

## Criminal competence and the choice of legal basis: space in the margins?

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*Can the European Union adopt criminal law measures without using Article 83 TFEU as a legal basis? The answer to this question has profound implications for the limits of EU criminal competence. This paper examines recent judgments of the Court of Justice concerning similar choices of legal basis. These suggest that ancillary criminal competence may exist in the margins of other legal bases.. The flexible legislative framework places ever greater emphasis on political decisionmaking during the EU legislative process.*

### I. Introduction

How may the Union act in the field of criminal law? The European Union has conferred competence. Powers exercised by the Union must be conferred on it by the Treaties.<sup>1</sup> However, the question of what has actually been conferred has remained a major constitutional debate throughout the history of the Union. The outer limits of what may be possible without Treaty change<sup>2</sup> are found in the margins, within case law of the Union's Court of Justice or in the legislative practices that are shaped by its doctrine.

In the context of criminal law, it is not clear that Article 83 TFEU, the Union's express criminal competence, is the only method of introducing EU-level rules of criminal law. The aim of this paper is to present three recent case studies that demonstrate why that is so. Although none directly concern Article 83 TFEU, they raise and decide issues like those that relate to choices between Article 83 and other legal bases.

The debate on EU competence has been especially pronounced in the context of the 'necessary powers' clause now found in Article 352 TFEU and, perhaps a lesser extent, internal market powers now in Article 114 TFEU.<sup>3</sup> However, 'necessary' powers also defined the limits of substantive competence: measures adopted on the basis of environmental powers could include criminal law measures if they were 'necessary'.<sup>4</sup> As a consequence of this type of reasoning, whilst it is generally

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<sup>1</sup> Article 4(1) TEU and Article 5(2) TEU both state i. a. 'competences not conferred upon the Union in the Treaties remain with the Member State'.

<sup>2</sup> See e. g. Opinion 2/94 and Opinion 2/13, both suggesting for different reasons that Treaty change is necessary in order for the Union to accede to the European Convention on Human Rights on particular terms.

<sup>3</sup> E.g. Kieran St Clair Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in: *Evolution of EU Law*, ed. by Paul Craig and Gráinne de Búrca 2011, pp. 85–109.

<sup>4</sup> See e. g. the implied ancillary competence case law before Lisbon in Case C-176/03. *Commission v Council*. (Environmental Crimes). Judgment of the Court (Grand Chamber) of 13 September 2005. ECR [2005] p. I-7879 ECLI:EU:C:2005:542 and Case C-440/05. *Commission of the European Communities v Council of the European*

agreed that the Union only has conferred powers, what has been conferred, and how, is subject to a vigorous debate that ranges beyond a close reading of any particular Treaty articles themselves.<sup>5</sup> That debate continues in the context of criminal law even after the Treaty of Lisbon.<sup>6</sup>

As the case studies below show, there might be overlaps between several plausible alternatives. In those circumstances, the legislature has significant discretion to shape the outcome. Powers can exist concurrently in express legal bases and in implied form elsewhere. Although the Court of Justice has not yet examined the same reasoning in relation to Article 83 TFEU, the lessons are transposable to that context.

## 1. Conferral

The discussion has a broader context in the quest to clarify EU legislative powers. It has, as Craig points out, never been easy to specify an exact division of competence between the EU and Member States.<sup>7</sup> The Union has developed its competences through a mixture of a generally permissive reading of existing powers and constant Treaty revision, encapsulated in the preamble Treaty objective of ‘ever closer union’. A large vein of scholarship describes the spill-over of competences: ancillary elements such as environmental protection may be desirable, and are connected to other legal bases before eventually being codified in their own right in Treaty revision.<sup>8</sup> Some consider the Court may have gone beyond acceptable limits: Dashwood notes ‘[t]here is a school of thought that no opportunity should be missed of moving the Community caravan forward, if necessary by night marches’.<sup>9</sup> The exercise of the internal market and ‘necessary powers’<sup>10</sup> provisions in particular have led to criticisms of ‘competence creep’.<sup>11</sup> The central tenets of

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Union (Ship-source pollution). Judgment of the Court (Grand Chamber) of 23 October 2007. ECR [2007] p. I-9097 ECLI:EU:C:2007:625.

<sup>5</sup> For a summary of this discussion with references, see Anne Weyembergh and Serge de Biolley, ‘Approximation of substantive criminal law: The new institutional and decision-making framework and new types of interaction between EU actors’ in: *Approximation of substantive criminal law in EU: The way forward*, eds. Francesca Galli and Anne Weyembergh 2013.

<sup>6</sup> See e.g. Ester Herlin-Karnell *The Constitutional Dimension of European Criminal Law*, 2012; Petter Asp *The Substantive Criminal Law Competence of the EU*, 2012; Weyembergh and de Biolley, see note 5 above; Jacob Öberg *Limits to EU powers – a case study on individual criminal sanctions for the enforcement of EU law* (PhD Thesis, European University Institute 2014).

<sup>7</sup> Craig *The Lisbon Treaty* 2012 155; in exactly these words, also i.a. Craig, P., ‘Competence: clarity, conferral, containment and consideration’ (2004) 29(3) *ELRev* 323–344 at 323.

<sup>8</sup> See the seminal account in Weiler, Joseph H. H., ‘The Transformation of Europe’ in Weiler 1999 10–101.

<sup>9</sup> Dashwood, Alan, ‘The limits of European Community powers’ (1996) 21(2) *ELRev* 113–128, p. 113, continuing that ‘I do not belong to that school... it is neither wise nor right to treat the Community like a tender plant that must be left alone in the dark to achieve its natural growth’.

<sup>10</sup> Articles 114 TFEU and 352 TFEU.

<sup>11</sup> On Competence creep, see e.g. J. Weiler, ‘“The Transformation of Europe” (1991) 100 *Yale L.J.* 2403, reprinted in Weiler, JHH, *The constitution of Europe* (1999) 10–101; M. Pollack, ‘Creeping Competence: The Expanding Agenda of the European Community’ (1994) 14 *Journal of Public Policy* 95 and later ‘The End of Creeping Competence? EU Policy Making since Maastricht’ *Journal of Common Market Studies* 2000 p 519; A. Stone Sweet, W. Sandholtz and N. Fligstein (eds), *The Institutionalisation of Europe*, 2001; Weatherill, S., *Competence Creep and Competence Control* (2004) *Yearbook of European Law* 1–55 and Weatherill, Stephen, ‘Better Competence Monitoring’, *E. L. Rev.* 2005, 30(1), 23–41.

the competence creep argument are that powers are defined in an ambiguous way that precludes strict constitutional review and that in any event, their exercise is subject to a weak standard of subsidiarity and proportionality review by a generally permissive Court of Justice.<sup>12</sup>

As the Union's catalogue of competences developed, so have calls for clearer legal limits. Rosas and Armati note the situation previous to Lisbon was 'unintelligible, unpredictable and... non-justiciable'.<sup>13</sup> Calls to re-examine competence increased during the Treaty revision process that has led to the present provisions in the TFEU and TEU.<sup>14</sup> One of the main objectives of those Treaty changes was to clarify the Union's competences.<sup>15</sup> Declaration 23 on the future of the Union, attached to the Treaty of Nice,<sup>16</sup> observed that a 'deeper and wider' debate on the future of the union should address four key objectives:

'how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity; the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne; a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning; the role of national parliaments in the European architecture'.<sup>17</sup>

The Laeken declaration on the future of Europe followed this lead,<sup>18</sup> establishing a Convention on the Future of Europe tasked with 'A better division and definition of competence in the European Union', 'Simplification of the Union's instruments', facilitating 'More democracy, transparency and efficiency in the European Union', and the simplification of the treaties in the form of 'a Constitution for European citizens'.<sup>19</sup> Whether the Laeken objectives were successful in the context of the present criminal law powers of the Union is something of an open question.

