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**HARMONISATION OF CRIMINAL LAW IN THE EU LEGISLATION – THE  
CURRENT STATUS AND THE IMPACT OF THE TREATY OF LISBON**

## **INTRODUCTION**

A significant element in the field of the European Union [EU] member states judicial cooperation constitutes the approximation (harmonisation) of their penal laws. This issue is one of the most important aspects of cooperation between the Member States. Since almost thirty years Europe has tried to improve its common activities with regard to cooperation in criminal matters by, *inter alia*, the harmonisation of penal laws.

The aim of this essay is to present the development and current state of the judicial cooperation in criminal matters within the EU. Therefore, it is necessary to present the subject in chronological order.

The essay is divided into three parts.

Part one is devoted to the short presentation of the background and history of the cooperation between the Member States in this area. As the development of the substantive European criminal law can be divided into two subsequent phases, the main content of the essay covers two parts. The first phase lasted till the entering into force of the Treaty of Lisbon and was based, generally, on the article 31 of the Treaty on the European Union [TEU]. Its procedural and material aspects are the subject of the second part of this essay. Finally, the third part presents the changes in this area and its legal consequences introduced by the Treaty of Lisbon.

### **I. HISTORICAL BACKGROUND**

The cooperation in criminal matters between the Member States had its beginning in 1975. Then, during the meeting of European Council, an informal group – TREVI (Terrorism, Radicalism, Extremism, Violence International) was established. TREVI was the forum of the operational cooperation between ministries of justice and internal affairs of the Member States. It functioned till the entering into force of TEU. The next step to improve the cooperation has constituted the Schengen Treaty of 14 June 1985, executed through Schengen Convention of 19 June 1990. It is crucial to remember that did not only eradicate the border

control between The Member States but also provided for the deepening of the cooperation in the area of the fight against criminal behaviours as well as the broadening of the operational cooperation.

Clearly, the cooperation of European states in the area of penal law goes further than the EU; however it was the Maastricht Treaty which for the first time regulated the questions of justice system and internal affairs. Since its adoption, the Union was based on, so called, three pillars – the third one was devoted to police and judicial cooperation in criminal matters.

One of the principal goals of the EU is the creation and realization of the “space of freedom, security and justice”, with the crucial role of Council and Commission (Article 3(2), Article 11 TEU). The European Judicial Area constitutes an element of the “space of freedom, security and justice” and covers the cooperation in both criminal and civil matters. The Title VI of the TEU established the cooperation in criminal matters as a subject of the intergovernmental cooperation. The common framework included the police and judicial cooperation in criminal matters and the prevention and combat against racism and xenophobia (Article 29 TEU).

The judicial cooperation intended to facilitate and accelerate the cooperation between competent ministries and judicial or equivalent authorities of the Member States with regard to judicial proceedings and the enforcement of judicial decisions. It also aimed in the facilitation of extradition between the Member States, the approximation of the criminal norms of the Member States, the prevention of the jurisdictional conflicts and, finally, the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields defined by the TEU (Article 31 TEU).

Under the Maastricht Treaty three different instruments could be adopted in the third pillar: common positions, common activities and conventions. The conventions, as treaties governed by public international law had appeared to be ineffective, as they were not ratified by all Member States. Furthermore, the ratification procedure was protracted<sup>1</sup>. Also, the other instruments of the third pillar appeared to be insufficient. The closer contacts between the Member States required the introduction of the more effective instruments. In the search for the adequate solutions, the Amsterdam Treaty (which entered into force on 1 May 1999) introduced a framework decision as a specific instrument of the third pillar.

Furthermore, during the European Council in Tampere in 1999 five-year program of actions was adopted. Its major aims were: to guarantee the freedom of movement of persons,

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<sup>1</sup> K. Karsznicki, *Traktat Lizboński – nowa szansa na usprawnienie współpracy w obszarze wymiaru sprawiedliwości*, „Prokuratura i Prawo” (2009), No. 11-12.

to establish the security for the EU citizens, to facilitate the access to the justice system and the mutual recognition of judicial decisions and their effective implementation on the territory of the EU Member States. Despite these challenging goals, again it proved to be complicated to create effective framework of cooperation<sup>2</sup>.

Subsequent five-year program of action (the Hague program) of 2005 aimed also in the strengthening of the cooperation between the Member States. The closer cooperation was considered as a device for the assurance of fundamental rights and the minimal procedural guarantees as well as the access to justice; the fight against transnational organized crime and the prevention of terrorist threats; the continuation of the mutual recognition of judicial decisions in civil and criminal matters. Unfortunately, also this initiative did not introduce any considerable institutional changes that could positively affect the effectiveness of the Member States cooperation.

Before the Lisbon reform, under Article 34 TEU, to achieve the aims of the Union, the Council could utilize certain measures. The Council could adopt common positions, framework decisions to approximate the legal regulations in the Member States, decisions to achieve the other goals and conventions recommended to be adopted by the Member States. However, also these solutions provided evidence to be inadequate for the approximation of the Member States' legal systems. Therefore, the next step has been undertaken with the adoption of the Lisbon Treaty.

