Has the European Union Begun to Drive Criminal Law Down a Slippery Road? – A Review of the Union's Efforts to Combat Road Safety Related Traffic Offences and its Implications for Future Criminal Law Policies

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Abstract

European lawmakers have recently enacted a directive to improve the safety on European roads by facilitating the cross-border identification of vehicle holders for certain traffic offences like speeding, failure to wear a seat-belt, illegally using a mobile phone while driving etc. When determining the legal basis, dispute arose among lawmakers during the legislative debates in the Council as to whether these offences should be classified as "administrative" or "criminal" offences. Lawmakers overruled the opposition by the Commission and opted for the latter. They thereby ignored the peculiar nature of criminal law and the fact that many Member States consider these traffic offences to be of an administrative nature. This paper aims to show why the decision made by the Council and the Parliament is wrong from a legal point of view and why it may set a dangerous precedent for future legislative acts in the field of criminal law. It concludes by demonstrating that the procedure for information exchange under this directive may give rise to problems with general concepts of criminal law, namely the principle of guilt, the rights of suspects and witnesses and the principle of proportionality.

I. Introduction

The Council of the European Union (hereinafter: Council) and the European Parliament (hereinafter: Parliament) have recently enacted a directive facilitating the cross-border exchange of information on road safety related traffic offences (hereinafter: Directive).[1] This Directive aims to overcome the remaining obstacles for the effective cross-border prosecution of certain traffic offences by providing a mechanism for the automated exchange of vehicle registration data. Although this Directive primarily aims to increase the safety on European roads, it seems nevertheless worthwhile for a European criminal lawyer to take a closer look at this recent piece of European legislation.

The Directive stipulates that the Member States mutually grant each other access to their vehicle registration databases.[2] The European Commission (hereinafter: Commission) had originally regarded this instrument as a matter of transport policy and consequently based its proposal in 2008[3] on Article 91 (1) TFEU (ex-Article 71

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[1] Directive 2011/82/EU, OJ 2011 L 288/1.

[2] For a detailed description of the information exchange see infra II.1.

(1) TEC), which allows the Council and the Parliament to lay down measures for improving road safety. Several Member States expressed their doubts regarding the choice of this legal basis[4] and negotiations were adjourned until the Lisbon Treaty entered into force.[5] The Council then unanimously amended the original proposal, changed the legal basis to Article 87 (2) TFEU and thereby modified the vantage point completely.[6] Since Article 87 (2) TFEU only applies to the exchange of information regarding "criminal offences", European lawmakers faced the question of whether the traffic offences to which the Directive applied were truly of a criminal nature. Offences like speeding, failure to wear a seat-belt, failure to stop at a red traffic light, drink-driving, driving under the influence of drugs, failure to wear a safety helmet, the use of a forbidden lane or illegally using a mobile telephone while driving are not considered to be criminal in all Member States, but rather, they are considered to be administrative offences instead. Although the Council and Parliament did not define the term "criminal offence", they may have determined its future interpretation by interpreting the term too broadly.[7] This paper aims to discuss whether Article 87 (2) TFEU was indeed the appropriate legal basis by examining the term "criminal offence" in the context of the Treaty (II.) and goes on to analyse whether the procedure for information exchange under the Directive is in line with general concepts of criminal law, namely the principle of guilt, the rights of suspects and witnesses and the principle of proportionality (III.). It concludes by analysing whether this Directive paves the way for an excessive use of criminal law competences under the Lisbon Treaty (IV.).

II. The Legal Basis

While negotiating the Commission's original proposal, delegations to the Council working groups engaged in a heated debate over whether or not Article 87 (2) TFEU was the appropriate legal basis for the Directive. Article 87 TFEU reads (emphasis added):

"1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of *criminal offence*s.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning:

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[3] COM(2008) 151 final.

[4] Cf. the minutes of the 2895th Council meeting (Transport, Telecommunications and Energy) in Luxembourg, 9 and 10 October, 2008, Council Document No. 13649/08.

[5] The consequences of the entry into force of the Lisbon Treaty are described in COM(2009) 665 final.

[6] As stipulated in Article 293 (1) TFEU, the Council may only amend a Commission proposal by unanimous vote (notwithstanding a few expressly mentioned exceptions).

[7] It must be noted that the Council discussed this Directive as a matter of Transport, Telecommunications and Energy, rather than as a matter of Justice and Home Affairs.

(a) the collection, storage, processing, analysis and exchange of relevant information;

(…)"

As mentioned above, the traffic offences to which the Directive applies are not considered to be criminal offences in all Member States. Some classify them as administrative, while for others they may be of either a criminal or an administrative nature. The Commission had pleaded for a restrictive interpretation of the term but was finally overruled by the unanimous vote of the Council, which advocated a broad interpretation. This led the Commission to formally reserve its right to challenge the Directive.[8]

The term "criminal offence" must be given an autonomous and uniform interpretation throughout the Union in order to ensure the uniform application of Union law and the equal significance of all official languages. Without an express reference to the law of the Member States for the purpose of determining its meaning and scope, the interpretation of a provision of Union law is not governed by the respective definitions or concepts in the laws of the Member States. The autonomous interpretation must be based on the context of the provision and the purpose of the legislation.[9] The scope of a Union competence cannot depend upon different concepts in the national law of the Member States.