## 2. The post-Lisbon framework: Article 83 TFEU and its role

Through a process of drafts, referenda and redrafts that lasted from 2001 to late 2007, the Union introduced a new categorization of competences.<sup>20</sup> It also provided a new provision recognizing two types of express substantive criminal compe-

<sup>12</sup> Or, as Weatherill puts it, 'ambiguity of relevant Treaty provisions and prevailing institutional incestuousness within the EU'. Stephen Weatherill, 'Better Competence Monitoring', E. L. Rev. 2005, 30(1), 23-41, at 25.

<sup>13</sup> Rosas and Armati 2012 2nd ed 21.

<sup>14</sup> On the voluminous literature, see i. a. Craig, P., 'Competence: clarity, conferral, containment and consideration' (2004) 29(3) European Law Review 323-344.

<sup>15</sup> See also Bradley, K., Institutional design in the Treaty of Nice. Common Market Law Review 2001, 38(5), 1095-1124.

<sup>16</sup> Official Journal of the European Communities C 080/01, 10 March 2001, pp. 85-86.

<sup>17</sup> Article 5, Declaration 23.

<sup>18</sup> European Council Meeting in Laeken 14-15 December 2001, *Presidency Conclusions* SN 300/1/01 REV 1, Annex I, pp. 18-26. Published also in Bulletin of the European Union, 2001 No 12, pp. 19-23.

<sup>19</sup> See also the summary of concerns in the Secretariat of the European Convention, Praesidium: Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored (2002) CONV 47/02.

<sup>20</sup> Articles 2-6 TFEU. See generally Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis*, 2006 and Jean-Claude Piris *The Lisbon Treaty: A Legal and Political Analysis*, 2010.

tence in the EU treaties. Article 83(1) TFEU lists specific areas<sup>21</sup> in which competence is granted to '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'. Article 83(2) TFEU provides a competence to 'establish 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 harmonization measures'. The Treaties specify, and thus mandate, a special legislative procedure for adding to the Treaty list of specified areas of crime in 83(1) TFEU.<sup>22</sup>

Article 83 TFEU was the product of intense but inconclusive discussion at the Convention. It has been argued elsewhere that the framers' intention to clarify competences and the public evidence on drafting suggest the new provisions could be read as the outer limits of any intent to confer powers.<sup>23</sup> This intent now matters because the Court has changed its doctrine on preparatory works of Treaties, and accepted that the drafters' intent could also be a factor in interpreting EU primary law.<sup>24</sup>

If Article 83 TFEU exhausts Union criminal competence, then the relatively strict requirements for proposals and the significant institutional obstacles to EU criminal law should be studied in detail. Those limits may even satisfy critics of broad Union criminalization powers. For example, express conditions such as the requirement that measures should be 'essential'<sup>25</sup> or that they are 'minimum rules'<sup>26</sup> might require convincing criminological evidence as prerequisite to EU competence. The geographical limits of AFSJ powers,<sup>27</sup> the requirement that Article 83 TFEU use 'directives' rather than 'measures',<sup>28</sup> and the special 'emergency brake procedure' in Article 83(3) TFEU further underline how fragile and limited such a competence is.

<sup>21</sup> Article 83(1) lists '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', with a possibility of adding to this list by unanimous decision of the Council with the consent of the EP.

<sup>22</sup> Article 83(1) third indent requires a unanimous Council decision with EP consent. After the Bundesverfassungsgericht Lisbon judgment, German national law was amended to prohibit the representative in Council from agreeing without a special legislative act: Satzger, Helmut, *International and European Criminal Law*, 2012 at 75.

<sup>23</sup> Samuli Miettinen, 'Implied ancillary criminal competence after Lisbon' in: *European Criminal Law Review* 2013 pp. 194-219.

<sup>24</sup> See Samuli Miettinen & Merita Huomo-Kettunen, 'Travaux to the Treaties: Treasure Trove or Travesty?' paper presented at the European Union Studies Association, March 5th, 2015.

<sup>25</sup> Jacob Öberg, 'Union Regulatory Criminal Law Competence after Lisbon Treaty' (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* pp. 289-318

<sup>26</sup> André Klip, *European Criminal Law: An Integrative Approach* 2009, pp. 154; Hans G Nilsson, 'How to combine minimum rules with maximum legal certainty?' in: *Europarättslig Tidskrift* 2011, pp. 670; André Klip, *European Criminal Law: An Integrative Approach*, 2nd ed. 2012, pp. 67. Describing this debate Asp 2012, see note 7, pp. 111-116; also noted in Valsamis Mitsilegas, 'EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation' in: *EU Security and Justice Law*, eds. Diego Acosta Arcazaro and Cian C Murphy, 2014; Weyembergh and de Biolley, see note 5 above, pp. 14-15.

<sup>27</sup> see Protocols No. 21 and 22 to TFEU concerning the positions of the United Kingdom, Ireland and Denmark.

<sup>28</sup> Compare, for example, with Article 114 TFEU.

Academic opinion in this field has nevertheless generally concurred that a strict demarcation of criminal competence in this way is unrealistic. Mitsilegas has noted 325(4) TFEU could be used independently of Article 83(2).<sup>29</sup> A later review notes discussion in the literature of Article 325, Article 86(2) and 86(4), and even Article 352 as plausible alternatives.<sup>30</sup> Ester Herlin-Karnell envisaged centre of gravity conflicts despite possible claims to *lex specialis*.<sup>31</sup> Petter Asp concluded that whilst Article 325 is the most plausible Article for criminal law protecting the Union's financial interests, even then 'the cleanest and most consistent interpretation' is that criminal competence is exhausted by Articles 82–86 TFEU.<sup>32</sup>

The Commission has already attempted to act outside the boundaries of Article 83. In its proposal for a directive to protect the financial interests of the Union, it argued that criminal measures could be based solely on Article 325 TFEU.<sup>33</sup> As a consequence, it even entertained the possibility of later measures in the form of regulations.<sup>34</sup>

### 3. Choices of legal basis: the legal framework in outline

In the language of EU institutional law, possibilities outside Article 83 TFEU arise because the legislator may be faced with a 'choice of legal basis': a situation where, depending on the overall aims and content of the measure, several alternative powers might be invoked.<sup>35</sup> It is generally agreed that the legislature has a great deal of power in drafting instruments so that a particular outcome is achieved, by emphasizing statements of aims that correspond to the desired legal bases.<sup>36</sup> As a consequence, for example a measure which is founded on an environmental competence will stress the aim of protecting the environment, and subordinate any measures that might otherwise look as if they fall within some other competence, to those aims. Thus, the appropriate choice is in practice determined by the text of the instrument.<sup>37</sup>

<sup>29</sup> Valsamis Mitsilegas, *EU Criminal Law* 2009, pp. 108–109.

<sup>30</sup> Valsamis Mitsilegas, 'EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation' in: *EU Security and Justice Law*, eds. Diego Acosta Arcazaro and Cian C Murphy, 2014 pp. 118–121; see also Herlin-Karnell 2012, note 7 above, pp. 62–86; Asp 2012, note 6 above, pp. 138; Rosaria Sicurella, 'Some Reflections on the Need for a General Theory of the Competence of the European Union in Criminal Law' in: *Substantive Criminal Law of the European Union*, ed. by André Klip 2011, pp. 236–237.

<sup>31</sup> Ester Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' in: *European Union Law after the Treaty of Lisbon*, ed. by Andrea Biondi, Piet Eckhout, and Stefanie Ripley 2012, pp. 338–341.

<sup>32</sup> Asp 2012, pp. 153 and 233.