## **II. CRIMINAL MATTERS IN THE TREATY ON THE EUROPEAN UNION**

### **1. Legislative possibilities (concerning harmonisation of the substantial criminal law) in TEU.**

Decision procedure in the EU shall be effective and simultaneously shall be subjected to a democratic control. By presenting the legal heritage and legislative possibilities of the EU in criminal matters before adopting the Treaty of Lisbon it is important to mention the division of the European law for three pillars existing since adopting the Treaty of Maastricht. What was the consequence of this division was a different legislative procedure in each of pillar. In the first pillar dominated so called community method. With deference to the principle of subsidiarity, this method were due to the logic of integration and cooperation between institutions and organs of the EU and had the following features: The European

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<sup>2</sup> A. Grzelak, *The European Union on the way towards the Area of Freedom, Security and Justice*, Centrum Europejskie Natolin, Warszawa 2009, p. 15.

Commission had a monopoly of the right of initiative, with some exceptions the European Council voted by the qualified majority. The European Parliament had an active role and the European Court of Justice [the ECJ] was responsible for the uniformity of the interpretation of the community law. The first pillar connected the whole common policy (e. g. common agricultural policy, monetary policy, transport, common trade). Consequently, in the first pillar the institutions of the EU had the biggest possibilities. As a rule, decisions in the first pillar were undertaken by the qualified majority voting in the European Council, after the proposal of the Commission, and the acceptance of the European Parliament. As a result, legal instruments adopted in the first pillar were the effect of the activity of three actors – the Commission, the Council and the European Parliament.

The community method was different from the rules of the activity of the institution in the other two pillars, which was based on the intergovernmental cooperation. The second and the third pillar contain the matters, that were not yet “communized”. The main purpose of the cooperation in the police and criminal matters were to guarantee the citizens of the EU the high level of protection, so the activity undertaken within its limits shall strengthen fast and effective cooperation of police and judicial authorities. The main role was played by the European Council conferring in these matters usually in the composition of ministers of justice and/or internal security. The justification of the intergovernmental method resulted from the fact, that the Member States were not ready for more advanced mechanisms of cooperation. It cannot be forgotten, that the area of judicial and police cooperation in criminal matters is not an exclusive EU competence.

In the intergovernmental method in the third pillar it can be observed a few characteristic elements: the European Commission has a right of initiative, which is divided with the Member States, the Council decides usually unanimously, the European Parliament has a consultative role, and a role of the ECJ is explicitly limited. Moreover, pursuant to article 42 TEU the Council could unanimously decide (after the opinion of the Commission or a member state), that activities undertaken in the judicial cooperation in criminal matters should be subjected to the Title IV of the Treaty establishing the European Community [TEC]. That meant that the rules governing the first pillar should apply to these matters. In comparison to the first pillar, article 39 TEU considerably limited the role of the European Parliament in the third pillar to the role of the opinion-giver<sup>3</sup>. The Council could have ignored the opinion the European Parliament, because it was not binding for the Council. As the

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<sup>3</sup> Maria Fletcher, Robin Lööf, Bill Gilmore, William C. Gilmore *EU criminal law and justice*, p. 177, Edward Elgar Publishing, 2008, p. 235.

institutional reforms developed, the role of the unanimity decreased and the role of qualified majority voting increased, that was expected to make the common policy more effective. However, in the first pillar unanimity was still the dominating form of legislation.

Pursuant to article 34 TEU in the area of judicial and police cooperation in criminal matters the EU has following possibilities of activity: (1) common positions, (2) framework decisions for the purpose of approximation of the laws and regulations of the Member States and (3) decisions for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. We will consider only framework decisions, introduced in the Treaty of Amsterdam, being the only instrument of approximation of the laws concerning criminal matters.

Framework decisions as a new instrument within the limits of the third pillar were introduced by the Treaty of Amsterdam. After this reform there were doubts whether framework decisions are international treaties, which would confirm the international aspect of the cooperation or they act of supranational law. There is no clear answer in TEU. On the margin of its problem we can underline, that framework decisions are destined only to the Member States, and its effectiveness is a result of the rules of international law and provisions of states' constitutions. They are similar to the directives in the first pillar but they do not have a direct effect<sup>4</sup>. Framework decisions are limited to the judicial and police cooperation in criminal matters. They replaced common activity in the area of judicial and police cooperation in criminal matters.

The main role in the coordination of the activity of the Member States were played by the Council. The Member States and the Commission had in the third pillar the equal right of initiative. Decisions were undertaken unanimously. Framework decisions could have been adopted in the purpose particularly indicated in the TEU: approximation of the laws and regulations of the Member States. The general legal basis for adopting framework decisions were article 34 paragraph 2 letter b) TEU. Nevertheless, it was not the sole basis, since, there was necessary to indicate – depending on the area of regulation – the particular provision of the Title VI TEU as well (other than article 34 TEU). These instruments were binding for the Member States only as to the result to be achieved, but national authorities were left to the choice of form and methods.

