GENERAL PRINCIPLES GUIDING THE INCRIMINATING ACTIVITY OF THE EUROPEAN LEGISLATURE

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Abstract

As the title itself reveals, the purpose of this study is to identify the general principles guiding the incriminating activity incumbent upon the European legislature. Thus, this study started in the first part to analyze the principle of legality which is found not only at the basis of the law itself – lato sensu – and specific to each member state of the European Union (but not exclusively), and which represents the fundamental principle of the European law also. Also, we shall also present a few important characteristics of other principles such as, subsidiarity and proportionality, ultima ratio principle, principle of guilt. Moreover, in the second part of this study we tried to analyze some procedural aspects regarding the conferral of powers and the jurisdiction in criminal matters and the duty to cooperate in good faith as tools that the European legislature has used and is using in its standardization activity and, if we may say so, even in the development of a common legislation to all member states of the European Union, especially in criminal matters. Furthermore, in its' third part, this study highlights the main changes brought by the Treaty of Lisbon regarding first and foremost the shared competence and also the new instruments used by the main Community actors.

Keywords: *european criminal law, principles, incrimination, sanctions, effects.*

Introduction

Some authors of specialized literature reveal and consider that any *criminal law theory* is made up of a set of ideas based upon which any criminal law can be clearly identified and consequently explained[1]. Thus, it is highlighted that an important role held by the theory of the criminal law is to systematize and clarify the structure, the actual meaning and the ethical sense of the criminal law[2].

As it has been noted by some criminal law scholars from ten European countries in a Manifesto on European Criminal Policy[3], the principles that we intend to present below are the *major contributor to and the motor of European civilization and current integration.*

Each of the principles presented below has it's own important role in EU law and criminal law doctrine respectively, starting with the legality principle as a part of the rule of law, and finishing with the conferral of powers and jurisdiction issues.

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[1] Jerome Hall, General Principles of Criminal Law, second edition, the Bobbs-Merrill Company; Indianapolis, New York, 1960, p.1.

[2] Idem, p.26.

[3] http://www.crimpol.eu.

I. Some aspects regarding the main principles of EU law.

1. Legality principle

In order to discuss the theory of law in general terms and not only the theory of the criminal law – be it national or European -, it is necessary to have some guiding principles able to build the foundation of this theory that shall be further used in the actual enforcement of the (criminal) law. The main principle with a crucial significance is the well-known and widely accepted principle of the lawfulness (known in the criminal law as – nulla poena sine lege, the Latin name bearing no connection with the time when this principle was developed). This principle is rooted in the *Declaration of the Rights of Man and of the Citizen* of 1789 according to the ideologies of the French revolutionaries. Article VIII of it provides that "no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offence". Because of the large number of infringements against this principle, the *Universal Declaration of Human Rights* adopted by the *United Nations General Assembly* on 10 December 1948 deemed necessary to reaffirm this principle. Thus, article III, par. 2 of this Declaration provides that "no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed". Later on, the *International Covenant on Civil and Political Rights* of 16 December 1966 provided in article 15 that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".

We can state with certainty that, regarded lato sensu, this principle applies in one way or another in all the decisions of the Court if Justice of the European Union as a starting point, if we may call it so. We base our opinion on the fact that the Court of Justice in Luxembourg analyses first of all whether the case presented for judgment refers to a provision regarding mainly the European Union and whether it is the subject of one of the norms of the European law. Moreover, if the case is on trial at a national court, the national proceedings may and sometimes must be suspended in order to give precedence to the European court.

2. Subsidiarity principle

As shown in the Treaty on the European Union, under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[4]

As the specialized literature highlights this principle started from a procedural dimension as the dominant perspective[5]. With the Lisbon Treaty, the national parliaments are more involved in the monitoring process of subisdiarity in imposing an obligation to consult widely before proposing legislative acts[6]. More that that, as art. 4 states *the Commission must send all legislative proposals to the national parliaments at the same time as to the Union institutions and the time limit for doing so has been increased from six to eight weeks.* This principle relates with

[4] Article 5, Treaty on the European Union.