In the following sections, the article will describe the position taken by the Council and the Parliament (1.) The article will call for a restrictive interpretation (2.) since the concerns expressed by the Commission are legitimate and point to difficulties when trying to assess the meaning of the term "criminal offence" (3.) and to the legal and institutional consequences beyond the scope of the legal basis (4.). Aiming to provide a conclusive definition of the term "criminal offence" in European law would exceed the scope of this article.

1. The position of the Council and the Parliament

The Council and the Parliament have based the Directive on a broad notion of the term "criminal offence". In support of their position, the scope of application of the legal basis – and of the Directive – should not depend on the classification of offences in national law. One might therefore argue that it should cover all kinds of offences regardless of whether a Member State considers them to be of a truly criminal or an administrative nature.[10] Article 87 TFEU may consequently refer to any kind of offence for which a punitive and deterrent sanction is provided. It should be noted that this approach is derived from the interpretation of the term "charge" pursuant to Article 6 (1) and (3) of the European Convention on Human Rights. According to the European Court of Human Rights, the classification of a state measure as a "charge" (or criminal offence) depends on the following factors:

[8] See the Commission Statement on the Legal Basis, OJ 2011 L 288/15.

[9] *European Court of Justice* (ECJ), case 327/82 (Ekro v Produktschap voor Vee en Vlees), [1984] ECR 107, margin no. 11 –; ECJ, case C-287/98 (*Linster*), [2000] ECR I-06917, margin no. 43.

[10] Cf. recital nos. 6 and 7 of the Directive.

the classification according to the legal system of the state to criminal law, the very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring.[11] Therefore, administrative sanctions under national law are considered "criminal" pursuant to the European Convention on Human Rights if they are of a punitive nature and aim to have a deterrent effect.[12]

Admittedly, the view endorsed by the Council and the Parliament is driven by a legitimate purpose: The cross-border enforcement of traffic offences would be impaired if due regard had to be given to the nature of the offence in the Member State in which it was committed. In some countries, it may not even be possible to distinguish on an abstract basis between administrative and criminal offences. In Germany, for example, drink-driving can be either a criminal or an administrative offence depending on the blood alcohol level, the experience of the driver and whether or not the driver showed characteristic symptoms of alcohol abuse.[13]

The ends, however, do not justify the means. Giving an autonomous and uniform notion to a provision of Union law does not necessarily have to result in broadening its scope to the greatest extent possible. A reference to the jurisprudence of the European Court of Human Rights is not convincing. The European Court of Human Rights has developed the above-mentioned criteria to define the scope of a fundamental procedural right. Any broad interpretation thereof is a necessary step towards ensuring civil liberties. Article 87(1) and (2) TFEU does not grant a fundamental procedural right but aims to facilitate cross-border cooperation of police forces by granting the Union the competence to harmonise national laws.

2. A call for a restrictive interpretation

Instead, Article 87 TFEU and the term "criminal offence" have to be interpreted restrictively. This would result in excluding administrative offences from the scope of application of Article 87 TFEU. The author admits that it may be difficult or even impossible to find a classification at the European level that matches all of the various notions of criminal offences among the Member States. Nevertheless, European law has been known to distinguish carefully between criminal and

[11] *European Court of Human Rights* (ECtHR), *Engel and others vs. the Netherlands*, Application no. 5100/71, Judgement of 8. 6. 1976, margin no. 82; *ECtHR*, *Janosevic vs. Sweden*, Application no. 34619/97, Judgement of 23. 7. 2002, margin no. 67; *ECtHR* (Grand Chamber), *Esboubet vs. Belgium*, Application no. 26780/95, Judgement of 28. 10. 1999, margin no. 32; *ECtHR*, *Özturk vs. Germany*, Application no. 8544/79, Judgement of 21. 2. 1984, margin no. 52.

[12] *ECtHR*, *Ziliberberg vs. Moldova*, Application no. 61821/00, Judgement of 1. 2. 2005; *ECtHR*, *Bendenoun vs. France*, Application no. 12547/86, Judgement of 24. 2. 1994, margin nos. 44 et seq.; *ECtHR*, *Lauko vs. Slovakia*, Application no. 26138/95, Judgement of 2. 9. 1998, margin nos. 56 et seq.