What is particularly important for the effective applying of framework decisions, it is their implementation. After adopting a framework decision the Member States were obliged

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<sup>4</sup> Feliks Prusak, *Zakres związania polskiego prawa karnego konwencją Unii Europejskiej w zakresie ochrony interesów finansowych Wspólnot Europejskich*, Prokuratura i Prawo 2009, nr 6, p. 9.

to undertake particular activity in the indicated term. The result pointed out by a framework decision had to be achieved in the specified term. However, there was no the method of execute the obligation of introducing provisions of a framework decision to a state's legal system in a specified term (as e. g. in the article 226 TEC). The Member states were free how to divide competences of their institutions by implementing a framework decision, and simultaneously states had to adopt the measures, which were not peremptory norms<sup>5</sup>. Freedom of choice of forms and methods of implementing decisions allowed to take into account the specific of criminal regulations in the sensitive area of cooperation in criminal matters. By adopting framework decisions the Member States were obliged mainly to approximate and to implement provisions concerning definition of criminal offences and sanctions. National regulations has a purpose to assure harmonised method of combating certain phenomena. The disadvantages of the framework decisions stem out from the obligation to taking into account the legal systems of different states, hence their regulations are frequently too general. Too general wording of framework decisions limits its planned effect: the harmonisation of law. Implementation of the rules in the particular legal systems was the role of the Member States. The governments were responsible for the correct transposition. The lack of it, deficient transposition or its delay was treated as an infringement of the obligations undertaken by accessing to the Union. However, the competence of the ECJ in this matter were limited, what is considered below.

According to the TEU, the Council had to consult the European Parliament before adopting any measure concerning criminal law. The European Parliament shall deliver its opinion within a time-limit which the Council may lay down, which shall not be less than three months. In the absence of an opinion within that time-limit, the Council may act alone. As a result, that the Council was independent in the adopting of decisions. An opinion of the European Parliament was not binding, but had a political importance. Forbearance of consulting the European Parliament or adopting a decision before the European Parliament had delivered an opinion was infringement of the procedure and could have been a basis for bringing an action pursuant to article 35 paragraph 6 TUE. To avoid total independence of the Council, the office of President and the European Commission had to inform the European Parliament of the working in this matter. What is more, the European Parliament was entitled to ask the questions or to present recommendations to the Council, and once a year it was held a debate about the progress in the judicial and police cooperation in criminal matters.

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<sup>5</sup> Anna Grzelak *Trzeci filar Unii Europejskiej*, Wydawnictwo Sejmowe, Warszawa 2008, p. 118.

It is impossible to present the former “third pillar” without mentioning the judgment of the ECJ in the case C-176/03<sup>6</sup>, which makes apparent the division of competences in criminal matters between the first and the third pillar. Up to this judgment the ECJ stated, that criminal law is – generally speaking – the competence of the Member States under the third pillar, while the European Community [EC] does not have a competence to regulate criminal substantial law and criminal procedure<sup>7</sup>. In this case the Commission, supported by the European Parliament, requested to annulled Framework Decision 2003/80/JAI of the Council from 27 January 2003 on the protection of the environment through criminal law. According to the Commission, the Council had applied erroneous legal basis (article 29 TUE and following ones) for imposing the obligation of implement the rules of criminal nature on the Member States. The Commission stated that right legal basis should have been article 175 TEC, because pursuant to the article 251 TEC decisions concerning environmental policy should have been undertaken in the codecision procedure (this area was the part of the first pillar). After analysing the first 7 articles of the decision, because of its substance and aim (environmental policy), the ECJ annulled the decision. This judgment had the crucial importance for division of competences between two pillars. What results from this judgment is that the Community was competent to establish criminal rules necessary to increase the level of the effectiveness of the common policy, while the rules of criminal law prepared to strengthen cooperation in criminal matters are subjected to the Title VI of the TEU (the third pillar). The choice of the legal basis determines the form and the procedure in which the act shall be prepared and adopted<sup>8</sup>. We shall remember, that criminal law as such was not a part of the competences of the Community and any acts of the Community in this matter had to have a particular legal basis. The judgment of the ECJ did not grant the Community the general competence in the area of criminal law, but stated, that approximation of states’ legal systems in the area of criminal law when it concerns the crimes infringing common policies should have been subjected to the procedures proper for the particular policy<sup>9</sup>.

Referring to the control over the framework decisions, the competence of the ECJ shall be underlined. The ECJ could control the legality and interpret framework decisions. The jurisdiction of the Tribunal was facultative, depending on the consent of the particular Member States (article 35 TEU). Pursuant to article 35 paragraph 3 letters a), b) a member

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<sup>6</sup> Case C-176/03, *Commission v Council*, judgment of September 13, 2005.

<sup>7</sup> Case 203/80, *Casati* [1981] E.C.R. 2595, Case 186/87, *Cowan* [1989] E.C.R. 195, Case C-226/97 *Lemmens* [1998].

<sup>8</sup> Simon White *Harmonisation of criminal law under the first pillar*, *European Law Review* 2006, 31(1), 81-92.

<sup>9</sup> Anna Grzelak *Trzeci filar ..* p. 60.

state, by a declaration made at the time of signature of the Treaty of Amsterdam or at anytime thereafter, could have accepted the jurisdiction of the Court of Justice to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them. The facultative jurisdiction of the ECJ suggests an approximation of the role of the ECJ to international courts, what underlines the international character of legal instruments adopted in the third pillar.