[5] N. W. Barber, The Limited Modesty of Subsidiarity, European Law Journal, Vol. 11, No. 3, May 2005, pp. 308-325.

[6] Ester Herlin Karnell, *What Principles Drive (or Should Drive) European Criminal Law?*, German Law Journal Vol. 11 No. 10, p.1123.

the subsidiarity from the criminal law area because criminal law has its own principle of subsidiarity embedded in the ultima ratio concept.[7] Article 69 TFEU stipulates that the National Parliaments shall ensure that subsidiarity and proportionality are respected when proposing legislation in the criminal law area. So, it can be said that the Lisbon Treaty appears unclear as regards a minimalism approach to the use of criminal law (as an *ultima ratio)*.[8] Even being considered one of the key constitutional principles that serve to set the character of the EU, this principle has had little obvious effect.[9]

3. Proportionality principle

The general principle of proportionality is provided for in article 5(4) of the Treaty on the European Union. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The proportionality principle is considered a „better tool than the subsidiarity" because it concerns the balancing of interests not only legality of the Union, but also of the member-states.[10] It's implication can be observed not only in situations against private interests, individual rights and fundamental freedoms, but also in areas of indirect discrimination cases[11]. It can be seen that this principle, as a tool as we mentioned before, gives to European Court of Justice the possibility of applying it in concrete cases. As it is noted in the specialized literature, proportionality means that the punishment for an offence ought to be proportionate to the seriousness of the offence, taking into account the harm, wrongdoing and culpability involved. In this way, the principle of proportionality connects with the issue of a fair trial because it insists that the appropriate legal safeguards have been respected[12]. In the art. 49 of the **Charter** of Fundamental Rights states that *the severity of a penalty must not be disproportionate to the criminal offence,* so as it is highlighted[13], the Charter will have a wider impact in the area of EU criminal law as a source of inspiration. According to one opinion[14]the principle is to legitimise the court's decision, it is problematic if the court in its interpretation deviates too much from the understanding of the principle it itself has proposed.

4. Ultima ratio principle

When the fundamental interests of European Union can not be defended and protected by provisions of each Member State and when these interests and values are in danger because of some specific actions, the Union can impose an obligation to that Member State to incriminate such behaviour. This is how criminal law becomes an instrument as *ultima ratio*, instrument that the Union can use as a last possibility in restoring the rule of the European Union law.

The ultima ratio principle is considered as an extinction of the proportionality principle, on

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[7] Opinion of AG Mazak in C-440/05, (June 28, 2007)

[8] Ester Herlin-Karnell, op.cit., p.1124.

[9] N. W. Barber op cit, p.324

[10] Ester Herlin Karnell, op.cit., p.1126

[11] Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR, 649

[12] Andrew Ashworth, *Criminal Law, Human Rights and Preventive Justice, in* REGULATING DEVIANCE (Alan Norrie, et. al., 2009) – cited in Ester Herlin-Karnell, op.cit., p.1119.

[13] M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, COMMON MKT. L. REV. Vol.45, (2008), p. 617.

[14] Tor-Inge Harbo , *The Function of the Proportionality, Principle in EU Law*, European Law Journal, Vol. 16, No. 2, March 2010, pp. 158–185.

one hand. On the other hand, it is shown that criminal law has it's own subsidiarity principle, included in the ultima ratio concept. Specialists[15] apreciate that ultima ratio is more an ethical principle, and less a constitutional one. It is true that the Lisbon Treaty does not explain clearly the need to use the criminal law as a ultima ratio, and more than that the Lisbon Treaty highlights the need of national parliaments to involve in the monitoring process of subsidiarity, as it is stipulated in the Protocol on the Role of the National Parliaments, Annex (2009). Article 69 TFEU stipulates that *National Parliaments shall ensure that subsidiarity and proportionality are respected when proposing legislation in the criminal law area.*