<sup>33</sup> Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM/2012/0363 Final. This was however unanimously opposed by the Council in June 2013, resulting in a change of legal basis to Article 83(2) TFEU.

<sup>34</sup> Commission Staff Working Paper Impact Assessment, SEC/2011/1446 Final, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, pp. 38.

<sup>35</sup> For a restatement of the formal rules, see C-130/10 *Parliament v Council*. Judgment of the Court (Grand Chamber) of 19 July 2012. EU:C:2012:472, paragraphs 42 to 45.

<sup>36</sup> Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide" ', (2011) 12(3) *German Law Journal* 827–862; Mattias Klamert, 'Conflicts of legal basis: no legality and no basis but a bright future under the Lisbon Treaty?' (2010) 35(4) *ELREV* 497.

<sup>37</sup> Case C-490/10 *European Parliament v Council of the European Union (Energy/Environment)*, referring, with approval, to Case C-155/07 *European Parliament v Council of the European Union* [2008] ECR p. I-8103, para 34.

The Court of Justice is uncharacteristically adamant, given what is known today of strategic drafting choices, that the choice of legal basis is divorced from the outcome in terms of procedures and measures. It claims, in essence, that neither it nor the institutions employ consequentialist reasoning.<sup>38</sup> The consequence for criminal law is that proposals with criminal law elements could be founded outside the express powers and thus without the protection of the express safeguards.

The legal rules for determining which legal basis is appropriate for an EU instrument are derived from the case law of the Court of Justice. The Court of Justice tends to regard its formula on the judicial review of choices of legal basis as 'settled case law'. Most of this predates the Lisbon Treaty. First, a legal basis had to be stated for acts with legal effects, at the very least if there was any doubt as to what an instrument was based on.<sup>39</sup> The choice of legal basis was to be based on 'objective factors amenable to judicial review, which include the aim and content of that measure'.<sup>40</sup> The legal basis of similar previous measures, with similar characteristics was irrelevant.<sup>41</sup> It is also irrelevant that the measures might be valid in light of the treaty provisions in force at the time of the judgment; the relevant temporal context is that of the measures in force during its adoption.<sup>42</sup> The most specific legal basis in the Treaty has to be used: 'where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision'.<sup>43</sup> However, 'If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component'.<sup>44</sup>

This last point is the essence of the cases examined below. A single legal basis is often appropriate, and therefore, no supplementary (but possibly more specific) legal basis must be invoked. Procedural rules will often differ and therefore prevent such a combination.<sup>45</sup> Therefore even if the 'main aim' approach was not the preferred solution, it may be forced because it is difficult to combine Article 83 TFEU legal bases with others outside the AFSJ.<sup>46</sup>

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<sup>38</sup> Case C-130/10 *European Parliament v Council of the European Union* at para 79, denying the EP voting rights as a factor in decision-making.

<sup>39</sup> Case C-370/07 *Commission of the European Communities v Council of the European Union (CITES)* [2009] ECR p. I-8917. See also Case C-45/86 *Commission of the European Communities v Council of the European Communities* [1987] ECR p. 1493 paras 8-9, where 'having regard to' particular objectives was too vague to constitute a statement of legal basis.

<sup>40</sup> Case C-155/07 *European Parliament v Council of the European Union (EIB Guarantees)* [2008] ECR p. I-8103 at 34, with citations.

<sup>41</sup> *Ibid.*

<sup>42</sup> E.g. Case C-403/05 *European Parliament v Commission of the European Communities* [2007] ECR p. I-9045 at 81.

<sup>43</sup> Case C-155/07 *EIB Guarantees* at para 34.

<sup>44</sup> Case C-155/07 *EIB Guarantees* at para 35.

<sup>45</sup> Case C-155/07 *EIB Guarantees* at para 37.

<sup>46</sup> On procedural incompatibilities and their inconsistent treatment in the case law, see Samuli Miettinen, *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era*, 2015, 422-493.

## II. Three ‘choices’ under judicial scrutiny

Three cases below show that it is possible to identify annex competences in the margins of various legal bases. In each, the institutions disagree where in the Union’s competences a particular power falls. Is an information exchange system on road traffic offences a transport policy question or a measure of police cooperation? Is a convention on conditional access devices completely within the common commercial policy, even though it introduces new criminal cooperation elements? Can a non-legislative common foreign and security policy instrument include rules on the transfer of suspected pirates to a third country? The solution in each of the judgments is to consider those elements ancillary to a main aim, with the result that a legal basis outside the AFSJ is approved by the Court of Justice.

### 1. Transfer of information on road traffic offences: transport policy or police cooperation?

Is the establishment of a system for exchanging information on road traffic offences a measure of police cooperation? If you said yes, you may be surprised by the judgment in *Road Traffic Offence Information Exchange*,<sup>47</sup> delivered in May 2014. Here, the Court of Justice came to the conclusion that such a system could be established as a part of the Union’s transport policy, even though similar rules might also fall within the police cooperation provisions. The Commission had originally proposed a directive – what it saw as a road transport measure – in 2008. As negotiations progressed, various elements of the proposal changed. One of these was the legal basis itself: the Council claimed that rather than road traffic, the proposal as adopted was in fact a police cooperation measure, and insisted on that legal basis being cited. This basis was then successfully challenged before the European Court of Justice.

Article 87(1) permits The Union to ‘establish police cooperation involving all the Member States’ competent authorities, including police, customs and other specialized law enforcement services in relation to the prevention, detection and investigation of criminal offences. Article 87(2) provides that for these purposes, ‘the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning: (a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection; (c) common investigative techniques in relation to the detection of serious forms of organised crime.’ The alternative legal basis proposed by the Commission, Article 91(1)(c) TFEU allows ‘measures to improve transport safety...’. Its predecessor, Article 71(1)(c), was suggested as the legal basis in the original 2008

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<sup>47</sup> Case C-43/12 European Commission v European Parliament and Council of the European Union (Cross-border exchange of information on road safety related traffic offences), Judgment of the Court (Grand Chamber) of 6 May 2014.

Commission proposal.<sup>48</sup> The Commission claimed that since the measure concerns administrative as well as criminal offences, the proper legal basis is Article 91(1) TFEU. 'The purpose of the directive is to improve road safety, which is one of the common transport policy areas expressly provided for in Article 91(1)(c)'.<sup>49</sup>

Fitting these textual provisions was a key task for both the Commission and the Council during the legislative process.<sup>50</sup> The Commission proposal suggested that enforcement was an element that contributed to the main aim of ensuring road safety. For this reason, offences which were particularly connected to safety issues were targeted.<sup>51</sup> The proposal text then targeted the exchange of information on four offences 'when the sanction is or includes a financial penalty':<sup>52</sup> (a) speeding; (b) drink-driving; (c) non-use of a seat-belt; (d) failing to stop at a red traffic light.<sup>53</sup> Article 2 of the proposal included loose definitions of these, but essentially categorized them according to behaviour which was sanctioned in national law. Where a vehicle registered in another Member State had committed an 'offence', the directive provided that the state of offence should send details,<sup>54</sup> through an electronic network,<sup>55</sup> to the state of registration, which in turn would provide details of the vehicle and holder.<sup>56</sup> The state of offence would then issue an offence notification directly to the offender,<sup>57</sup> based on a pro forma annexed to the proposed directive. This provided details of the financial penalty, which could either be paid, or a set of questions about the actual driver of the vehicle which could instead be sent in reply.

A Council Legal Service opinion issued soon after the proposal cast doubt on the appropriateness of the transport policy legal basis,<sup>58</sup> and whilst the matter was under examination regularly in 2008 and 2009, little progress was made until the entry into force of the Lisbon Treaty. The same issue was again put to the CLS: was the measure police cooperation or road safety under the TFEU now the appropriate legal basis?<sup>59</sup> The Opinions show the importance of drafting in determining the

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<sup>48</sup> Proposal for a Directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety COM (2008) 0151 final, 19/03/2008, Registered under interinstitutional procedure 2008/0062 (COD) and Council Document 7984/08.