The ECJ was also competent to control the legality of framework decisions, (article 35 paragraph 6 TEU)<sup>10</sup>. The subjects legitimated to brought action were the Commission or a member state. TEU did not regulated the legal effects of proclaiming decisions null and void. It shall be underlined, that article 35 paragraph 6 TEU did not obligated the ECJ to declare the act null. Moreover, the ECJ ruled on any dispute between the Member States regarding the interpretation or the application of framework decisions, unless the Council settled the dispute within six months of its being referred to the Council by one of its member.

In the latest case-law the ECJ confirmed its position in the third pillar and appliance of its heritage to some instruments of the third pillar<sup>11</sup> (e. g. the necessity of respecting the Community competence, which stemmed out from the abovementioned case C-176/03). Referring to the right of control pursuant to article 35 TEU, the ECJ treated this procedure as an equivalent of the procedure based on article 234 TEC (with deference to the limitations of article 35 TEU). What is more, the ECJ underlined, that European friendly interpretation of legal acts of the EC applies to framework decisions as well.

## **2. Current status of harmonisation**

Under the TEU there were adopted a number of legal acts directed in the harmonisation of penal laws with regard to certain areas considered crucial in the fight against organized crime.

Accordingly, the main legal instruments to approximate the national substantive criminal law were framework decisions. Nonetheless, one should remember that although the Treaties of Maastricht and Amsterdam gave the impression that approximation was a new concept, the idea to approximate or harmonize the criminal legislation had already been incorporated in

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<sup>10</sup> Jan Barcz, *Obecny reżim prawny w Tytule IV TWE. Znaczenie klauzuli kładki zawartej w art.67 ust. 2 TWE [w:] Jurysdykcja Trybunału Sprawiedliwości WE do orzekania w trybie prejudycjalnym w dziedzinie wiz, azylu, imigracji i innych polityk związanych ze swobodnym przepływem osób (Tytuł IV TWE)*, Warszawa 2007.

<sup>11</sup> Case C-105/03 Pupino [2005].

earlier legal instruments of the UE. Some of them – conventions, joint actions and others are mentioned below.

As has been already stated above, Article 29 TEU provided that the ‘area of freedom, security and justice’ shall be achieved through closer police cooperation, judicial cooperation and, where necessary, through approximation of rules on criminal matters in the Member States, the latter in accordance with Article 31 paragraph 1 letter e) TEU. According to it, approximation shall be achieved by progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking. However, despite that strict regulation contained in Article 31 paragraph 1 letter e) TUE, apart from crimes in relation to terrorism and illicit drug trafficking, a wide range of offences such as racism/xenophobia, high-tech crime, trafficking in human beings, financial crime, tax fraud, sexual exploitation of children, environmental crime and even unauthorized entry, transit and residence are the subject of the harmonisation efforts in the EU. One should note that such an activity was neither in line with TEU provisions nor with the EU policy documents. In literature it was assessed that the Justice and Home Affairs Council (JHA Council) and the Commission seemed to deliberately disregard the essentially limited mandate that the TEU had given them – that is to adopt measures establishing minimum rules relating to substantive criminal law in only a limited number of subject areas.

The scope and size of this article does not allow to describe all of the framework decisions (and other legal instruments) dealing with the approximation of substantive criminal law, even with regard to binding legal instruments. What is more, there was a great number of non-binding documents – resolutions of the EC/EU institutions, programs of action, declarations etc. One must have them in mind although they are not the subject of this article. It should be also underlined that the binding legal instruments cover, in general terms, the broad-spectrum area of fight against organized crime. Therefore, in addition to the specific regulations, some legal documents relating to this general category were adopted. It is sufficient to mention the Framework Decision of 24 October 2008 on the fight against organized crime<sup>12</sup> that deals with the offences relating to participation in a criminal organization and provides for minimum criminal sanctions as well as the liability of legal persons. It should be added that

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<sup>12</sup> 2008/841/JHA, OJ L 300/42 of 11 November 2008 (it repealed previous Joint Action 98/733/JHA).

the EU has also approved the United Nations Convention against transnational organized crime (Palermo Convention)<sup>13</sup>.

### **A. Crimes against financial interests of the EU**

One of the first areas in which common activities with regard to approximation of penal laws were undertaken has been the combat against fraud and other illegal acts affecting the financial interests of EC. It was rather clear – the realization of the idea of common market had also their negative implication that is also the criminal behaviours “went beyond the borders”.

