



EDOARDO MAZZANTI

CRIMINAL OBLIGATIONS UNDER EUROPEAN UNION LAW

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Summary

(A) European Union (EU) framework

(B) Criminal Law (CL) and EU

(C) European Union Criminal Law (EUCL) evolution

(A) EU framework

§ EU framework evolution

§ Phase I (—> 1992): **‘common market’ era**

§ Phase II (1992 —> 2009): Creation of the ‘Union’, divided into **three pillars**: European Community (EC), Common Foreign and Security Policy (CFSP) and Area of Freedom Security and Justice (AFSJ).

§ Phase III (2009 —>): **Lisbon era**

§ EU bodies

European Council, European Commission, Council of the EU, European Parliament (EP), Court of Justice (CJ).

§ EU sources

§ Primary law: Treaty of the EU (TEU), Treaty on the Functioning of the EU (TFEU), Charter of the Fundamental Rights of the EU (CFREU)

§ Secondary law: Regulation (reg), Directive (dir), Decision (dec).

(B) CL and EU

§ Main evolution

From ‘taboo zone’ (state sovereignty) —> to europeanization (EU *dynamic* competence)

Art. 5 TEU — «1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of **subsidiarity** and **proportionality**.
2. Under the principle of **conferral**, the Union shall act only **within the limits of the competences conferred** upon it by the Member States in the Treaties **to attain the objectives set out therein**. *Competences not conferred upon the Union in the Treaties remain with the Member States*.
3. 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. 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**. [...]».

§ Conflicting needs

Inclusion vs respect of national criminal identity

Art. 4 TEU — «[...] 3. Pursuant to the principle of **sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to **ensure fulfillment of the obligations** arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall **facilitate the achievement of the Union's tasks** and refrain from any measure which could jeopardize the attainment of the Union's objectives».

Art. 4 TEU — «[...] 2. The Union shall respect the equality of Member States before the Treaties as well as **their national identities**, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, **in full mutual respect**, assist each other in carrying out tasks which flow from the Treaties. [...]»

Art. 67 TFEU — «1. The Union shall construe an area of freedom, security and justice with respect for fundamental rights and **the different legal systems and traditions** of the Member States. [...]»

Solution —> EU should adopt a minimally invasive approach towards CL.

(C) EUCL evolution. Phase I (—> 1992)

§ NO criminal competence in the Treaty

§ CJ activism ('Greek maize' case): (i) principle of **assimilation** + (ii) principle of **adequate protection**.

*«It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty **requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion**, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, (i) which **are analogous** to those applicable to infringements of national law of a similar nature and importance and which, in any event, (ii) make the penalty **effective, proportionate and dissuasive**».*
(CJ, 21.9.1989, C-68/88, §23s)

Phase II (1992 —> 2009)

§ Within AFSJ

Art. 29 TEU — «*Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. That objective shall be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offenses against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through [...] **approximation, where necessary, of rules on criminal matters** in the Member States, in accordance with the provisions of Article 31(e)*».

Art. 31 TEU — «*Common action on judicial cooperation in criminal matters shall include [...] (e) 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*».

Art. 34 TEU — «*[...] 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: [...] (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**; [...] (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*».

Example

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (PIF convention)

Article 2

Penalties

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1, and participating in, instigating, or attempting the conduct referred to in Article 1 (1), are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition, it being understood that serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State. This minimum amount may not be set at a sum exceeding ECU 50 000.
2. However in cases of minor fraud involving a total amount of less than ECU 4 000 and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type from those laid down in paragraph 1.
3. The Council of the European Union, acting unanimously, may alter the amount referred to in paragraph 2.

§ Within EC

Disputes on the legal basis and, thus, on the competent body to adopt an act encompassing criminal obligations in the environmental field.

Case 1. CJ annuls **FD 2003/80/JHA** (*Protection of the environment through criminal law*) arguing it was enacted on the **wrong legal basis** (3rd pillar instead of 1st).

«As regards the aim of the framework decision, it is clear both from its title and from its first three recitals that its objective is the protection of the environment [...] *As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence* [...] However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an **essential measure** for combating serious environmental offenses, from **taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective** [...] That finding is not called into question by the fact that [Articles 135 EC and 280(4) EC] reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, **for the purposes of the implementation of environmental policy**, any harmonization of criminal law, even as limited as that resulting from the framework decision, **must be ruled out even where it is necessary in order to ensure the effectiveness of Community law**» (**CJ, 13.9.2005, C-176/03, §46ss**).

Case 2. CJ annuls the **FD 2005/667/JHA** (*Strengthening of the criminal-law framework for the enforcement of the law against ship-source pollution*), cfr. **CJ, 23.10.2007, C-440/05**.

Example

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

- (4) Common rules on criminal offences make it possible to use effective methods of investigation and assistance within and between Member States.
- (5) In order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.
- (6) Failure to comply with a legal duty to act can have the same effect as active behaviour and should therefore also be subject to corresponding penalties.

§ What's the nature of the criminal competence recognized by CJ? —> **Indirect** criminal competence.

§ Who's bound by the directive? —> The national legislator, NOT the individual.

*«The Court has, however, also consistently ruled that **a directive cannot of itself impose obligations on an individual** and cannot therefore be relied on as such against that individual [...] In the specific context of a situation in which a directive is relied on against an individual by the authorities of a Member State **within the context of criminal proceedings**, the Court has ruled that **a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive**» (CJ, 3.5.2005, C-387/02, C-391/04, C-403/02, §73s).*

§ How's a MS bound by a directive? —> It creates only an **obligation of results** regarding **the legislative level**.

Phase III (2009 —>)

EU has an **express**, albeit **indirect**, competence in substantial CL (**art. 83 TFEU**).

§ Autonomous competence ('eurocrimes')

Art. 83 §1 TFEU — «1. 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 offenses and sanctions** in the areas of **particularly serious crime** with a **cross-border dimension** resulting from the nature or impact of such offenses 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 organized 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 [...].».

Eg.: Dir. 2011/93/EU of the EP and of the Council, on combating the sexual abuse and sexual exploitation of children and child pornography.

§ Accessory competence

Art. 83 §2 TFEU — «[...] 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 harmonization measures**, directives may establish minimum rules with regard to the definition of criminal offenses 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 harmonization measures in question, without prejudice to Article 76 [...]*».

Eg.: Dir. 2017/1371/EU of the EP and the Council, on the fight against fraud to the Union's financial interests by means of criminal law (PIF directive).

§ ‘Emergency break’ procedure

Art. 83 §3 TFEU — «[...] 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 case, the authorization 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».

§ Previous acts

Art. 9 Prot. 36 — «*The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon **shall be preserved** until those acts are repealed, annulled or amended in implementation of the Treaties [...]*».

Eg.: FD 2004/757/JHA, laying down minimum provisions in the field of illicit drug trafficking.

However, many of the previous third pillar's acts have been 'lisbonized':

Eg.: Dir. 2011/93/EU replaces FD 2004/68/JHA;

Eg.: PIF Directive replaces PIF Convention.