[13] Pursuant to Section 316 of the German Criminal Code (StGB), drink-driving is a criminal offence if the driver drives a vehicle in traffic although due to consumption of alcoholic beverages or other intoxicants he is not in a condition to drive (irrefutably assumed where the blood alcohol level amounts to or exceeds 1.1‰). Where the driver remains capable to drive, he is nevertheless subject to an (administrative) fine pursuant to Section 24 a of the German Road Traffic Act (StVG) if his blood alcohol level is 0.5‰ or above. For novice drivers, there is no tolerated blood alcohol level (Section 24 c StVG). See *Krismann*, EuCLR 2011, pp. 252 et seq. for an overview of the laws of the Member States.

administrative offences (a). The term "criminal offence" should be interpreted in coherence with other provisions of the Treaty – namely Article 83 TFEU (b).

a) The acknowledged difference between criminal and administrative offences in European law

While not all of the Member States distinguish terminologically[14], the law of the European Union itself distinguishes between administrative and criminal offences[15] – albeit without further specifying where to draw the line.[16] Before the Lisbon Treaty entered into force, the European Communities did not have the competence to enact supranational criminal law[17] but measures concerning administrative offences were permissible.[18] European lawmakers have also enacted various legislative acts which have allowed for imposing different kinds of sanctions with the exception of criminal punishments. This is exemplified inter alia by the Regulation on the European Communities' financial interests[19] which adopted general rules for administrative penalties concerning financial irregularities. The (former) Community competences for harmonising national criminal law were embodied in the former third pillar (police and judicial cooperation in criminal matters) and any approximation was – *e contrario* – not possible within the framework of the former first pillar.[20] Although this previous institutional structure has been abolished by elevating policies of the former third pillar to the supranational level, the peculiar role of criminal law continues to be stressed even under the new legal framework of the Union: The Member States reserved their right to table initiatives (Article 76 (b) TFEU) and installed the so-called "emergency break" embodied in Article 83 (3) TFEU as a procedural safeguard to protect the fundamental aspects of their criminal law systems.

Apart from distinguishing criminal from administrative offences at the supranational level, the Union did not turn a blind eye towards the classifications in the laws of the Member States either. As a provision of primary European law, former Article

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[14] *Tiedemann*, in: Liber Amicorum Jescheck, Vol. 2, Berlin 1985, p. 1411 (p. 1416).

[15] See the Opinion of Advocate General *Lagrange*, cases 2/57 and 15/57 [1958] ECR 234 (236) and the Opinion of Advocate General *Roemer*, case 14/68 (*Walt Wilhelm*, German version), [1969] 14 (24 et seq.). See also *Tiedemann* (fn. 14), p. 1411 (p. 1417).

[16] See infra I.3. The former European Communities had not pursued an integrated approach towards sanctions as is shown by *Bitter*, Die Sanktion im Recht der Europäischen Union, Berlin 2010, p. 190, and *Vogel*, in: Sieber/Brüner/Satzger/v. Heintschel-Heinegg (eds.), Europäisches Strafrecht, Baden-Baden 2011, § 5 paras. 9 et seq.

[17] The ECJ acknowledged in case 203/80 (*Casati*) [1981] ECR 2595, margin no. 27 that "in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible" (confirmed in ECJ, case 187/87 (*Cowan vs. Trésor public*) [1989] ECR 189, margin no. 19 –; see also *ECJ*, case 8/77 (*Sagulo*) [1977] ECR 1495 margin no. 4) – a view to which most scholars concurred, see *Satzger*, Die Europäisierung des Strafrechts, Cologne et al. 2001, pp. 134 et seq. and *Böse*, Strafen und Sanktionen im Gemeinschaftsrecht, Cologne et al. 1996, pp. 55 et seq., both with further references.

[18] *Satzger* (fn. 17), pp. 105 et seq. and p. 134. It was, however, disputed among scholars and legal practitioners to what extent the European Communities were competent to enact provisions for imposing administrative penalties cf. *Satzger* (fn. 17), pp. 92 et seq. with further references.

[19] Regulation 2988/95, OJ 1995 L 312/1.

[20] *Satzger* (fn. 17), pp. 135 et seq.; differing Advocate General *Colomer*, case C-176/03 (*Commission vs. Council*) [2005] ECR I-7879, margin nos. 38 et seq.

280(4) TEC [Treaty of Amsterdam] allowed the Council to adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community (…) but excluded the approximation of criminal offences in its second sentence[21], which read: "These measures shall not concern the application of national criminal law or the national administration of justice." The directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements[22] distinguishes criminal and administrative sanctions in its Article 8.[23] The heavily criticised[24] jurisprudence of the European Court of Justice[25] with regard to the protection of the environment through criminal law[26], which had assumed a Union competence to harmonise national criminal law to a certain extent by means of directives under the Treaty of Nice, did not level the differences between administrative and criminal offences in national law from a European perspective. Instead, Advocate General *Colomer*, who supported the ruling, noted himself that "there are criminal penalties – those of greater severity – and administrative penalties".[27] Ironically, the Prüm Decisions[28], on which the Directive was based and which will be discussed below, do themselves distinguish "criminal offences" and "other offences coming within the jurisdiction of the courts or the public prosecution service"[29] and thereby suggest that not all state sanctions (not even all state sanctions imposed by a court) are of a criminal nature.

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[21] This view was expressed by *Satzger* (fn. 17), pp.138 et seq. with further references but disputed by other scholars like *Delmas-Marty*, in: Delmas-Marty/Vervaele, Implementation, Vol. 1, Antwerp et al. 2000, pp. 55 et seq., and *Tiedemann*, in: Liber Amicorum Lenckner, München 1998, p. 411 (p. 415).

[22] Directive 2005/35/EC, OJ 2005 L 255/11. Cf. also recital no. 3 of the Directive 2008/99/EC, OJ 2008 L 328/28.