Under Article 280 of TEC the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Community through measures which shall act as a deterrent and be such as to afford effective protection in the Member States. As the framework decision were introduced by the Amsterdam Treaty, the Member States signed the Convention of 26 July 1995 on the protection of the European Communities' financial interests<sup>14</sup> and two additional protocols<sup>15</sup> which provide for measures aimed in particular at aligning national criminal laws. More specifically, they address corruption and other financial or economic crimes as well as related conduct, insofar as the conduct involved affects the interests of the EU itself. The Convention deals with a list of conduct designated as “fraud affecting the European Communities' financial interests”. The first Protocol deals with active and passive corruption (bribery and similar conduct, in which some promise, benefit or advantage is solicited, offered or exchanged in return for undue influence on the exercise of public duty), the second with money laundering and the confiscation of the proceeds of fraud and corruption as set out in the previous instruments. Other important legal instruments adopted in this area include: Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro<sup>16</sup>, Framework Decision of 28 May 2001 on combating fraud and

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<sup>13</sup> See: Decision of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention against Transnational Organized Crime, 2004/579/EC, OJ L 261/69 of 6 August 2004.

<sup>14</sup> Council Act of 26 July 1995 drawing up the Convention on the protection of the financial interests of the European Communities, OJ C 316 of 27 November 1995 (entered into force on 17 October 2002).

<sup>15</sup> See: Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, OJ C 313 of 23 October 1996; Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19 July 1997.

<sup>16</sup> 2000/383/JHA, OJ L 140 of 14 June 2000. See also: Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 329/3 of 14 December 2001.

counterfeiting of non-cash means of payment<sup>17</sup> and Convention against corruption involving officials<sup>18</sup>. Generally speaking, all these abovementioned legal acts define specific behaviors that shall be considered criminal offences as well as introduce minimal criminal sanctions.

The abuses against the financial interests of the Union have also been the subject of the case law of the Court of Justice. In its judgment of 8 July 1999 in the case *Criminal Proceedings against Maria Amélia Nunes and Evangelina de Matos*<sup>19</sup>, the Court stated that Article 10 TEC requires the Member States to take all effective measures to sanction conduct which affects the financial interests of the Community. Such measures may include criminal penalties even where the Community legislation only provides for civil sanctions (as was clearly established in Article 280 TEC). The sanctions provided for must be analogous to those applicable to infringements of national law of similar nature and importance, and must be effective, proportionate and dissuasive.

Protection of the EU financial interest constitutes important area of cooperation between the Member States. Therefore, different proposal relating to its strengthening has appeared. Worth mentioning is the proposal of *Corpus Iuris*. It is considered as a common, unified system of criminal law rules – both material and procedural – for dealing with fraud against the EC/EU that aims in unification of certain aspects of criminal law by defining a series of specific common offences, followed by provisions determining the general principles governing them in substantive law terms and the centralisation of prosecutions by means of a European Public Prosecutor. The essence of the proposal therefore contains elements of both substantive and procedural legal unification. It provides for establishment of specifically European criminal offences – “eurocrimes” affecting the financial interests of the EU in relation to a single geographical jurisdiction comprising the territory of all EU Member States.

## **B. Terrorist crimes**

Another crucial area of common actions within EU relates to terrorism and terrorist crimes. There were a number of legal acts dealing with them, both non-binding and binding. The most important one is the Framework Decision of 13 June 2002 on combating

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<sup>17</sup> 2001/413/JHA, OJ L 149 of 2 June 2001.

<sup>18</sup> See: Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 of 25 June 1997.

<sup>19</sup> C-186/98 (reference for a preliminary ruling from the Tribunal de Círculo do Porto): *criminal proceedings against Maria Amélia Nunes, Evangelina de Matos*, 1999/C 333/16.

terrorism<sup>20</sup>. It gives the definition of a terrorist crime, terrorist-linked offence as well as it provides for the responsibility of legal persons. One should also mention the Framework Decision of 24 February 2005 on attacks against information systems<sup>21</sup>. Also it does not specifically deals with terrorism it relates to the area that potentially may be utilized by terrorists. It obliges the Member States to ensure that illegal access to information systems, illegal system and data interference as well as instigation, aiding and abetting, attempt to commit them are punishable as criminal offences. Moreover, it introduces minimal criminal sanctions.

### **C. Trafficking in human beings and crimes against children**

As an answer for the increase of crimes that infringe predominantly the rights of women and children specific legal instruments were adopted on the EU level. On 19 July 2002 Council adopted the Framework Decision on combating trafficking in human beings<sup>22</sup>. It lists the offences concerning trafficking in human beings for the purposes of labour exploitation or sexual exploitation and gives the minimal criminal sanctions. To protect the children, the Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography<sup>23</sup> was adopted. It requires the Member States to take the necessary measures to ensure that certain criminal behaviours involving coercing and recruiting the children into prostitution or participating in pornographic performances and engaging in sexual activities with a child as well as production, distribution and similar acts relating to child pornography shall be punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.

### **D. Drug trafficking**

Irrespective of important legal documents adopted by EU institutions, EC has joined to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988<sup>24</sup>.

On the EU level, one should note the Joint Action of 17 December 1996 concerning the approximation of the laws and practices of the Member States of the European Union to

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<sup>20</sup> 2002/475/JHA, OJ L 164 of 22 June 2002. See also: Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9 December 2008.

<sup>21</sup> 2005/222/JHA, OJ L 69/67 of 16 March 2005.

<sup>22</sup> 2002/629/JHA, OJ L 203 of 1 August 2002.

<sup>23</sup> 2004/68/JHA, OJ L 13/44 of 20 January 2004.