<sup>49</sup> Notice of case lodged before the Court of Justice, OJ 2011 L 288, p. 1.

<sup>50</sup> On the proposal, Langheld, G C., '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' (2012) 2(3) EUCLR 276–290.

<sup>51</sup> Proposal for a Directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety COM (2008) 0151 final, 19/03/2008, Recitals 2–6.

<sup>52</sup> Proposal for a Directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety COM (2008) 0151 final, 19/03/2008 Article 1(2), p. 14.

<sup>53</sup> *Ibid*, Article 1(1) of the proposal.

<sup>54</sup> *Ibid*, Article 3.

<sup>55</sup> *Ibid*, Article 4.

<sup>56</sup> *Ibid*, Article 3.

<sup>57</sup> *Ibid*, Article 5.

<sup>58</sup> Council Document 12015/08, summarised in a presidency report, 13659/08, Brussels, 6 October 2008 during the time that access was *very* 'partial', (a redaction concerned pages 4–10 of the 10-page document in its entirety, and part of page 3). This has now been released in its entirety.

<sup>59</sup> Council Document 14115/10, Opinion of the Legal Service, Brussels, 28 September 2010 (05.10), 'Contribution of the Legal Service', Only partially accessible, but released in its entirety following the delivery of the judgments.



outcome of legal basis challenges. Steps are taken to ensure, or argue, that a particular aim should be emphasized over another: road safety over police cooperation.

The Council Legal Service's first opinion pointed out that there were no Union road safety rules.<sup>60</sup> As a consequence, there were no common rules the enforcement of which necessarily required rules such as the exchange of information foreseen in the proposed directive. Thus, there was nothing in its view to which an ancillary competence could be attached.<sup>61</sup> It had little interest in the distinctions between criminal and administrative enforcement methods: although it argued EU terminology, including criminal law, and criminal procedure, must be given 'an autonomous interpretation'.<sup>62</sup> In fact, it found that 'it cannot be seriously held that the legal character of the proceeding changes, in a general way, from administrative to criminal following the notification of the offence... and that consequently, the Community would have the power to regulate the early stages, but not the subsequent stages of that procedure'.<sup>63</sup> As for the similar information exchange arrangements that existed under Prüm decision, the CLS found that whilst there was an overlap, the proposed directive went further and obliged the State of offence to take action<sup>64</sup> and that in any event it was too early to consider whether the Prüm decision actually fulfilled the objectives proposed by the directive.<sup>65</sup> Ultimately, neither the Transport legal basis 'nor any other provision of that Treaty' gave the EC competence to adopt the measure.<sup>66</sup>

The proposal was then modified in order to take account of these objections. A 2010 Council Legal Service review<sup>67</sup> of the modified proposal compared the transport and police cooperation legal bases after Lisbon as plausible candidates on which to base the directive. By this time, the text no longer concerned notification of offences or the procedure for collecting fines, but rather 'only the aspect regarding cross-border collection of relevant information'.<sup>68</sup> This 'fits exclusively but perfectly within the framework formed by Article 87(2)(a)' TFEU<sup>69</sup> because

'the measure contemplated is intended in practical terms to facilitate detection of perpetrators of offences committed on the territory of a Member State other than

<sup>60</sup> Council Document 12015/08 (the first opinion on the 2008 proposal).

<sup>61</sup> *Ibid.*, point 17, p. 7.

<sup>62</sup> *Ibid.*, point 14, p. 6.

<sup>63</sup> *Ibid.*, point 15, p. 6.

<sup>64</sup> *Ibid.*, point 22, p. 9, considering Council Document 11896/07. See the Prüm decisions, later published as Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime OJ L 210, 6.8.2008, p. 1–11 Date of document: 23/06/2008 and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime OJ 210 of 6.8.2008.

<sup>65</sup> Council Document 12015/08, point 23, page 10.

<sup>66</sup> Council Document 12015/08 at p. 10, point 24.

<sup>67</sup> Council Document 14115/10 Contribution of the Legal Service, Brussels, 28.9.2010.

<sup>68</sup> *Ibid.* at pt 5, p. 3.

<sup>69</sup> *Ibid.* at pt 6, p. 3.

the one in which the vehicle used to commit the offence is registered. The expected impact of its introduction on the improvement of road safety, while forming the main justification for the measure, is neither the substance nor the *immediate aim of the measure*. Article 91 of the TFEU cannot therefore provide an appropriate legal basis...<sup>70</sup>

The Council Legal Service also noted that the purpose of the instrument was ‘the collection of information on offences in order to facilitate their detection and penalisation...’<sup>71</sup> and that the wording of Article 87 ‘shows that whether the authorities... are of an administrative or police character is irrelevant’... because it refers to ‘*all the competent authorities*’.<sup>72</sup> Thus, 87(2)(a) TFEU was ‘the only legal basis appropriate for adoption of the proposed instrument...’.<sup>73</sup>

A significantly altered proposal (as compared to the original) was accepted- but, as the CLS suggested, as a police cooperation measure. This change of legal basis was accompanied by drafting changes that sought to make the measure appear a better fit with its new police cooperation legal basis. Directive 2011/82 inserted a reference to offences in the title which otherwise connected information exchange to traffic safety.<sup>74</sup> Although its recitals still referred to the overarching purpose of increasing road safety,<sup>75</sup> there were now 27 recitals rather than 11, with a greater emphasis on facilitating information exchange. The text itself now concerned eight offence categories: (a) speeding; (b) non-use of a seat-belt; (c) failing to stop at a red traffic light; (d) drink-driving; (e) driving under the influence of drugs; (f) failing to wear a safety helmet; (g) use of a forbidden lane; (h) illegally using a mobile telephone or any other communication devices while driving.<sup>76</sup> The state of registration effectively lost control of information: searches were to be automatically conducted by the state of the offence.<sup>77</sup> Contact with the registered owner was now largely covered by the law of the state of offence; a model information letter was merely optional.<sup>78</sup> A revision of the directive was foreseen, involving the possibility of adding offences, evaluating the effectiveness of the directive in reducing fatalities, assessing needs to strengthen sanctions, harmonize traffic rules, and review the technical features of information exchange.<sup>79</sup> The Commission, unhappy with the changes and in particular the change of legal basis, challenged it before the Court of Justice.

<sup>70</sup> *Ibid* at pt 7, p. 3, emphasis added. Here, it is clear the immediate aim is criminal cooperation.

<sup>71</sup> *Ibid* at pt 8, p. 3.

<sup>72</sup> *Ibid* at pt 9, p. 4, suggesting ‘including’ makes the list of police authorities non-exhaustive: ‘the nature of the activities... is relevant and not their position in Member States’ institutional structure’.

<sup>73</sup> *Ibid* at pt 11, p. 4.

<sup>74</sup> Directive 2011/82/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences [2011] OJ L 288, 5.11.2011, p. 1–15.

<sup>75</sup> *Ibid*, recitals 1–8, 13, 15, 17, 26.

<sup>76</sup> *Ibid*, Article 2, defined in Article 3.

<sup>77</sup> *Ibid*, Article 4.

<sup>78</sup> *Ibid*, Article 5, and the letter in Annex II.

<sup>79</sup> *Ibid*, Article 11.