[23] The Council's Conclusions (Council Document No. 16542/2/09, p. 8.) on model provisions guiding its criminal law deliberations, which are not legally binding, also indicate the difference between administrative and criminal offences at the European level by explicitly distinguishing between "penalties that do not necessarily have to be criminal" and "criminal law provisions".

[24] Inter alia *Pohl*, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2006, pp. 213 et seq.; *Hefendehl*, ZIS 2006, pp. 161 et seqq.; *Kaiafa-Gbandi*, ZIS 2006, .p. 521 (pp. 523 et seq.); see also *Dawes/Lynskey*, Common Market Law Review (CMLR), Vol. 45 (2008), pp. 131 et seq.; *Vervaele*, in: Liber Amicorum Tiedemann, Cologne et al. 2008, pp. 1353, 1361 et seq., provides an insightful overview of the inter-institutional wars that were fought prior to the respective rulings of the ECJ; for further references cf. *Satzger*, Internationales und Europäisches Strafrecht, 5th ed., Baden-Baden 2011, § 9 margin no. 41.

[25] *ECJ*, case C-176/03 (*Commission vs. Council*) [2005] ECR I-7879, margin nos. 38 et seq.: On the basis of the Treaty of Nice, this ruling effectively established a competence of the Union to approximate national criminal laws which was broader in scope than the corresponding competence provision embodied expressis verbis in the Lisbon Treaty (Article 83(2) TFEU). As *Satzger* (fn. 24), § 9 margin no. 39, points out, pursuant to the ECJ case-law, the Treaty of Lisbon did not further the integration in this regard but consequently led to narrowing the scope of this previously existing competence. See also *Skouris*, EuCLR 2011, pp. 108 et seq., defending the ruling by the ECJ.

[26] Directive 2008/99/EC, OJ 2008 L 328/28.

[27] Advocate General *Colomor, Commission vs. Council* (fn. 20), I-7879, margin nos. 38 et seq. Cf. also Opinion of Advocate General *Colomer*, Case C-387/97 (*Commission vs. Council*) [2000] ECR I-5047, margin nos. 38 et seq. and Opinion of Advocate General *Mazak*, Case-440/05 (*Ship-source pollution*) [2007] ECR I-9100, margin nos. 67 et seq.

[28] Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ 2008 L 210/1, and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA, OJ 2008 L 210/12, hereinafter together referred to as the "Prüm Decisions". The Prüm Decisions incorporated the so-called Prüm Treaty (UNTS I-46562) into the legal framework of the European Union. See infra II.1.

[29] Art. 12 of Council Decision 2008/615/JHA (fn. 28).

b) A coherent interpretation of the term "criminal offence"

aa) The term "criminal offence" in other Treaty provisions

Other Treaty provisions may help to interpret the term "criminal offence" pursuant to Article 87(1) TFEU – namely Article 83 TFEU. Article 83(1) TFEU embodies a Union competence to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension (…). Article 83(2) TFEU provides a competence for establishing minimum rules with regard to the definition of criminal offences and sanctions in the area concerned 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. Both provisions have to be applied restrictively and the term "criminal offence" needs to be confined to truly criminal offences. More than any other field of law, criminal law is formed and strongly influenced by the traditions, moral beliefs and social circumstances of the Member States' societies[30] and reflects their national identities. Matters involving criminal law are therefore closely interwoven with the principle of democratic self-determination[31] in European societies and a Member State's sovereignty[32]. According to Article 4(2) TEU, the Union is obliged to respect these national identities of its Member States.

One may argue that administrative and criminal offences are part of the same criminal justice system (in a broader sense) of a Member State since a Member State's decision to opt for either of the two also reflects the national criminal law traditions, moral beliefs and social circumstances. As regards Article 83 TFEU, one may choose to apply a broad notion to the term "criminal offence" and still limit the scope by a restrictive interpretation of the terms "particularly serious crime with a cross-border dimension (…)" in Article 83(1) or "essential" in Article 83(2).[33] This approach, however, is not convincing, since European law did and continues to distinguish between administrative and criminal offences at the national level.[34] Prior to the entry into force of the Lisbon Treaty, this was stressed by the institutional ("pillar") structure of the Union.

bb) Implications for Article 87 TFEU

A restrictive interpretation of the term "criminal offence" in Article 83 TFEU does not necessarily have to have implications on other provisions of the Treaty. In fact, the wording of Article 83(1) TFEU leaves room for a broader interpretation of the term "criminal offence" in other provisions of the Treaty, as it restricts the scope

[30] For further references cf. *Satzger*, Die Europäisierung des Strafrechts, Cologne et al. 2001, pp. 159 et seqq. This is also acknowledged by Advocate General *Mazak*, *Ship-source pollution* (fn. 27), I-9100, margin no. 68.

[31] *Bundesverfassungsgericht* (BVerfG, German Federal Constitutional Court, Neue Juristische Wochenschrift (NJW) 2009, p. 2267 (p. 2288, margin no. 358) – *Lisbon Treaty*.

[32] Cf. *Satzger* (fn. 17), pp. 157 et seq. and *BVerfG*, *Lisbon Treaty* (fn. 31), p. 2288, margin no. 358.

