrased) for an approximation or codification of common concepts in a separate directive or regulation by the European legislator (a sort of ‘general part directive or regulation’). The approximation of common concepts in every sectorial directive that deals with the criminalisation of specific offences would perhaps constitute a more realistic approach but it is not easily justifiable on the basis of Article 83 para. 1 and 2 as currently worded. As seen in the introductory contribution, although most of the approximating EU acts have gone further than the strict definition of constituent elements of offences and levels of sanctions, it is important to understand how extensive the interpretation of the scope of Article 83 can be in this regard. The discussions relating to the insertion of requirements related to prescription in the proposal for a directive on the protection of the euro and

other currencies against counterfeiting by criminal law¹¹ will surely yield interesting lessons. The same is true for the interpretation of the limits of Articles 86 and 325 TFEU because their scope is not explicitly restricted to minimum rules concerning the definition of criminal offences and sanctions.

A third question is about determining whether we will witness the establishment of a real ‘EU criminal law’, in other words whether there will be a move from the *approximation* of substantive criminal law towards the *unification* of criminal law. So far, there has only been an embryonic EU substantive criminal law, which is mainly made up of all the sources of approximation of substantive criminal law. So far, there has been no real EU substantive criminal law in the strict sense of the word: there is no EU criminal code as we understand it at the national level, no EU supranational, unified criminal law adopted via regulations directly applicable in all the EU Member States¹².

Yet, in the current version of the TFEU, two main provisions could open the door to such a “unification” trend¹³.

On the one hand, there is Article 86 TFEU, which allows for the adoption of regulation(s) aiming at establishing an European Public Prosecutor Office (EPPO). As Katalin Ligeti underlines in her contribution to this book, the question is to establish whether it would be sufficient for the future regulation establishing an EPPO to make reference to the upcoming PIF Directive and to the national implementing provisions or whether Article 86 TFEU requires that the regulation itself defines the offences falling within the competence of the EPPO. She opts for the second alternative and considers that Article 86 grants the EU a genuine competence to adopt common offence definitions but also to adopt common provisions in relation to the concepts of the general part of criminal law. We shall see what the European Commission’s position is in this respect in its upcoming proposal on the establishment of an EPPO, which is scheduled to come out in June or early July 2013.

On the other hand, there is Article 325 TFEU in the field of fraud affecting the Union’s financial interests. If it is interpreted as containing additional criminal law competence in this field, it would allow for the adoption of regulations and for the possibility to go beyond the establishment “of minimum rules concerning the definition of criminal offences and sanctions”... However, as explained in the introductory contribution to this book, it remains to be seen whether the choice of this provision as the legal basis for the proposal for a PIF Directive will be confirmed during the negotiations. For the time being, it seems that it will not secure a qualified majority within the Council.

A fourth and essential question is to determine whether the approximation of substantive criminal law will follow or be guided by a real EU criminal policy. As things stand, the EU lacks a genuine criminal policy. The EU’s interventions in the

¹¹ See its Article 12.

¹² See H. SATZGER, *International and European Criminal Law*, München, C.H. Beck, Hart, Nomos, 2012, p. 43 f.

¹³ See also Article 33 TFEU on measures to strengthen customs cooperation (V. MITSILEGAS, *EU Criminal Law*, Oxford and Portland, Hart Publishing, 2009, p. 109 and S. MIETTINEN, *Criminal law and Policy in the EU*, London – New York, Routledge, 2013, p. 52).

criminal field are more or less guided by programmes, action plans etc. but they do not follow a consistent line of policy or strategy and they do not implement a ‘vision’. As John Vervaele states in this book, so far the approach has been events-driven, *ad hoc* and eclectic.

So far, some scholars have categorised the three aforementioned documents – the Council ‘Conclusions on model provisions, guiding the Council’s criminal law deliberations’, the 2011 Commission Communication entitled ‘Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law’ and the European Parliament resolution of 22 May 2012 on an EU approach to criminal law - as ‘European criminal policy documents’¹⁴. As stressed by Maria Kaiafa-Gbandi and Cornelis De Jong, these texts have merits – and especially the merit of recalling some basic principles of criminal law such as the *ultima ratio* principle which should make it possible to avoid “overcriminalisation” – which should not be underestimated. They are in that sense a good start. However, they can only be considered as a very embryonic EU criminal policy. Although the three documents contain important common features, it is strange to be confronted with three different texts emanating from three different EU institutions. Their purpose was, in any case, not to reflect on the bases of a global or inter-institutional EU criminal policy. As seen in the introduction to this book, instead they aimed at giving each relevant EU institution general guiding principles in their respective field of action and at positioning themselves in the context of the decision-making changes and the increasing number of actors introduced by the Lisbon Treaty. In addition, as seen in John Vervaele’s contribution, there are significant limitations with regard to the contents of these documents¹⁵. According to this author, careful consideration of the process of criminalisation should be pursued. Among the questions to be examined closely is the question of which legal interests deserve criminal protection and to what extent. A deeper reflection on the functions of the approximation of criminal law and on the functions of criminal law itself is also particularly necessary. And elaborating a criminal policy implies more than answering the questions as to what should be criminalised, why and how. These are important aspects of a criminal policy but other aspects should be tackled as well, such as, for example, the whole issue of criminal sanctions and their enforcement. Besides, establishing a criminal policy is not limited to organising a repressive approach to crime but should also encompass the preventive and protective approaches. It also implies going further than just adopting a criminal law response to crime: it entails a deep reflection about the interaction between the different legal disciplines and especially between criminal law and administrative law.

The next multiannual programme which is due to succeed the Stockholm Programme and which is due to be adopted under the Italian Presidency of the EU – the future ‘Rome programme’ – could be an opportunity to launch a reflection and to take the first steps towards the elaboration of an EU criminal policy.

¹⁴ P. DE HERT and I. WIECZOREK, “Testing the principle of subsidiarity in EU criminal law”, *NJECL*, 3, 2012, p. 394 f.

¹⁵ See also S. MIETTINEN, *op. cit.*, p. 143.