5. Principle of guilt

In respect to **the principle of guilt**, it is important to mention that it regards not only sanctioning that crimes that affect some interests or values of different individuals, but also the crimes that affect especially general and important values for all the Member States, for all accepted and protected. Art. 48 (1) from the European Chart stipulates the need to guarantee the presumption of innocence. Another important mention regarding this principle is that application of a sanction has to be in accordance with proving the guilt for that individual, and more, the sanction to be proportional with the guilt. In the European Criminal Policy Initiative[16] there are some community acts that reffers especially to the principle of guilt, such as the Decision regarding corruption on the privat field[17], where the states apreciate if the sanctioning of legal persons will be by reffering to the criminal law area. Also, the Decision regarding the fight against deception and forgery against non-cash means of payment[18] establishes that the guilt is a priority needed to be proven. It is also important to mention that in this handbill it is highlighted that European Union determined the same sanctioning limits to punish different crimes that put in danger in different ways some values, and this determination from the European Union comes to break the need to have proportional sanctions versus guilt[19].

II. Involvement of the general principles in the incriminating activity of European Union law. Procedural aspects regarding the conferral of powers and jurisdiction. (Decision C - 440/05)

1. Conferral of powers

A specific problem identified in the case-law of the Court of Justice is that of the allocation of the jurisdiction. This gives rise to the following legitimate question: "What is the jurisdiction of the Court of Justice in Luxembourg compared, for example, with that of a court from a Member State of the European Union?" The former has a general jurisdiction regarding the control of the *lawfulness* of the acts of the institutions of the European Union and it also has the task to ensure the correct interpretation for the uniform enforcement of the European Union *law*. Thus, the European Court of Justice has the jurisdiction to settle the disputes between the different institutions of the European Union, between the institutions of the European Union and the

[15] Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio),* OHIO ST. J. CRIM. L. vol.2, (2005), p. 531.
[16] http://www.crimpol.eu.
[17] Decision 2003/568/JAI, JO 2003 Nr. L 192, p. 54.
[18] Decision 2001/413/JAI, JO 2001 Nr. L 149, p. 1.
[19] Decision 2002/475/JAI JO 2002 Nr. L 164, p. 3 (modified by Decision 2008/919/JAI, JO 2008 Nr. L 330, p. 21.)

member states and even between the member states. The Court of Justice has no jurisdiction as regards the appeals (as legal remedy, but of course not only appeals) for the judgments already passed by a national court. Considering the fact that the EU legislation is included in the legislation of every member state, it is possible that a national court be compelled to actually interpret one or more provisions of a European norm. Consequently, the national court must check whether the enforcement of a national norm conflicts with the European law. In this case, the national court is forced to address the Court by means of a "preliminary ruling" so that the latter may interpret a provision of an act issued by one of the institutions of the European Union. Nevertheless, in such cases, the Court of Justice *shall merely offer an interpretation*, and the national court shall be responsible for settling the case. For example, in the case T-116/08 AJ[20] the Court rejected the application as inadmissible and offered the following explanation: "*1 . By way of letters lodged at the Registry of the Court of First Instance on 7 February 2008 and on 7 March 2008, Mr. C.G. A. submitted an application for legal aid in order to bring an action for establishing the illegal nature of the Commission's denial to initiate the infringement procedure against Romania following the complaint filed by the applicant concerning the alleged infringement against the prisoners' rights in Romanian prisons. 2. As shown in the annexes to the application for legal aid, the Commission answered the applicant in the letters from 25 January 2008 and 5 February 2008. In the latter, the Commission stated that it could not interfere with the daily activity of the criminal justice of the member states, as the European Union has no jurisdiction in this field (……) according to article 35 paragraph (5) EU, the Court of Justice of the European Communities shall have no jurisdiction to review the validity or proportionality of the operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order.[21] (……..) Consequently, the application for legal aid must be rejected. "*