[33] Cf. *BVerfG*, *Lisbon Treaty* (fn. 31), p. 2288, margin nos. 358 et seq.

[34] See supra I.2.a.

of application to certain kinds of "criminal offences", namely those 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. The restrictive wording of Article 83(1) TFEU does not, however, – *e contrario* – lead to the assumption that the term "criminal offence" refers to just any kind of state punishment. Article 83(2) TFEU also applies to "criminal offences" as well and has to be interpreted restrictively.[35] The identical wordings in Article 83(1) and (2) and Article 87(2) TFEU are therefore strong indicators for a coherent and consistent interpretation of all these provisions. Although articles 83 and 87 TFEU belong to different chapters of title V of the TFEU and do not serve the same purpose, this does not necessitate a different interpretation. Admittedly, Article 87 TFEU, which governs matters of police cooperation, does not concern the approximation of criminal laws and therefore does not infringe on national criminal law systems. However, law enforcement measures remain another sensitive aspect of state sovereignty. This is illustrated by the new Article 72 TFEU[36], the special legislative procedure regarding operational police cooperation embodied in Article 87(3) TFEU, and may be inferred from the history of primary European law. Prior to the entry into force of the Lisbon Treaty, police cooperation was dealt with as a matter of the former third pillar (the previous Article 30 TEU). This also calls for a cautious use of Article 87(2) TFEU as a legal basis and a restrictive interpretation of the term "criminal offence".

3. Meaning of the term "criminal offence"

The need for restrictive interpretation of the term "criminal offence" does not illuminate its meaning. While it is impossible within the scope of this paper to dispose of the ambiguity once and for all, the author would like to point out a way forward to finding a solution. Since criminal justice is so closely linked to the national identities of the Member States, the author considers it appropriate to derive the notion of the term "criminal offence" from a comparison of the national laws.[37] This comparison may not lead to establishing a clear definition but may instead help to characterise the type of criminal offence through several criteria that do not have to be common to all Member States, but which would pertain to at least a considerable number of them. These criteria may include aspects of criminal procedure as well as substantive aspects.

Satzger identified a number of (non-exclusive) common criteria[38] such as the punitive nature of an offence; whether or not a criminal sanction is imposed by an impartial judge; whether or not it is possible to impose a custodial sentence or to convert a fine into a custodial sentence; whether a certain sanction expresses a

[35] See supra I.2.b. i.

[36] Article 72 TFEU reads: „This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

[37] Cf. *Satzger* (fn. 17), pp. 74 et seqq.

[38] *Satzger* (fn. 17), p. 79. Cf. *Böse* (fn. 17), pp. 139 et seq. and pp. 336 et seq.

society's condemnation of a particular conduct by assigning a stigmatising effect[39] or one which shows on a person's criminal record; or, finally, whether the principles of guilt and legality apply. Moreover, it may be interesting to compare the national criminal law systems to determine whether a (criminal) defendant is charged and sentenced by different authorities[40], to examine how the rules of evidence are employed[41] and to look at the severity of an offence in question.

4. Institutional consequences of the interpretation

The interpretation of the term "criminal offence" entails consequences for other provisions of the Treaty. As shown above, there are no compelling reasons for different interpretations pursuant to articles 82 and 83 TFEU on the one hand, and Article 87 TFEU on the other hand. The mere use of a competence provision naturally neither defines its scope nor technically determines its future interpretation. It does, however, set a precedent which cannot be contained by the Commission's resolution to disagree on the legal basis[42] since the Council may continue to amend any proposal by unanimous vote. The ECJ will not necessarily have a say in the matter as it is left entirely to the Commission's discretion whether or not to initiate action for the Directive's annulment pursuant to Article 263 TFEU and the Commission may simply decide not to challenge this Directive for any number of reasons.

As a corollary to the broad interpretation pursued by the Council and the Parliament, Article 83(2) TFEU would then have to be considered a *lex generalis* for the harmonisation of any kind of offences and therefore would also have to cover administrative offences – a consequence definitely not intended by the recent revision of the Treaties. Compared to the legal situation prior to Lisbon, Article 83 (2) TFEU would then result in limiting the Union's competence in this regard.[43] Consequently, the "emergency break" as well as the Member States' right to initiate legislative proceedings would also apply. Any broad interpretation of the term "criminal offence" will define and possibly enlarge the scope of those fields of Union policy to which the United Kingdom, Ireland[44] and Denmark[45] opted out.

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[39] *Tiedemann* (fn. 14), p. 1411 (p. 1416).

[40] A future European Public Prosecutor would have the right to prosecute and to bring to judgment perpetrators of certain "offences" as stipulated in Article 86(2) TFEU. This indicates that for the offences within the European Prosecutor's Competence different authorities are competent for charging and for sentencing a perpetrator. Note that Article 86(2) TFEU does only use the term "offence" instead of "criminal offence".

[41] These aspects are also highlighted by *Lamont*, Oxford Journal of Legal Studies, Vol. 27 (2007), pp. 609 et seq.

[42] See the Commission Statement on the Legal Basis, OJ 2011 L 288/15.

[43] See supra I.2.a and fn. 25.