Advocate Bot approached the issues from the perspective of criminal competence, whereas the Court treated the case as a simple application of the case law on marginal (and thus omitted) legal bases.<sup>80</sup> Although the Court decided contrary to his reasoning and outcome, the Opinion's observations on the 'aim and content' of the directive show that the same facts can lead to very different thinking, and conclusions, as to the key elements determining the correct choice of legal basis.<sup>81</sup>

According to AG Bot, a main legal basis should be chosen as the only legal basis over ancillary bases.<sup>82</sup> However, Bot was unconvinced that this was enough to exclude police cooperation.<sup>83</sup> The directive could in his view be linked to the purpose of maintaining a high level of security declared in Article 67(3) TFEU.<sup>84</sup> Furthermore, police cooperation under Article 87, facilitating enforcement, can also aim at a general objective such as that in the context of transport policy.<sup>85</sup> Here, AG Bot makes an analogy between 83(2) TFEU and 87 TFEU: the division between 83(2) and substantive policies is unclear, but he sees that EU legislation which aims to determine minimum rules and sanctions for road traffic offences seeks to improve transport safety, but nevertheless falls within the scope of Article 83(2).<sup>86</sup> Bot also recalls the pre-Lisbon Framework Decision on the mutual recognition of financial penalties 2005/214/JHA as an example of facilitating road traffic safety.<sup>87</sup> Bot therefore sees a need to examine objectives beyond road traffic safety.<sup>88</sup> Bot considers that the EU legislature took as its point of departure the lack of consequences for traffic infringements which result from the free movement of persons.<sup>89</sup> The use of a system to exchange information is necessary because traffic infringements otherwise are often left unpunished with the vehicle is registered in another state especially where the detection of the offence is automated. (e.g. a traffic camera)<sup>90</sup> Thus, Bot emphasizes the reference in Recital 2 that the Directive 'aims to ensure that even in such cases, the effectiveness of the investigation of road safety related traffic offences should be ensured.'<sup>91</sup> He further relies on recitals 6 and 7 in coming to the conclusion that the main purpose of the directive is to make sanctions for traffic offences more effective by establishing a system for police cooperation which involves the exchange of information.<sup>92</sup> It is this system which Bot considers instrumental in determining the legal basis: Article 87 TFEU should be its legal basis, and therefore that of the directive.<sup>93</sup>

<sup>80</sup> Case C-43/12, Opinion of AG Bot 10.9.2013.

<sup>81</sup> At point 22, AG Bot also makes an express comparison between this case and Article 83(2) issues.

<sup>82</sup> *Ibid* at 15.

<sup>83</sup> *Ibid* at 19.

<sup>84</sup> *Ibid* at 20.

<sup>85</sup> *Ibid* at 21.

<sup>86</sup> *Ibid* at 22.

<sup>87</sup> AG Bot at 23. See also at 67.

<sup>88</sup> AG Bot at 26.

<sup>89</sup> *Ibid* at 27.

<sup>90</sup> *Ibid* at 28.

<sup>91</sup> *Ibid* at 29.

<sup>92</sup> *Ibid* at 30–32.

<sup>93</sup> *Ibid* at 34.

In his examination of the content of the directive, Bot observes that the offences or sanctions have not been harmonized.<sup>94</sup> The ‘only purpose’ of the directive is therefore establishing a system for the information exchange between competent authorities.<sup>95</sup> The directive’s reference to the use of software previously used in the JHA context under 2008/615/JHA demonstrates continuity with other instruments of police cooperation such as the Prüm decision.<sup>96</sup> Bot then reviews case law on what has previously been accepted as part of the JHA police cooperation, namely the data retention legal basis case<sup>97</sup> and the *VIS* case.<sup>98</sup> Although the Court has considered that the legal basis of other instruments should not play a role in the decision to be made on the basis of ‘objective criteria’, it is true that in *Data Retention I*, the Court noted that the internal market legal basis was appropriate since the directive did not seek to harmonise the rights of enforcement authorities to access information.<sup>99</sup> Likewise, in *VIS*, the Court stated that some aims belong as such within police cooperation; in particular, detailed rules which call for the designation of competent authorities permitted to make inquiries in the *VIS* system, and the conditions which concern access to information held for those purposes.<sup>100</sup> These, Bot concludes, suffice to place the directive firmly under Article 87(2) TFEU competence.<sup>101</sup>

Bot’s review of the recitals and text of the directive suggested that, as the first article also expressly proclaimed its objective, ‘This Directive aims to ensure a high level of protection for all road users...’.<sup>102</sup> Recitals referred to the purpose of reducing deaths.<sup>103</sup> Could the legal bases have been combined? As the parties framed the dispute as a choice of alternative legal bases, the question was not considered by AG Bot, instead concluding that the dispute should be settled in favour of police cooperation competence.

In its judgment, the Court of Justice radically departed from the course of action advocated by AG Bot. It advanced a pluralistic view of legal bases, declined to entertain the ring-fencing argument, and concluded that the directive had to be based on the substantive policy grounds rather than ‘more general’ police cooperation provisions. It framed the content of the decision and the direct aim of

<sup>94</sup> AG Bot at 38

<sup>95</sup> *Ibid* at 40

<sup>96</sup> *Ibid* at 44, referring to recitals 2, 9 and 10.

<sup>97</sup> AG Bot at 47. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105, 13.4.2006, p. 54–63

<sup>98</sup> Case C-482/08 *UK v Council (VIS)*.

<sup>99</sup> AG Bot at 47, referring to Case C-301/06 *Ireland v European Parliament and Council of the European Union* [2009] ECR p. I-593 at 80.

<sup>100</sup> AG Bot at 48 referring to Case C-428/08 *Monsanto Technology LLC v Cefetra BV and Others* [2010] ECR p. I-6765 at 51

<sup>101</sup> AG Bot at 49

<sup>102</sup> Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences [2011] OJ L 288, 5.11.2011, p. 1–15, Article 1. AG Bot at 16.

<sup>103</sup> AG Bot at 17, referring to recitals 1, 6, 15 and 26.

facilitating enforcement cooperation as elements that contributed to an underlying ultimate aim of improving road safety, and therefore facilitating the Union's transport policy.

Given the choice of legal basis case law,<sup>104</sup> the Court examined the aim and content of the instrument. Article 1 and Recital 26 of the directive stated an aim of ensuring an aim of protecting road users 'by facilitating the cross-border exchange of information on road safety related traffic offences'.<sup>105</sup> Recitals 1–6 suggested that the aim 'must be pursued precisely by setting up a system of cross-border exchange of information' regardless of how the underlying offences were classified as administrative or criminal.<sup>106</sup> As things stood, traffic offences committed with vehicles from other Member States were not often enforced,<sup>107</sup> so information exchange may increase deterrence, 'thereby helping to reduce the number of casualties due to road traffic accidents'.<sup>108</sup> This led to the conclusion that 'the main aim of Directive 2011/82 is to improve road safety', and therefore a matter of EU transport policy:<sup>109</sup> the 'precise aim' of the information exchange system is to enable the EU to pursue road safety goals.<sup>110</sup>

The Court's examination of the content of the directive leads to the same conclusion. Article 2 creates an exchange system based on offenses loosely defined in Article 3.<sup>111</sup> The directive also provides a procedure for using the system,<sup>112</sup> but then permits the Member State of offense to determine how this will be followed up.<sup>113</sup> If it does follow this up, the directive provides a single form letter of information to be sent to the suspect.<sup>114</sup> The implementation report required in the directive requires measuring the directive's effect on fatalities, considering the possibility of EU road safety guidelines, and examine whether traffic rules are harmonized, perhaps implying that the report is to be focused on road safety goals rather than enforcement as an end in itself.<sup>115</sup> Thus, content of the provisions 'confirms that the system for the exchange of information between the competent authorities of the Member States set up by the directive provides the means of pursuing the objective of improving road safety...'.<sup>116</sup> Having concluded that the aim and content of the directive, or at least the parts cited by the Court, are

<sup>104</sup> At 29–30, citing objective factors (Case C–411/06 *Commission of the European Communities v European Parliament and Council of the European Union* [2008] ECR p. I–2577 at 45 and Case C–130/10 *European Parliament v Council of the European Union* at 42); and the rules on twofold purposes requiring a single basis if it is based on a main or predominant purpose (Case C–137/12 *European Commission v Council of the European Union* at 53).