<sup>24</sup> UNTS, Vol. 1582, p. 95 (entered into force on 11 November 1990).

combat drug addiction and to prevent and combat illegal drug trafficking<sup>25</sup>. More recently, EU-wide minimum penalties for drug production and trafficking has been introduced to enhance cooperation in this field: in November 2004, the Council adopted the Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking<sup>26</sup>. This decision formally commits the Member States to apply common standards and principles of law enforcement and justice in cross-border drug trafficking.

This sub-part of this article has presented main legal achievements of the EU with regard to the specific crimes that are considered as being the most problematic and requiring concerted, regular actions of the Member States. As one can note, it has been mostly devoted to certain categories of crimes. Nonetheless, it is important to remember that also other criminal behaviors are on the agenda of the EU, like environmental crimes or combating the illegal immigration<sup>27</sup>.

### III. TREATY OF LISBON

#### 1. “Communitisation” instead of intergovernmental cooperation

The Treaty of Lisbon has been adopted after long discussions and political turbulences. Finally, it is in force since 1 December 2009. Amongst many reforms provided for in the Treaty of Lisbon, reform of the judicial cooperation in criminal matters is perhaps the deepest and the most visible. The Treaty of Lisbon has abolished the abovementioned “third pillar”. The former Article 31 paragraph 1 letter e) TEU has been replaced by the article 83 paragraph 1 Treaty on the Functioning of the European Union [TFEU], which provides as follows:

*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*

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<sup>25</sup> 96/750/JHA, OJ L 342 of 31 December 1996.

<sup>26</sup> 2004/757/JHA, OJ L 335 of 11 November 2004.

<sup>27</sup> See, e.g. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, 2002/90/EC, OJ L 328 of 5 December 2002;

*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.*

The transfer of this provision from TEU to TFEU is not only of technical nature. The regulations of TFEU adopt the so called “community method” instead of the hitherto prevailing intergovernmental method.

## **2. The ordinary procedure**

The ordinary procedure means the procedure provided for in the article 294 TFEU. The scope of this article does not allow to completely present the ordinary legislative procedure, hence we will limit our considerations to point out the main differences between the new and the old regulations

- the European Commission has a monopoly of the right of initiative;
- the European Council decides by a qualified majority voting instead of an unanimously voted framework decision;
- the European Parliament is involved in the procedure and even has the power to bring a proposal to an end.;
- the Court of Justice ensures the uniformity in the interpretation of the Community law;
- national parliaments may be involved in the procedure<sup>28</sup>.

This change has two main features.

First, it is limiting of the sovereign power of the Member States to regulate the criminal matters, e. g. to define types of crimes and to establish penalties. Under the new regulation a simple veto of a state is impossible. Moreover, after 1 January, 2014, it will not even be sufficient to reject a proposal for a directive. Criminal matters were always recognized as one of the most delicate issues regarding the sovereignty of the state<sup>29</sup>. It seems that the authors of the European Constitution and then the Treaty of Lisbon were aware thereof and it was the reason why they established paragraph 3 of the article 83, which will be discussed below.

Secondly, the power of governments was restrained and the competence of the European Parliament was extended. It is worth noting that the prerogatives of national parliaments were

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<sup>28</sup> Daniela Pisou, *Reactive Integration: Police and Judicial Cooperation in Criminal Matters: Cooperation Or Communitisation?*, Nordstedt, 2005, p. 7-8.

<sup>29</sup> Christopher Harding, *Exploring The Intersection of European Law and National Criminal Law*, European Law Review 2000, 25(4), p. 380; Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 507.

also enlarged, however in a very limited scope. Under new regulations, the consent of the European Parliament (at least in a silent form) is necessary to adopt any directive concerning criminal matters.

Such a reform must be welcomed as an attempt to tackle so called “EU democracy deficit”. In criminal matters this deficit is especially sensitive, since the criminal law is the deepest interference in the human freedom. The commonly recognized rule: *nullum crimen, nulla poena sine lege* (no crime, no punishment without the statute), sometimes known as *nullum crimen, nulla poena sine lege parlamentaria* (no crime, no punishment without the statute of a parliament), is at least partially fulfilled.

The next consequence of transferring criminal matters to the first pillar is a change of the form of the legal instruments. The former framework decisions were replaced by the directives. Obviously the framework decisions adopted before 1 December, 2009 are still in force. Both types of acts seems to be similar. The general rule is that each member state is obliged to adopt provisions in its own legal system to implement the matter regulated in a framework decision or a directive. The main difference is the direct effect. TEU specified that the framework decisions do not have a direct effect. There is no such provision concerning the directives. According to case law of the European Court of Justice, the directives have only a limited direct effect. An individual can only raise an argument stemming from a directive if a state did not implement it or the implementation thereof is incorrect and only provided that the individual’s claim is against a state or its agency<sup>30</sup>. It is hardly imaginable that an argument concerning a directive on the substantial criminal law could be raised by an individual. This is because such directives are the instruments of a state or/and EU. Bearing in mind the traditional function of the penal law as a guarantee for an individual such arguments do not make any sense here, as the EU establishes only minimal rules and any member state can adopt more severe punishments or can criminalize other types of crimes than EU. As a result, the change of the form of the acts will have little impact in practice.