[44] See Protocol (No. 19) on the Schengen Acquis integrated into the framework of the European Union, OJ 2010 C 83/290, and Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, OJ 2010 C 83/295.

[45] See Protocol (No. 19) (fn. 44) and Protocol (No. 22) on the position of Denmark, OJ 2010 C 83/299.

III. General Concepts of Criminal Law

Besides the matter of the appropriate legal basis, the Directive raises questions with regard to general concepts of criminal (procedural) law. After taking a close look at the proceedings stipulated in the Directive (1.), this paper will elaborate on whether or not they are in line with the principle of guilt (2.), the rights of suspects and witnesses (3.) and the principle of proportionality (4.).

1. The prosecution proceedings stipulated in the Directive

The original proposal tabled by the Commission obliged Member States to set up an electronic information exchange network developed under the auspices of the Commission. If an offence had been committed in a Member State (hereinafter: Member State of the offence) with a vehicle which is registered in another Member State (hereinafter: Member State of registration), a designated competent authority in that State would then have sent the vehicle registration number and information concerning the place and date of the offence to the competent authority in the Member State of the offence. The Member State of registration would then have had to transmit the requested relevant information, which the Member State of the offence could subsequently use to force the holder to either pay a fine or to provide information about the person liable for the offence.[46]

Under the revised Directive, there is no further need for an active exchange of information within the framework of mutual legal assistance. Instead, pursuant to the principle of availability, Article 4 of the Directive provides that Member States mutually grant each other access to their vehicle registration databases with the power to conduct searches on data relating to vehicles and holders of vehicles. The data to be exchanged are specified in Annex I to the Directive and include information such as the make and model of the vehicle as well as the name and address of the holder. In order to avoid technical overlaps, this mechanism builds upon the Prüm Decisions, which established such a framework of information exchange for combating cross-border crime, and the infrastructure put in place for their transposition.[47] After obtaining the relevant vehicle registration data, the Member State of the offence decides pursuant to its own discretion whether or not to initiate follow-up proceedings (Art. 5 (1) of the Directive). Should a Member State choose to prosecute an offence, it shall then inform the holder of the vehicle of the circumstances pursuant to its own (national) law but may use a template information letter (Annex II).

[46] This proceeding is described in articles 3 and 5 of the original proposal (COM(2008) 151 final).

[47] The Directive in its recital no. 10 calls for building this new aspect of exchanging vehicle registration data in existing systems. This refers to the European Vehicle and Driving Licence Information System (Eucaris), which was established by the Member States under the Prüm Framework. An initial explicit reference in the directive was dropped in order to maintain technological flexibility.

2. Nulla poena sine culpa

a) Driver liability vs. holder liability

The Directive may lead to conflicts with the principle of guilt where the Member State of the offence and the Member State of registration have different liability regimes in place. While in some Member States only the driver may be held accountable for traffic offences (driver liability)[48], the holder is (subsidiarily) liable in other Member States (holder liability)[49]. The concept of holder liability, however, puts a strain on the principle of guilt. This principle emanates from the idea of self-determined people who are capable of distinguishing between right from wrong and of deliberately basing their actions on their choice between the two. It requires that no sanction be imposed unless an offender is personally responsible for his (illegal) conduct.[50] The principle of guilt is also a general principle of Union law which can be inferred from the recognition of the presumption of innocence by the European Court of Justice (ECJ)[51] and Article 48(1) of the Charter of Fundamental Rights.[52] Since the holder of the vehicle is not necessarily always the driver, any sanctions imposed on him for offences committed by others need additional justification. From a legal perspective, several approaches are conceivable:

First, the Member State of the offence could choose not to officially prosecute the offender at all. The *Anonymverfügung*[53] (anonymous order), as it is known in Austria, allows the authorities to settle certain minor cases if the holder voluntarily chooses to pay a certain amount. The *Anonymverfügung* does not seek to determine who committed the offence and neither constitutes a sanction nor appears on any official records. Only if the holder chooses not to pay the stated amount will the authorities initiate formal proceedings targeted at identifying the responsible person. Since this approach does not result in a sanction, it does not concern the principle of guilt.

Secondly, it may be possible in some countries – like the United Kingdom[54] – to exclude certain (minor administrative) offences which do not stigmatise perpetrators as much as criminal offences from the scope of application of the principle of guilt. This approach is bound to fail where the principle of guilt is embodied in the constitution and where it applies to all kinds of sanctions, regardless of whether they

[48] Under German law, only the driver may be held liable for traffic offences.

[49] In Italy, besides the driver, the holder of a vehicle is also liable for traffic offences (art. 196 codice della strada).

[50] Cf. *BVerfG*, *Lisbon Treaty* (fn. 31), p. 2288; see also *Roxin*, Strafrecht Allgemeiner Teil, Vol. 1, 4th ed., Munich 2006, p. 851.

[51] *ECJ*, Case C-199/92 (*Hüls AG v Commission*) [1999] ECR 4287; *ECJ*, C-235/92 (*Montecatini Spa*) [1999] ECR 4539.