2. Jurisdiction

As regards the jurisdiction based upon which the European Union is involved through the Court of Justice in the settlement of the disputes that may arise as a result of the practical situations related to the Community norms applicable in a certain field, it is important to analyse it from the perspective of the jurisdiction of the European Community, on the one hand, and of the Member States, on the other hand, in the criminal law field as well. As shown above, our analysis started with the emergence of the principle of legality that is applied and observed lato sensu by the European Union and the Court of Justice respectively in the settlement of all submitted cases. Nevertheless, it should not be ignored that the Court and the European Union itself through its institutions comes across many situations in its activity that refer to the national criminal law. It is of course a known fact that each Member State has its *own* criminal law, a law that incriminates certain acts as crimes and for which specific sanctions are imposed, but are evaluated individually by each Member State depending on its social environment as individual entity and independent from the way in which other Member States would sanction the same act. However, this should not mean that in developing their own criminal legislation the Member States should not take into account for example the norms of the neighboring countries as this is the reason why we speak so often of the well known *comparative law*, but we do not believe that we can ask three different states to have an identical criminal legislation. Starting from this assumption, we can state that no *European* criminal law should contain binding general provisions applied identically to each Member State of the European Union.

[20] According to http://curia.europa.eu/jurisp/
[21] Article 276 TFEU after the Lisbon Treaty.

On the basis of the considerations set out, there was a case submitted to the analysis of the Court, namely a case between two institutions of the European Union, the Commission of the European Communities v. the Council of the European Union, case C-440/05.

First of all, it would be useful to take a closer look at the *development* of the criminal law inside the European Union.

Thus, the first starting point is the Treaty of Rome from 1958 that established a series of economic objectives, the so-called "common market": free movement of goods, persons, capital and free delivery of services. The Treaty of Rome makes no reference to criminal matters. However, until the Treaty of Maastricht, there were several conventions such as the European Convention on Extradition from 1957, the Mutual Legal Assistance Convention from 1959, the Convention on the Transfer of Sentenced Persons from 1983 which attempted and succeeded in drawing attention on criminal matters. There is a growing concern regarding the activity of the terrorist groups, but no concrete action has been taken. The Schengen Agreement was signed in 1985 by 5 member states and the Implementation Agreement was signed in 1990. The main change was the abolition of internal border controls and the reinforcement of outside border controls. Also, the Schengen information system (SIS) has been introduced, the exchange police information and most important, the *ne bis in idem* principle.

The Maastricht Treaty entered into force on 1 November 1993. The pillar system was thereafter created. Each pillar has it's own role as follows: the 1st pillar – in charge with the EC policies, the 2nd pillar – in charge with CFSP (security policies), and the 3rd pillar – in charge with justice and home affairs, including cooperation in criminal matters. It is obvious that once with the Treaty of Maastricht the issues regarding terrorism, drugs and other similar crimes became "matters of common interest". A big step forward was made once the Treaty of Amsterdam came into force, because now the third pillar gained more effectiveness with the creation of the area of freedom, security and justice (AFSJ), and the integration of ther Schengen acquis partly in the third pillar (police and judicial cooperation in criminal matters). New legislative instruments could be used, such as framework decisions. The most important step made is the Treaty of Lisbon – treaty on European Union (TEU), treaty on the Functioning of the European Union (TFEU) – which came into force on 1.12.2009. It is obvious at this moment that there were changes made, such as the abolition of the pillar system, and also changes in the criminal law area.

3. A *new competence* in criminal matters? (Decision C - 440/05)

Until the Treaty of Lisbon there have been few attempts when the Court found itself in a position to create a new competence in criminal matters, but this was a step the Court was not willing to make[22] , as we will see below.

In this context, the case C-440/05 is emblematic for the approximation of the EU Member States' legislations in criminal matters; this case was brought to the judgment of the Court of Justice by the Commission of the European Communities, which «seeks the annulment of Council 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 ("the framework decision"), on the grounds that, in infringement of article 47 EU, the measures contained therein providing for an approximation of the Member States' legislation in criminal matters should have been adopted on

[22] Norel Neagu, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law,* European Law Journal, Vol. 15, No. 4, July 2009, p.549.

the basis of the EC Treaty rather than on the basis of Title VI of the Treaty on European Union»[23]. Thus, this case concerns the distribution of competences between the Community and the EU Member States in the area of criminal law.