<sup>105</sup> Case C–43/12, Judgment of the Court of Justice, at 32.

<sup>106</sup> *Ibid* at 33.

<sup>107</sup> *Ibid* at 34.

<sup>108</sup> *Ibid* at 35, citing recital 7.

<sup>109</sup> Case C–43/12, Judgment of the Court of Justice 36.

<sup>110</sup> *Ibid* at 37.

<sup>111</sup> *Ibid* at 38.

<sup>112</sup> Article 4, cited in Case C–43/12 at 39.

<sup>113</sup> Case C–43/12, Judgment of the Court of Justice at 40.

<sup>114</sup> *Ibid* at, referring to Article 5.

<sup>115</sup> Case C–43/12, Judgment of the Court of Justice at 41.

<sup>116</sup> *Ibid* at 42.

pursuing the objective of improving road safety (it is notable there was no balancing exercise here), it was already established that measures to improve transport safety were within the scope of transport policy.<sup>117</sup>

The Court then followed with a brief dismissal of counterarguments. First, in response to the claim that the instrument could equally have been adopted on the basis of the Police cooperation provisions of the treaty, the Court quotes the text of article 87(1) TFEU and its predecessor, 30(1)(a) TEU: cooperation is permitted 'in relation to the prevention, detection and investigation of *criminal* offences'.<sup>118</sup> Their context of the objective in the AFSJ objectives in article 67 TFEU was also noted.<sup>119</sup> In light of these provisions the aim and content of the directive 'is not directly linked to the objectives referred to' in Article 67 TFEU,<sup>120</sup> and could not validly be adopted on the basis of 87(2) TFEU.<sup>121</sup>

The judgment raises some interesting parallels with ancillary criminal competence in Article 83(2) TFEU. A great deal of emphasis was placed on the underlying purposes found in the pursuit of substantive policies. The directive facilitated measures that could, but did not have to, lead to criminal prosecutions. Could an analogy be constructed between this case, and the use of a main (policy) legal basis to justify similar cooperation in the context of regulatory measures that potentially involve both civil and criminal actions? The heavy emphasis on underlying aims could perhaps be transposed to the use of Article 83(2).

## 2. Conditional Access Convention: Common Commercial Policy or implied external AFSJ competence?

The judgment in the *Conditional Access Convention* case concerns many similar legal issues relevant to EU criminal competence.<sup>122</sup> The Commission argues that the Union's involvement in the Conditional Access Convention was entirely a matter of Common Commercial Policy, and that it should therefore have exclusive competence. Instead, the Council passes a decision involving mixed agreement because particular provisions in the proposed agreement had clear criminal procedure implications, and had they not already been internally implemented in the Union. When the Commission challenges this approach before the Court of Justice, the Court finds that new provisions required by the Council of Europe Convention on Conditional Access<sup>123</sup> can be included as ancillary elements of an

<sup>117</sup> *Ibid* at 43–44, citing in 43 Joined cases C–184/02 and C–223/02 *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* [2004] ECR p. I–7789, para 30 – not observing the fact that in the interim, the Lisbon Treaty communitarised the third pillar, thus placing this on an equal footing with former first pillar transport policy. Previously, 47 EU would have led to the primacy of a transport policy aim.

<sup>118</sup> Case C–43/12, Judgment of the Court of Justice at 47, emphasis added.

<sup>119</sup> *Ibid* at 48; citing para 2 and para 3 of the Article 67.

<sup>120</sup> Case C–43/12 at 49.

<sup>121</sup> Case C–43/12 at 50.

<sup>122</sup> Case C–137/12 *European Commission v Council of the European Union* (Conditional Access Convention), Judgment of the Court (Grand Chamber) of 22 October 2013.

<sup>123</sup> Council of Europe Convention on Conditional Access, 24 January 2001.

instrument founded on the Common Commercial Policy legal basis and do not require the agreement of the Member States in a mixed agreement.

In 1998, the EU legislature passed Directive 98/84/EC on conditional access. This was based on Articles 57(2), 66 and 100 a, equivalents of which are now found in Articles 53(2), 62 and 114 TFEU.<sup>124</sup> The directive was much like other prohibitions then based on internal market legal bases: It established a protected internal market interest; in this case services protected by conditional access,<sup>125</sup> and then required member States to 'prohibit' activities that infringed on the protected interest. The text was careful not to expressly require criminal sanctions for infringing activities, instead requiring 'effective, dissuasive and proportionate' sanctions.<sup>126</sup> The Directive also included a clear internal market provision protecting the free movement of protected services and conditional access devices.<sup>127</sup> As implementation reports from 2003<sup>128</sup> and 2008<sup>129</sup> show, the directive's lack of strong criminal law protection was not on its own seen as problematic.

In 1999, the Council was authorized to participate in negotiations for a Council of Europe convention on the same matter.<sup>130</sup> The content of the Convention that was eventually agreed was very similar to the Directive. It did not absolutely require criminal sanctions.<sup>131</sup> However, it contained two articles which went beyond the Conditional Access Directive: Article 6 of the Convention required confiscation measures, and Article 8 required 'the widest measure of cooperation in investigations and judicial proceedings relating to criminal or administrative offences'. These alone raised the question of whether the Union had implied external competence on the basis of an exercise of internal competence.<sup>132</sup> After all, the predicate measure did not contain references to confiscation or police cooperation. Since

<sup>124</sup> The reference to Article 57(2) appears to be a mistake in the original. This is now 53(2), and unchanged, speaks about abolishing restrictions for the medical and allied pharmaceutical professions. If the post-Amsterdam 57 (2) EC was meant (capital), then it should have been 73 c.

<sup>125</sup> Directive 98/84/EC Article 2.

<sup>126</sup> *Ibid* Article 5(1).

<sup>127</sup> *Ibid* Article 3.

<sup>128</sup> COM/2003/0198 final 'On the legal protection of electronic pay services – Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, and consisting of, conditional access' p. 12 noting that all but two Member States already imposed criminal sanctions for infringements.

<sup>129</sup> Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Second Report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, p.5.

<sup>130</sup> Council Document ST 9556 1999 INIT, Adoption of a Council Decision authorising the Commission to participate in the negotiation, within the competent bodies of the Council of Europe, of a draft Convention on the legal protection of services based on, or consisting of, conditional access, 24.6.21999, and ST 9556 1999 COR 1, Adoption of a Council Decision authorising the Commission to participate in the negotiation, within the competent bodies of the Council of Europe, of a draft Convention on the legal protection of services based on, or consisting of, conditional access, 06-07-1999.

<sup>131</sup> Article 5 of the Directive provided for punishment by 'criminal, administrative or other sanctions'.