### **3. New areas of crimes**

The areas of crime – in comparison to the previous regulation – have been extended. The new areas are: trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime. However, as we have mentioned above, some of these areas were regulated

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<sup>30</sup> Case C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt*, Judgment of the Court of 19 January 1982; Case C-91/92, *Paola Faccini Dori v Recreb Srl.*, Judgment of the Court of 14 July 1994; Andrzej Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Kraków 2005, p. 97-98.

by the framework decisions under TEU as well. Such an extension of the list in TFEU can be interpreted in two ways. According to the first option, this change in words does not modify the EU's competence. This provision is a mere acceptance of the hitherto prevailing practice<sup>31</sup>. However, this extension may be interpreted as giving the expressive competence, which is necessary to the existing acts. The harmonisation of the criminal law in certain other areas was acceptable as long as every state had an option of vetoing a proposal. Under TFUE, where a member state can be outvoted in the European Council, there is no place for the extension of that competence *per facta concludentia*. This interpretation is confirmed by the last part of paragraph 1. To extend the competence of the EU to regulate other areas of crimes, it is necessary to adopt a unanimous decision in the Council. If the enumeration in the paragraph 1 a. 2 was open, such a provision would be out of place. Therefore, we claim that enumeration in the article 83 paragraph 1 is exhaustive.

The wording of the last sentence “on basis of developments in crime” suggests that a proposal of adding new areas of crimes should be justified by the criminological research concerning the development of crime. Such a premise – posed by the German Federal Constitutional Tribunal<sup>32</sup> – seems too restrictive to us. It is true that every decision on penalisation should certainly be based on the rational basis. But it does not mean that extending the EU competences is possible only in case it is some new criminal phenomena. A unanimous decision in the European Council regarding the extension is in our opinion the sufficient protection for the sovereignty of the Member States.

#### **4. Paragraph 2 – new old competence of the EU**

Paragraph 2 of the Article 83 provides as follows:

*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.*

It is a new provision, there was no such regulation in the former treaties. Nevertheless, as we have mentioned above, such a type of competence is nothing new. The provision should

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<sup>31</sup> Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 518.

<sup>32</sup> Urteil des Zweiten Senats vom 30. Juni 2009, BVerfG, 2 BvE 2/08, Absatz-Nr. 364 [Judgment of the Second Senate of the German Federal Constitutional Tribunal of 30 June 2009].

be regarded as a formal sanctioning of the decisions of the ECJ in cases C-176/03<sup>33</sup> and C-440/05<sup>34</sup>.

Nevertheless, this new provision has some importance for the procedure of adopting the minimum rules. Under TEC and the abovementioned decisions of the ECJ, to adopt such a measure, the procedure sufficient for harmonisation measures was also sufficient for minimum criminal rules. Under TFEU the procedure is limited also by so called “emergency brake” regulated by paragraph 3.

The interesting question is the relationship between paragraphs 1 and 2 of the article 83. Distinguishing between these two competences is necessary because of a possibly different procedure. It is argued that in the absence of any express wording to the contrary, each paragraph should be interpreted as a *lex specialis* as regards to the other paragraph<sup>35</sup>. This interpretation, even though logical and formally correct, does not answer the core of the question – what concerns the areas that are mentioned in paragraph 1 and are subject to harmonisation measures by the other articles of the Treaty? We foresee that, as in *Pupino* case, the competence provided in the paragraph 2 will prevail.

#### **5. Limits of the “communisation” – emergency brake and opt-outs.**

A possibility of being outvoted in the matters concerning criminal law is considered – at least by part of the countries – as a limitation of their own sovereignty. To satisfy their interests, the Treaty of Lisbon provides for two special instruments of restricting the ordinary procedure – emergency brakes and opt-outs.

Pursuant to article 83 paragraph 3, *Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.*

*Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a*

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<sup>33</sup> *Pupino*, Judgment of the Court (Grand Chamber) of 16 June 2005.

<sup>34</sup> *Commission of the European Communities v Council of the European Union*, Judgment of the Court (Grand Chamber) of 23 October 2007.

<sup>35</sup> Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 516.

*case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.*

The emergency brake seems to be a compromise between unlimited “communisation” and a simple veto<sup>36</sup>. A state that is dissatisfied with a draft cannot veto it, but it can suspend the whole procedure for four months. This suspension cannot be raised on the sole basis of being against the proposal. Each suspension has to be justified by a detrimental effect of a proposed regulation on the fundamental aspects of a state’s criminal justice system. The crucial problem is the meaning of this formula. Most of the authors claim that this provision should be interpreted strictly<sup>37</sup>. Some of them claim that it refers only to the aspects of constitutional importance and rank<sup>38</sup>. The other claim that strict interpretation excludes from the scope of this article certain constitutional problems and shall be referred only to the criminal justice system<sup>39</sup>. The latter option seems to abstract to apply. In modern constitutions there are catalogues of personal rights and freedoms – also of rights concerning criminal justice. Therefore, it is impossible to distinguish what is “constitutional” and what is “criminal” law. As examples of the areas that might affect fundamental principles of states’ criminal justice, we can enumerate: the minimal penalties, the principle of fault, the sentence for life, offences concerning the question of religious freedom and freedom of speech and criminal responsibility of legal persons<sup>40</sup>. What is important is the wording of this provision. The word “would” instead of – for instance – “might”, “may” or “could” means that a state must be sure that such a draft would affect its system. The sole possibility of such a detriment is not sufficient.