By the judgment of 13 September 2005 the Court annulled the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. The problem that existed and we believe still exists is represented by the way in which the Community has competence to oblige the Member States to provide for criminal penalties and especially to oblige them on the precise extent to which that competence may be exercised [24] by the Community in general, not only in the area of environmental law.

As in any other procedure, the Commission, the European Parliament, the Council of the European Union and the 20 Member States supporting the case expressed their opinions. Thus, the Commission and the Parliament believe that "the approach adopted by the Court exceeds the area of environmental protection and confirm the fact that the *Community legislature is, in principle, competent to adopt any provisions within the first pillar connected to the criminal law of the Member States,* aimed at ensuring the full efficiency of the norms of the Community law." For this purpose, the Commission submitted proposals for directives aimed at obliging the Member States to provide for criminal penalties in their own legislations: Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights [COM(2006) 168 final] and the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law [COM(2007) 51 final][25]. On the contrary, the Member States supporting the Council in the case (Kingdom of Belgium, Czech Republic, Kingdom of Denmark, Republic of Estonia, Hellenic Republic, French Republic, Ireland, Republic of Latvia, Republic of Lithuania, Republic of Hungary, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Republic of Poland, Portuguese Republic, Slovak Republic, Republic of Finland, Kingdom of Sweden and United Kingdom of Great Britain and Northern Ireland) do not recognize the competence of the Community to "establish the name and the level of criminal penalties" to be applied even in such circumstances.

As the literature unanimously states, the criminal law has an autonomous character, despite its connection to other legal spheres. That is so because the criminal law has its own regulating object and a specific object of the legal protection: the existence and the safety of the value system of the society; these values are protected by developing conduct norms that must be observed or otherwise by enforcing specific penalties. However, the states, and particularly the Member States of the European Union do not define the criminal law in a unitary manner, as each state reserves its right to define it as it best fits it. However, considering the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, more exactly of articles 6 and 7, that provide for certain guarantees especially for criminal matters, the European Court of Human Rights has held, as regards more particularly the purpose of the criminal sanctions that "the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment"[26].

In the explanatory memorandum of the Advocate General in the case mentioned above it is clearly stated that "it can be said without mistaking too much that the criminal law has a dissuasive

[23] The Conclusions of the Advocate General can be read *in extenso* at http://curia.europa.eu/jurisp/

[24] As it results from the Judgment of the Court (Grand Chamber) of 23 October 2007. For further details see www.curia.europa.eu

[25] According to http://curia.europa.eu/jurisp/

[26] European Court of Human Rights, Welch v. the United Kingdom, judgment of 9 February 1993, Series A, no. 307.

or discouraging nature.[27] However, we should bear in mind that the dissuasion is not the sole purpose of the criminal law and that the way in which this *ultimum remedium* of the law is used – some parties have also underlined this aspect – is an indication of the conduct norms on which the society is based and is finally intrinsically connected to the very identity of the society." Moreover, other judgments[28] stated that *neither the criminal law nor the criminal procedure norms fall within the scope of the Community* and that *it must be stressed that the EC Treaty does not make of the criminal law an area reserved for the Member States.*

There was a great deal of debate concerning the relationship between the Community law and the national criminal law of each Member State, and the fact that generated disputes was that in its treaty the Community failed to point out clearly the extent of such competence in criminal matters and allowed this issue to remain ambiguous[29]. The questioned was raised as to how far the Community law can *extend* into the national criminal law, referring actually to the proportionality principle. Thus, in the case Casati, 1981, the Court ruled that:

"In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be concerned in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom. (emphasis added)."[30] So, it is obvious that the Court's approach is based on the principle of proportionality.