<sup>132</sup> Article 216(2) TFEU, previously the doctrine in Case C-22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR p. 263. See AG Kokott's opinion at [44-45] and [112]; Kokott was not sure whether 216(2) should be the *only* legal base to be cited where external competence was derived from a substantive provision.

these provisions were not part of the internal market instrument, this may have meant those elements of external competence remained with the Member States and the agreement was thus mixed. This was a premise of the legislative text.<sup>133</sup>

The Court of Justice considered the Convention was not part of an implied external competence. Instead, although it was similar to an established internal market measure, it was entirely part of the Union's Common Commercial Policy under Article 207(4) TFEU. This, in turn, prevents Member States from participating: the competence to conclude the agreement is exclusive to the Union. The judgment also confirms that at least in this field, confiscation measures and police cooperation can be part of an ancillary competence. Measures that might, on their own, be subject to the safeguards in Title V, can be included as ancillary elements of a package based on another legal basis.<sup>134</sup>

In practice, Member State implementing measures impose criminal measures even where they oppose being forced to do so by the Union. The Commission's 2008 report on its implementation suggested a wide range of financial penalties was supplemented by penalties involving the deprivation of liberty.<sup>135</sup> Nevertheless, compulsory use of confiscation and criminal cooperation remains controversial. Controversy surrounding the broader criminalization of intellectual property infringements is further underlined by the rejection of proposals to criminalise infringements of intellectual property rights at EU level<sup>136</sup> as well as the EP vote pre-empting EU participation in the ACTA agreement.<sup>137</sup>

The Court examines the predominant purpose of the Convention. An EU act falls within Common Commercial policy 'if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.'<sup>138</sup> It is not enough that it merely has implications for international trade. The convention's main purpose was to extend the protection of an internal market directive abroad: by authorising the signing of the Convention on behalf of the European Union, is intended to introduce similar protection in European non-member countries, in order to promote the supply of such services to those States by EU service providers',<sup>139</sup> therefore legitimately

<sup>133</sup> Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access OJ L 336, 20.12.2011, Recital 6.

<sup>134</sup> See also the Opinion of AG Kokott at 80 and 82, noting three Member States' arguments to this effect, and compare with the Opinion in C-13/07.

<sup>135</sup> Commission Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Final evaluation of the "Youth" Community action programme (2000-2006) and of the Community action programme to promote bodies active at European level in the field of youth (2004-2006) /★ COM/2008/0398 final ★/ Date of document: 26/06/2008, p. 5; See also the Staff Working Document SEC(2008) 2506 p.

<sup>136</sup> See the proposals in COM(2005) 276-1 and COM(2005) 276-2.

<sup>137</sup> European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America (12195/2011 – C7-0027/2012 – 2011/0167 (NLE)), 4.7.2012.

<sup>138</sup> Case C-137/12, judgment of the Court at 57

<sup>139</sup> *Ibid* at 64.



linking it to the CCP.<sup>140</sup> Bans on illicit devices support this purpose:<sup>141</sup> the provisions of Articles 6 and 8 which were not already part of the directive 'are intended generally to ensure effective legal protection for conditional access services'.<sup>142</sup> The objective of improving sanctions is 'purely incidental to the primary objective of the contested decision'.<sup>143</sup>

This judgment considers the Protocols governing AFSJ opt-outs as procedural provisions from the perspective of choice of legal basis case law, not factors affecting the vertical division of competences.<sup>144</sup> Thus, when the legal basis is Article 207 TFEU, the protocols simply do not apply, regardless of whether there might be marginal or ancillary provisions to this effect. However, the judgment could be read as an even broader endorsement of implied ancillary criminal competence: The Court of Justice characterized the contested provisions as seeking to improve the conditions for the functioning of the internal market, and in this context expressly referred to Article 114 TFEU rather than police cooperation.<sup>145</sup> The outcome of this reasoning is that internal competence might be expanded to the opt-in states and Denmark.<sup>146</sup>

Police and criminal cooperation provisions in the Convention are confirmed as ancillary to a main aim, and therefore an appropriate legal basis outside the AFSJ. The Court comes to the conclusion that the Conditional Access Convention has a main purpose founded related to international trade: it primarily exports the Union's regulatory standard in Directive 98/84 in order to promote the Union's export of services.<sup>147</sup> The Convention contains a clause retaining the mutual relations of EU member states, and does not primarily seek to approximate internal market rules. However, this clause is not a complete exemption: the EU's internal rules could be affected 'in so far as there is no Community rule governing the particular subject...'.<sup>148</sup> This could be said of the two additional provisions in Articles 6 and 8, which now impose previously unharmonized criminal cooperation provisions also on EU Member States. Thus, the only two rules which accession will alter are not primarily trade-focused, but enforcement-focused. However, these are characterised as ancillary to the main commercial policy aims: 'those provisions are intended generally to ensure effective legal

<sup>140</sup> *Ibid* at 65.

<sup>141</sup> *Ibid* at 69, citing a ban on the export of illicit devices to the European Union concerns the defence of the European Union's global interests and falls, by its very nature, within the ambit of the common commercial policy (see, to that effect, Opinion 1/75 of 11 November 1975 ECR 1335 and 1364; Opinion 1/94 of 15 November 1994 ECR I-5267, paras 55, 63 and 71; and Case C-94/03 *Commission of the European Communities v Council of the European Union* [2006] ECR p. I-1, paras 46, 47 and 49).

<sup>142</sup> Case C-137/12, Judgment of the Court at 70.

<sup>143</sup> *Ibid* at 71.

<sup>144</sup> *Ibid* at 73-75.

<sup>145</sup> *Ibid* at 76.

<sup>146</sup> See, by way of contrast, the contrary clause in Article 207(6) TFEU: Article 207(6) TFEU exercise of the external competence 'shall not affect the delimitation of competences between the Union and the Member States'. Markus Krajewski, 'The Reform of the Common Commercial Policy', in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds) *EU Law After Lisbon* (OUP 2012) 292-311 at 304-305.

<sup>147</sup> Case C-137/12, Judgment of the Court of Justice at 65-66.

<sup>148</sup> Conditional Access Convention, Article 11(4).

protection for conditional access services... [and] help to achieve the primary objective....'<sup>149</sup>

Before the judgment, the state of the law was generally that the Union could only exercise externally such competences as it had internally. Ankersmit considers the existence of Directive 98/84 made the conclusion in Conditional Access easier to justify- if there was no pre-existing harmonization, then the instrument would probably have more than a marginal effect on the internal market.<sup>150</sup> Thus, it could, and perhaps should, have been argued that, even if the choice of legal basis case law calling for the ignoring of marginal legal bases could be transposed from internal policies to external policies, this is contrary to long-standing practice of adding substantive policy bases to CCP legal instruments. It is interesting that of the interveners; only Sweden and Poland appeared to support the Council's reading of AFSJ specificity.<sup>151</sup>

Might there be any escape from a broad reading of the judgment in favour of implied AFSJ competences under other legal bases, such as 207 TFEU? First, there are some qualifications in the judgment itself. The Court notes that the contested provisions do not require the sanctions and measures to be exclusively of a criminal-law nature.<sup>152</sup> It does not, in other words, mandate AFSJ measures but only makes them possible. The joined legal basis case law itself points to the possibility of two or more joined legal bases in cases where there are several purposes. Why, then, did the CJEU not grasp at this straw? It might also be argued that the issue of conferral was never properly pleaded in the case, and that it therefore remains unsettled.

### 3. Transfer of suspected pirates to Mauritius: External AFJS action or CFSP?

Criminal law issues can also surface in formally non-legislative CFSP instruments. In 2011, the Council issued a Decision on the signing and conclusion of an agreement between the EU and Mauritius on the conditions by which the EU-led naval force could transfer suspected pirates and seized property, and on the conditions of the suspects after transfer.<sup>153</sup> Here, the debate focuses on the powers of the European Parliament, which differ significantly based on whether the Union's Common Foreign and Security Policy offers the correct legal basis.

The EP argued the agreement could not 'exclusively' relate to the CFSP as required by Article 218(6) if the EP's own rights were to be limited to information.

<sup>149</sup> Case C-137/12 *European Commission v Council of the European Union*, at 70.

<sup>150</sup> Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon: The Daiichi Sankyo and Conditional Access Services Grand Chamber Judgments' 2014 41(2) *Legal Issues of European Integration* 193-210 at 207.

<sup>151</sup> AG Kokott at 80.

<sup>152</sup> Case C-137/12 *Conditional Access Convention*, Judgment of the Court of Justice, at 72.