[52] See the Manifesto on European Criminal Policy, ZIS 2009, pp. 707 et seq.; cf. *Fitzpatrick*, Journal of Criminal Law, Vol. 68 (2004), p. 195 (p. 200) for references suggesting that no conclusions as to the substance may be derived from the presumption of innocence.

[53] § 49 a Verwaltungsstrafgesetz 1991, Austrian Law Gazette (BGBl.) No. 52/1991 as lastly amended by BGBl. I No. 117/2002.

[54] *Strict liability offences* in the UK do not require any "culpable state of mind" and allow punishment in the absence of intention, belief, recklessness or negligence, see *Simons*, The Journal of Criminal Justice & Criminology, Vol. 87 (1997), pp. 1079 et seq.; The ECJ, Case C-326/88 [1990] ECR I-2911 – Hansen, discusses a Danish case of a strict liability criminal offence.

are of a criminal or an administrative nature.[55] It may also give rise to conflicts where the prosecution of an offence would involve the liability of a holder who registered his vehicle in a Member State with driver liability (b).

Thirdly, the holder could be held accountable for certain personal conduct like failing to provide information regarding the identity of the driver.[56] This approach links a subsequent sanction to culpable conduct and does therefore conform to the principle of guilt. Problems may, however, arise with regard to the principle of territoriality (c).

b) Exceptions to the principle of guilt

While the different liability regimes may each conform to the requirements of national (constitutional) law, any cross-border enforcement of traffic offences involving different liability concepts faces problems. The principle of *nulla poena sine culpa* is challenged where two jurisdictions with different approaches toward liability are concerned. This is illustrated by the following example: The holder of a vehicle lives in a Member State with driver liability where he registers his car. He then lends his car to his son. The son drives the car to a Member State with holder liability where he exceeds the speeding limit. May the Member State of the offence prosecute the holder?

The principle of guilt requires that any perpetrator – in this case: the holder of a vehicle – has to be able to foresee that a particular conduct may lead to his liability.[57] One may argue that vehicle holders in a Member State with holder liability may well foresee that the registration of their vehicle may subsequently lead to their (strict) liability for traffic offences. Nevertheless, holder liability violates the principle of guilt, as it holds the holder accountable for conduct for which he is not personally responsible. This is especially true for holders from Member States with driver liability since the applicable exceptions to the principle of guilt in the Member State of the offence do not as such apply in the Member State of registration, and a (potential) strict liability is neither foreseeable nor based on the individual culpable conduct of the holder. Lawmakers in the Council and in the Parliament were aware of this conflict[58] and amended the original Commission initiative. Pursuant to Article 4(2) subparagraph (3), the Member State of the offence shall, under this Directive, use the data obtained in order to establish who is personally liable for road safety related traffic offences. This amendment is welcome and spares the discussion about whether or not the principle of guilt as a legal principle of Union law would

[55] This applies e. g. to Germany and is recognised by the German Federal Constitutional Court in its established case-law, cf. the official court review (BVerfGE) 9, p. 167 (p. 169); BVerfGE 20, p. 323 (p. 333); BVerfGE 58, 159 (pp. 162 et seq.).

[56] See for example § 103 para. 2 Kraftfahrgesetz (Austria), BGBl. No. 267/1967 as lastly amended by BGBl. I No. 6/2008 or § 31 a Straßenverkehrs-Zulassungs-Ordnung (Germany), BGBl. I 1993, p. 1024.

[57] See the Manifesto on European Criminal Policy (fn. 52).

[58] Particularly the German delegation to Council negotiations recalled that the German Federal Constitutional Court had European integration may not lead to punishment without guilt, cf. *BVerfG*, *Lisbon Treaty* (fn. 31), p. 2289.

as such bar any holder liability based on information obtained under a European legal instrument such as the Directive at hand.

c) Incriminating certain conduct of the holder on foreign soil

The article will elaborate briefly on whether the Member State of the offence is permitted under international law to extend a holder's duty to provide information on the driver's identity to cases involving a vehicle that was registered in another Member State. Such a duty may conflict with certain procedural rights – namely, the right against self-incrimination and a witness's right to refuse testimony, which will be addressed below.[59]

From an international law perspective, a state needs a "genuine link" to a particular situation or conduct in order to submit it to its jurisdiction.[60] According to the principle of territoriality, a state may exercise its jurisdiction to prescribe criminal law if the respective conduct or the injury took place on its territory. It is not required that one of the distinct elements of an offence is linked to the territory. Instead, it suffices if an act or omission committed abroad entails effects within the territory of that state.[61] Traffic offences which are committed in a state's territory provide a sufficient link in order to prescribe the obligations of the persons involved.[62] This does not determine the subsequent questions regarding whether the holder may be held liable for certain conduct and if any sanctions may be enforced in other Member States.

Regardless of the principle of territoriality, states may of course agree to extend their jurisdiction to matters on which they are not genuinely linked and waive their right to challenge any possible violations of the principle of territoriality.[63] In the present case, however, the Directive does not lead to this assumption since it does not deal with the (substantive) questions of a holder's responsibilities, but instead focuses exclusively on improving police cooperation.