Moreover, in these judgments[31] it was ruled that it does not fall within the competence of the Community to establish the procedure norms of the criminal legislation to be enforced in a case, however, the Courts states that *when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure (…here for the environment…),* ***the Community legislature*** *can* ***impose*** *the Member States the obligation to apply such* ***penalties*** *in order to ensure that the* ***rules it lays down in this field are fully effective.***[32]

The fact that lead to a certain ambiguity in the correct interpretation of what the Court let to be understood was the fact whether this extension of the competence of the Community legislature in the national criminal law of the Member State(s) in question was given the value of principle or whether the Court only referred to the environmental field. Depending on the interests of those intervening, there were opinions concerning the interpretation in both senses. According to the interpretation stricto sensu, related only to that case, we would have to believe that the European criminal law, actually the instruments specific to the European criminal law could only apply to the environmental field, but in practice there are far more than only environmental issues. At that

[27] Conclusions of the Advocate General Jacobs in the case Germany/Commission (judgment of 27 October1992, C-240/90, Rec., p. I-5383), point 11 and Conclusions of the Advocate General Saggio in the case Molkereigenossenschaft Wiedergeltingen (judgment of 6 July 2000, C-356/97, Rec., p. I-5461), point 50.

[28] Judgment of 11 November 1981, Casati (203/80, Rec., p. 2595) and judgment of 16 June 1998, Lemmens (C-226/97, Rec., p. I-3711)

[29] M Delmas-Marty, 'The European Union and Penal Law', *European Law Journal* vol. 4/1, 1998, 87–115

[30] Case 203/80, [1981] ECR 2595, para 27.

[31] Judgment of 16 June 1998, Lemmens, C-226/97, Rec., p. I-3711, point 19, and Judgment of 13 September 2005, Commission/Council, C-176/03, Rec., p. I-7879

[32] Judgment of 13 September 2005, Commission/Council, C-176/03, Rec., p. I-7879

time, the Commission itself did not adopt such an interpretation, but a broad interpretation in line with our notes above.

It is worth mentioning that we believe that the main issue does not concern the competence and the power of the Community legislature to impose the state to apply penalties, but the extent and the type thereof. It is known that each Member State divides its penalty system differently depending on each committed crime, on the person who committed it and so on. That is why we believe that it is not admissible for this legislature to impose upon a Member State the extent of a penalty, except those offenses expressly listed by the European legislator , and except the situation when *to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish* ***minimum rules*** *with regard to the definition of criminal offences and sanctions in the area concerned.*[33] As it was correctly pointed out, this may lead to *fragmentation and may compromise the coherence of the national criminal systems.* Thus, the government of the United Kingdom pointed out as an example that *a fine applied in a certain amount may contain a different message concerning the severity of the crime depending on the involved Member State.*

Consequently, in his conclusions presented on 28 June 2007, the Advocate General JÁN Mazák pointed out that «*according to the* ***subsidiarity principle, the Member States*** *are, in general in a* ***better position that the Community*** *to „****transpose****" the terms „****efficient, proportionate and dissuasive criminal penalties****" into their legal systems and* ***their own social contexts***.» Moreover, in his conclusions presented in the case C-176/03 of 13 September 2005 the Advocate General Ruiz-Jarabo Colomer maintained at the time that «*the* ***Community cannot go further that requiring*** *the Member States* ***to provide for certain offences*** *and to make them punishable by „effective, proportionate and dissuasive" criminal penalties*»; moreover, there are also other judgments of the Court supporting the same idea[34].

According to an opinion, the Decision C - 440/05 attempted to prepare a sensitive transition from the competence according to the third pillar to the shared competence, which was finally achieved by the Treaty of Lisbon. Although it can be maintained that at that time the Court failed to determine the very effectiveness of the competence in criminal matters as regards the environmental protection, which was the subject of the respective case, however, the enforcement of the Treaty of Lisbon was successful in creating the legal basis for the Community competence in adopting norms specific to the criminal matters.