<sup>153</sup> Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer OJ L 254, 30.9.2011, p. 1-2.

Articles 3 to 7– the majority of the substantive articles of the agreement– facilitated cooperation between the EU and Mauritian authorities in relation to criminal proceedings, and could arguably have been adopted as external agreements based partly on 82(1)(d), 82(2)(c) and 82(2)(a) TFEU,<sup>154</sup> 87(1) and 87(2)(a) TFEU,<sup>155</sup> and 208 TFEU.<sup>156</sup> The titles themselves suggest as much: these provisions were argued to be found in the ‘general provisions’,<sup>157</sup> ‘treatment, prosecution and trial of transferred persons’,<sup>158</sup> ‘death penalty’,<sup>159</sup> ‘records and notifications’,<sup>160</sup> and ‘EU and EUNAVFOR assistance’<sup>161</sup> articles of the agreement. This view was then tested before the Court of Justice.<sup>162</sup>

In order to fall within implied ‘area of freedom, security and justice’ external competence under Article 216 TFEU, AG Bot considered that a ‘direct’ link between external action and furthering the internal AFSJ objectives is required.<sup>163</sup> There was no such ‘sufficient’ link here.<sup>164</sup> As ‘Union action forms part of an international cooperation initiative launched by the Security Council and seeking above all to combat a threat to international peace and security, that action must be adopted within the framework of the CFSP’.<sup>165</sup> The centre of gravity here fell within the CFSP<sup>166</sup> and no development cooperation element could be identified, so the contested instrument was a CFSP measure.<sup>167</sup>

The Court first characterizes the EP claims as accepting that non-CFSP objectives were only ancillary to Article 37 TEU.<sup>168</sup> However, it did not follow from these ancillary aims that, as the EP alleged, the classification of the external competence had to be examined also in the light of the ancillary aims.<sup>169</sup> This is surprising because the text of Article 218(6) refers to EP participation ‘[e]xcept where agreements *relate exclusively to the common foreign and security policy*...’.<sup>170</sup> In other words, whilst the ancillary aims doctrine is crucial to a choice of a main substantive legal basis, even a small incidental AFSJ element should, on the basis of the CFSP competence rules, involve the EP.<sup>171</sup> The Court justifies its ruling on the

<sup>154</sup> Case C-658/11 *Parliament v Council (Transfer of Pirates to Mauritius)* 26, as regards admissibility of evidence, individual rights and aspects of proceedings.

<sup>155</sup> *Ibid* at 27, as regards data processing

<sup>156</sup> Development cooperation, since arts 7 and 10(2)(f) foresee financial assistance in the fields of judicial and police activity. Case C-658/11 at para 28.

<sup>157</sup> EU-Mauritius agreement, Article 3.

<sup>158</sup> *Ibid*, Article 4.

<sup>159</sup> *Ibid*, Article 5.

<sup>160</sup> *Ibid*, Article 6.

<sup>161</sup> *Ibid*, Article 7.

<sup>162</sup> Case C-658/11 *European Parliament v Council of the European Union*, judgment of 24.6.2014.

<sup>163</sup> Case C-658/11 *European Parliament v Council of the European Union*, AG Bot 30.1.2014 at 112.

<sup>164</sup> AG Bot at 115.

<sup>165</sup> AG Bot at 114.

<sup>166</sup> CFSP ‘forms the centre of gravity of the Agreement and of the contested decision’ AG Bot at 124.

<sup>167</sup> AG Bot at 130, noting the legal basis Article 37 TEU.

<sup>168</sup> Case C-658/11 *European Parliament v Council of the European Union*, judgment of 24.6.2014 at 45.

<sup>169</sup> Case C-658/11 *European Parliament v Council of the European Union*, judgment of 24.6.2014 at 46–47.

<sup>170</sup> Case C-658/11 at 51, referring to Case C-466/07 *Dietmar Klarenberg v Ferrotron Technologies GmbH* [2009] ECR p. I-803 at 37 and Case C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* at 34

<sup>171</sup> Case C-658/11 at 55, referring to Case C-130/10 *European Parliament v Council of the European Union* at 82; see also para 57.

basis of legal certainty: ‘anchoring the procedural legal basis to the substantive legal basis of a measure... enables the applicable procedure to be determined on the basis of objective criteria that are amenable to judicial review’, and ensures consistency, whereas the EP claim ‘would have the effect of introducing a degree of uncertainty and inconsistency into that choice’.<sup>172</sup> An ‘exclusively’ CFSP measure can apparently contain other elements: the Court did not seriously review the ‘aim and content’ of the measure in the light of claims made as to the proper legal basis of most of its substantive provisions.<sup>173</sup>

### III. The implications of the case law: space in the margins?

Rules that emerged from the Court’s well-known case law on choices of legal bases mean that there is space in the margins of other competences for provisions with criminal law implications. While none of the cases above involve a provision that must necessarily fall within Article 83 TFEU, they all involve choices which sideline AFSJ provisions that are in legally significant ways *like Article 83*. Thus, the lessons drawn from those cases could also apply to choices involving Article 83 TFEU.

Criminal cooperation may be an aspect of another substantive policy like transport policy, so long as the instrument is drafted so that this is the ‘main aim’. They can slip in as features of a common commercial policy measure, or even in the context of measures that should have no legal effects, such as the CFSP instrument in the *Mauritius* case. Article 83 TFEU and the context of the AFSJ provide many important safeguards, but cases like those cited above suggest they might be circumvented. Drafting practice during negotiations for the PFI directive suggests the Council is vigilant, and tends to attempt refocusing such proposals on the AFSJ elements. The cases above however also demonstrate that such efforts will not always be successful.

The Court has even had an opportunity to pontificate on whether criminal law is, in its own right, an issue to consider in the legal bases calculus. Rather than engage in building fences between the criminal and the administrative, as AG Bot invited the Court to do in *Road Traffic Information Exchange*, the Court prevents national solutions from being imported to the EU level.

For the time being, the Union’s criminal law competence remains framed by institutional politics. The Council has, both before and after Lisbon, continued to insist on discrete AFSJ measures in order to ensure that the legal bases of such provisions take account of the peculiarities of that field. When, as in the PFI negotiations, a non-83 TFEU legal basis is proposed, the Council acts to change the legal basis. *Road Traffic Information Exchange* shows that type of redrafting is not always successful. Another tactic is to split instruments at the pre-legislative stage so

<sup>172</sup> Case C-658/11 *European Parliament v Council of the European Union*, judgment of 24.6.2014 at 60.

<sup>173</sup> In something of a judgment of Solomon, the CJEU annulled the act because even the EP’s more limited right to consultation was not respected.

that they contain an obvious AFSJ element and another which contains none. This was the solution taken for example in the context of the MAD/MAR negotiations,<sup>174</sup> and in the context of some external agreements.<sup>175</sup> It remains to be seen how far into the politics of the legislative process the Court of Justice is willing to investigate. Is such a practice, when it seeks to ensure a particular outcome, an abuse of law?<sup>176</sup>

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<sup>174</sup> See e.g. the proposal on Market Abuse, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on criminal sanctions for insider dealing and market manipulation COM/2011/0654 final, and a separate Regulation proposed in COM 2011 651, now Regulation No 596/2014 on market abuse and Directive 2014/57/EU on criminal sanctions for market abuse.

<sup>175</sup> See also in the external relations context the Match fixing proposal at press release, Council Document 9816/13 p. 27.

<sup>176</sup> see e.g. Case C-124/13 *Case European Parliament v Council (Cod Stocks)*, Action brought on 14 March 2013 (pending as of May 2015), and the attempt to plead similar arguments in Joined Cases C-103/12, C-165/12 *Parliament v Council*, judgment of 26 November 2014.