Such a broad application of the principle of territoriality also touches upon the principle of guilt. It diminishes a citizen's capability to foresee whether or not certain conduct is criminal since he does not only have to take into account the law of the Member State on whose territory he registered his vehicle but also the laws of those Member States to which the car might be driven in the future. A perpetrator may – generally speaking – avoid punishment in some cases by success-

[59] See infra II.2.

[60] In its *Lotus* judgment, the Permanent Court of International Justice (Judgment No. 9, 1927, Series A, No. 10, pp. 18 et seq.) assumed that states were free to extend their jurisdiction to all conceivable matters unless a rule in international law provided otherwise. Today, domestic (BVerfGE 63, p. 343 [margin no. 96]) and international courts (cf. International Court of Justice in the cases of *Nottebohm*, ICJ Reports 1955, pp. 4 et seq., and *Barcelona Traction, Light and Power Company*, ICJ Reports 1970, pp. 3 et seq.) as well as scholars (like *Shaw*, International Law, 5th ed., Cambridge 2003, p. 582) agree that it is in fact the other way round. States need a "genuine link" to a particular case in order to prescribe legal rules.

[61] *Lowe/Staker*, in: Evans, International Law, 3rd edition, Oxford 2010, p. 322.

[62] *Herdegen*, Völkerrecht, 10th ed., Munich 2011, p. 183 argues that states may not impose sanctions simply to enforce a certain conduct in another state.

[63] *Shaw* (fn. 60), p. 584.

fully claiming a mistake of law. Where a holder is charged with failure to identify the driver, the holder is, however, usually informed of his obligations under the law of the Member State of the offence and made aware of the legal consequences.

3. The right to refuse testimony and the right against self-incrimination

Since the Directive only governs the exchange of information, it leaves the subsequent prosecution of the offence to the Member States and to their respective procedural laws including the questions of whether or not to grant a holder the right to remain silent or whether to require the holder to provide information on the driver's identity.

The different approaches towards the obligations and rights of holders in the Member States lead to a factual problem. Since the Member States employ different sets of procedural rules, a conflict arises when the Member State of the offence requires a holder to provide information on the driver, and the Member State of registration grants the holder the right to refuse testimony, especially in cases in which the holder would have to incriminate close relatives or his spouse. By the Member State of the offence initiating a follow-up proceeding, it may be suggestive of a duty to provide information. Especially the non-mandatory[64] use of the information letter attached to the Directive may give this impression as it advises the holder to complete the attached reply form and send it to an indicated address, if the holder does not wish to pay the financial penalty. The model information letter[65] does not inform the recipient holder of any right to refuse testimony or the right against self-incrimination. By enclosing a model letter to the holder, the Member States mutually grant each other the right to virtually sideline their respective procedural laws. The Member States represented in the Council have yet again proven to be unaware of fundamental criminal law principles.

4. The principle of proportionality

Extending the scope of the Directive to offences like drink-driving and driving while under the influence of drugs appears to be questionable in light of the principle of proportionality, which is embodied in Article 5(4) TEU and which stipulates that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Road safety is an objective of the Treaties, as is illustrated by Article 91(1) (c) TFEU. The Directive, however, exceeds what is necessary to attain this objective as far as these two types of offences are concerned. In these cases, the Directive can hardly contribute significant improvements to road safety by facilitating the enforcement of sanctions for road safety related traffic offences through providing the information needed for the investigation of these offences. The exchange of information is particularly useful for

[64] An obligation to use the information letter would clearly exceed the scope of the legal basis. This would no longer be a matter of police cooperation but of cross-border prosecution of offences.

[65] The information letter is attached to the Directive in Annex II, OJ 2011 L 288/10 (11).

offences that are typically detected by automated detection devices. The vehicles are usually not intercepted in these cases and the offenders cannot be caught in the act. This reasoning does not, however, apply to drink-driving and driving while under the influence of drugs since the perpetrators of these offences are typically stopped by police officers, who have all the legal means at their hands to identify the driver on the spot and to gather all other relevant information needed for prosecution. The Directive only serves to straighten out possible mistakes made by police officers. Such a minor, potential and indirect improvement for promoting road safety may not justify European legislation. It seems that the Council and the Parliament preferred to be safe rather than sorry and overlooked the idea that there are limits to their competences.

IV. Conclusions

While the Directive does not define the term "criminal offence", it does set a precedent for future legislative acts in this regard. In advocating a broad definition of the term "criminal offence", both the Council and the Parliament have shown a certain ignorance towards the very particular and sensitive nature of criminal law. The opposition by the Commission is necessary and welcome. It remains, however, uncertain as to whether this opposition will entail any legal consequences or whether the Commission will choose to follow the lead of the Council and the Parliament in the future. Apart from the questions concerning the legal basis, the substance of the Directive does not appear to be well thought-out. As regards the principle of guilt, it may be hoped that the provision mentioned above bars Member States from enforcing holder liability. Criminal lawyers must be aware that the optional use of the information letter may bypass the law of procedure (be it criminal or administrative) of the Member State of registration. In any case, the Directive illustrates the need for firmly upholding criminal law principles in European legislation. Road safety continues to be ensured best – literally and figuratively speaking – if drivers adjust, above all, to the specific conditions of the road.