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

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament. 2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

[34] Judgment of 21 September 1989, Commission /Greece (68/88, Rec., p. 2965)

III. Conferral of powers and jurisdiction after Lisbon.

The legal basis of what was successfully introduced by the Treaty of Lisbon, namely the shared competence in criminal matters, is represented by article 5 TEU.[35] Moreover, as common law of all other previous treaties, the TFEU provided in article 67 that *the Union shall endeavor* to ensure *a high level of security* for the Member States*,* which constitutes the basis for the judicial cooperation in criminal matters between the Member States of the EU. Thus, according to article 4 of TFEU, the environment is among the fields where the shared competence applies between the Union and the Member States (in line with the practical situations, but also with the judgments of the Court analysed above), but especially the *area of freedom, security and justice.*

Besides that fact that the TFEU abolished the pillar system, we can point out other aspects concerning the changes that have been made in the criminal law area. Therefore, we can notice by comparison that until the Treaty of Lisbon there was *unanimity in Council*, and after the Treaty of Lisbon there is *QMV (qualified majority) in Council*; also until the Treaty of Lisbon there was *consultation with the EP*, and after the TFEU there is a co-decision system (Council – EP). More than that, another important aspect reffers to special legal instruments in previous provisions (former art. 34 TEU)[36], which became after Lisabona ordinary legal instruments (art. 288 TFEU).[37] Also, Lisbon brings general and horizontal principles of European Union law and full powers for

[35] "The European Parliament, the Council, the Commission, the Court of Justice and the Court of Accounts exercise their duties according to the conditions and for the purposes provided for, on the one hand, by the treaties establishing the European Communities and by the treaties and subsequent acts amending and completing the same and, on the other hand, by the remaining provisions of this treaty."

[36] 1. In the areas referred to in this title, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations. 2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the

Council may: (a) adopt common positions defining the approach of the Union to a particular matter;

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;(c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union; (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties. 3. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the Treaty establishing the European Community, and for their adoption acts of the Council shall require at least 232 votes in favour, cast by at least two thirds of the members. When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted. 4. For procedural questions, the Council shall act by a majority of its members.

[37] "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force."

the Commission and the ECJ (transitional period) not like before when there were limited powers for the Commission and the ECJ. The treaty brings some changes in respect to the competences of the European Council, compentences focused on criminal law sector, of course. So, art. 15(1)[38]states that the European Council should provide the necessary impetus for development of the Union, define the general political directions and priorities, without a legislative function. More of that, art. 68 TFEU[39] highlightes strategic guidelines for legislative and operational planning in the area of freedom, security and justice (well, multiannual programs). Regarding also the criminal law area we can observe that the Commission has power of initiative, **but shared with the** Member States[40]. We can see that the most of the EU legislation in criminal matters is made of framework decisions and, now, directives.

As already mentioned above, the legal basis of the mutual cooperation on criminal matters are the conferral of powers and the principle of subsidiarity. Regarding the principle of conferral of powers, it is highlighted by specialists, but even by the Treaty that the Union shall act only within the limits of competences conferred upon it by the Member States (the Union does not have a "Kompetenz – Kompetenz"[41]). Regarding the principle of subsidiarity: if a competence is not exclusive, the EU shall act only if and so far as the objectives "cannot be sufficiently achieved by Member States".

As legal basis on criminal law competence on solving issues that impose the involvement of the EU, art. 82(1) TFEU regards the international cooperation in criminal matters, stricto sensu.

The most important measures aim at establishing rules and procedures for mutual recognition, preventing and settling conflicts of jurisdiction, supporting the training of judiciary and judicial staff, facilitate cooperation for proceedings and enforcement of decisions. Art. 83(1) TFEU defines criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting **either** *from the nature or impact of offences* or *from a special need to combat on a common basis.* We can observe that areas of intervention are in a closed list which can be extended by Council *unanimously* with consent of the European Parliament. Important to note that the action is merged only by directives. Art. 83(2) highlights the approximation of criminal laws as *essential instrument of ensuring the effectiveness of a Union policy in an area which is subject to* ***harmonization measures.*** Very important is to observe that *competence* ***was given to establish*** rules on definition of offences and sanctions ***by means of directives***. Well, we have already discussed above that before Lisbon, the question of competence in these areas had been the object of two important decisions of the ECJ[42], so the Treaty of Lisbon settles the question once and for all[43]. Lisbon treaty settles also some issues on the promotion and support of Member States action in the field of crime prevention (art. 84 TFEU), Eurojust (art. 85 TFEU), European Public Prosecutor's Office – in first instance to combat crimes affecting the financial interests of the Union, European Council may extend powers, acting unanimously – art. 86 TFEU.