A broad interpretation of this provision may result in a risk, that calling for suspension would be used by the Member States to achieve other aims than protecting principles of their own systems. A state could suspend a procedure of adopting a directive to make pressure on the other states e. g. to change a decision concerning other matter, perhaps even not a criminal one. To protect the Union before such a practice, the Treaty provides for a “fast track”

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<sup>36</sup> Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 526.

<sup>37</sup> Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 527; Ester Herlin-Karnell, *The Lisbon Treaty and the Area of Criminal Law and Justice*, European Policy Analysis 2008, 3, p. 6-7, Marco Mansdörfer, *Das europäische Strafrecht nach dem Vertrag von Lissabon - oder: Europäisierung des Strafrechts unter nationalstaatlicher Mitverantwortung*.

<sup>38</sup> Marco Mansdörfer, *Das europäische Strafrecht nach dem Vertrag von Lissabon - oder: Europäisierung des Strafrechts unter nationalstaatlicher Mitverantwortung*.

<sup>39</sup> Steeve Peers, *EU criminal law and the Treaty of Lisbon*, European Law Review 2008, 33(4), p. 526.

<sup>40</sup> Martin Heger, *Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon*, Zeitschrift für Internationale Strafrechtsdogmatik, 2009, 8, p. 414.

enhanced cooperation. Nine countries – after a disagreement on an issue of criminal matter – can establish enhanced cooperation without the whole ordinary procedure provided in such cases in the articles 326-334 TFEU.

For Denmark, Ireland and United Kingdom emergency brake has been recognised as not a sufficient protection of their sovereignty in criminal matters. These countries have opt-outs in criminal matters, which means that they are bound by the provisions concerning criminal matter only if they want to<sup>41</sup>.

### **6. Proposal for a first directive**

Up till now, there is no directive adopted under TFEU. However, there is a pending procedure concerning the first proposal of: Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA. The proposal contains new types of crimes, for instance organisation of travel arrangements with the purpose of committing sexual abuse or offences in IT environment. The main aim of the proposal is to increase the level of criminal penalties.

## **IV. CONCLUSIONS**

The firm and unequivocal evaluation of the changes introduced by the Lisbon Treaty with relation to harmonisation of penal law constitutes a quite difficult task.

However, in general terms it should be assessed positively. Unquestionably, it is a long-awaited answer for the inadequacies of legal instruments that could be adopted in this area. There is no doubt that both conventions and framework decisions have not been the most appropriate means of bringing in the legal framework. Conventions as international treaties governed by international law have not still been adopted by all EU Member States; the main difficulty with framework decisions has been the lack of any sanction for their non-implementation.

The changes brought about by the Lisbon treaty allows for the further unification of the system of substantive law that deals with the crimes considered to be the most challenging for the EU.

It is possible to notice to important aspects of these changes.

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<sup>41</sup> Steeve Peers, *UK and Irish opt-outs from EU Justice and Home Affairs (JHA) law*, University of Essex 2009.

The first one relates to the adjustments in the legislative procedures that allow for increased role of the European Parliament as well as national parliaments. This development is especially significant with regard to penal law. Among all Member States penal law is considered as belonging solely to the sovereign powers of the state. If there is more of the democratic control over the EU institution, the better chance to persuade the Member States that some modifications are vital and necessary.

Changing the procedure from the intergovernmental to the communitarian one, should be also appreciated. Procedure, provided for in the former first pillar, seems to be quicker, simpler and more democratic. Nevertheless, the Member States may be reluctant to decide over criminal matters if they know that they can be outvoted. We must remember that abovementioned Framework Decision on the protection of the environment through criminal law was earlier rejected as a proposal for a directive. It is easily imaginable that such a situation may return under new rules, especially if the majority threshold will be lower than current. The next risk is connected with the emergency brake. What is our concern is that a member state can try to apply it as a part of political bargaining.

The next advantage of the Treaty of Lisbon is changing the form of legal act concerning criminal matters. Directives have been the most popular instruments in the legal heritage of the EC and applying them to criminal matters strengthens the consistency of the common legal system. However, as we have mentioned above, it is hardly possible that these directives will have any direct effect. Hence the crucial point is possibility to force the Member States to implement the directive.

That brings us to the last point, that is the jurisdiction of the ECJ on criminal matters. In the new legal framework, the ECJ's jurisdiction on criminal matters is the same as that on any other issue regulated earlier in the first pillar. The European Commission is entitled to bring an action against a member state that does not exercise its duty to implement a directive. Even more important is unlimited competence of the ECJ to interpret the legal acts concerning criminal matters. Unified law without unified interpretation is fiction. We expect that this competence of the ECJ will have the greatest impact on the future of the European criminal law.