As we mentioned above regarding the "Unions' situation" before and after Lisbon, the third pillar legal instruments were: common positions, framework decisions, decisions, conventions (art. 34 old TEU). After Lisbon, EU criminal law is regulated through the ordinary types of legal

[38] "In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible."

[39] "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."

[40] see note above.

[41] Steven Cras, Making criminal law in the EU: Actors and procedures, ERA Summer School, 2011.

[42] 13 September 2005, Case C-176/03 and 23 October 2007, Case C-440/05, both Commission v. Council.

[43] Steven Cras, Making criminal law in the EU: Actors and procedures, ERA Summer School, 2011.

instruments, common to the entire action of the EU (art. 288 TFEU)[44]. So, we have regulations with general application and being directly applicable and also directives with vertical direct effect[45] - they must be implemented in national law, but the Member States will have the choice of form and methods of implementation. It is known that if directives are not corectly implemented or not implemented in time "you" can directly rely on the provisions concerned against the State. Another important aspect that is worth mentioning when analyzing what means *european criminal law* from the EU treaties point of view, is the one of QMV (Qualified Majority Voting). So, Lisbon Treaty extends the QMV rule in the Council to the area of criminal law. Well, according to art. 238 TFEU, as of 1 November 2014, QMV will be: 55% of the members of Council / at least 15 member-states / which represent at least 65% of the population, and a *blocking minority* shall be of at least 4 member-states. If a proposal (that regards a criminal issue, because this is the subject of our research) does not come from the Commission, QMV shall be 72% of member-states representing 65% of population (art. 238(2)).

Articles 82(3) and 83(3) TFEU establish mechanisms to ensure a measure of control of member-states over EU legislative activity in the field of criminal law. So, very important to notice that if a Member State concludes that a draft directive "would affect fundamental aspects of its criminal system", it can either stop the procedure or reffer the issue to the European Council (within 4 months, after discussion and in case of consensus the procedure can be restarted) – this process took the name of *Emergency brake.* On the other hand, in case of disagreement, at least nine Member States may decide to proceed nevertheless to adopt the instrument, establishing a so called *enhaced cooperation* on criminal matter, a facilitated procedure.

Conclusion

If until Lisbon the crisis in the field of criminal law was very deep[46], after the Treaty of Lisbon important steps have been made, namely the *shared competence in criminal matters* and others was introduced. However, it is important to point out that although the EU has the competence to criminalise conduct, we believe that the situation continues to remain sensitive especially as regards the penalties, because as it was stated in the Decision 440/05 the EU cannot at least yet explicitly impose a certain penalty upon a Member State, especially if the Member State opposes it. In our opinion, this is a legitimate position, so that the European legislature must continue its efforts to identify viable solutions in order to be able to truly unify the European criminal law, and not only for certain categories of offences considered severe offences at the Community level. On the other hand, the paradox is that it is likely that this unifying attempt could become a radical one in the sense that the EU interference in the national law of any Member State could affect the internal law. So, the skillfulness of the European legislature shall have to be demonstrated from now on, since the instruments have already been developed. We have to say that it is important that these instruments are also used and developed in a diplomatic manner for the purpose of creating a powerful community in which the criminal repression, the prevention and the punishment of the offences affecting not only the Community (!), but the Member State itself, must be first of all efficient.

[44] See note 20.

[45] Steven Cras, Making criminal law in the EU: Actors and procedures, ERA Summer School, 2011.

[46] Norel Neagu, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law,* European Law Journal, Vol. 15, No. 4, July 2009, p.551.

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