Implied ancillary criminal law competence after Lisbon

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Does the European Union have the competence to enact criminal law without relying on Article 83 of the Treaty on the Functioning of the European Union? An analysis of documents from the Convention on the Future of Europe suggests the provision was intended to be both strictly interpreted and exhaustive. However, the opposite is implied by the Commission's choice of legal basis for a directive on the protection of the financial interests of the Union proposed in 2012. Its original legal basis also implies that the Union could eventually establish directly applicable criminal law. The 2012 proposal has proven nearly as controversial as its 2001-2002 predecessors. Nevertheless, analogous post-Lisbon case law from the Court of Justice of the European Union further supports a broad implied ancillary criminal law competence. This will cause difficulties in some Member States. Several common objections can be identified from a close reading of the Bundesverfassungsgericht Lisbon judgment. The concerns of the German Federal Constitutional Court could be taken into account by the Court of Justice if it selects a more nuanced approach when applying the choice of legal basis rules within the field of EU criminal law.

I. Introduction

In July 2012, the Commission proposed a directive that would, if passed, require Member States to criminalise infringements of the Union's financial interests.[1] This is part of a long quest to ensure sufficient attention is paid to this phenomenon at national level.[2] Over the course of several decades, the Union has developed detailed duties of cooperation,[3] EU institutions[4] and legal instruments[5] in order to curtail fraud against EU financial interests. The idea that fraud against the Union should be criminalized at EU level is difficult to dismiss. However, some of the most controversial proposals to date involving centralisation in the EU have been made

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[1] COM(2012) 363 final, 11. 7. 2012, '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'. The proposal has already been noted in the editorial, 2012 EuCLR pp. 201-202, and *M. Kaiafa-Gbandi*, 'The Commission's Proposal for a Directive on the Fight against Fraud to the Union's Financial Interest by means of Criminal Law' pp. 319-337.

[2] See e. g. *V. Mitsilegas,* EU Criminal Law (Hart, 2009) pp. 65-69.

[3] E.g. Court of Justice of the European Union (CJEU), C-68/88 *Commission v Greece (Greek Maize)* ECR [1989] ECR 2965.

[4] UCLAF/OLAF: see recently, *C. Stefanou, S. White* and *H. Xanthaki*,. Olaf at the Crossroads: Action against EU *Fraud*, 2012.

[5] Convention of 26 July 1995 (OJ C 316, 27. 11. 1995, p. 49) (fraud); First Protocol (OJ C 313, 23. 10. 1996, p. 2) and Convention of 26 May 1997 (OJ C 195, 25. 6. 1997) (corruption); Protocol of 29 November 1996 (OJ C 151, 20. 5. 1997, p. 2) (court interpretation); Second Protocol of 19 June 1997 (OJ C 221, 19. 7. 1997, p. 12) (money laundering). On their implementation, see the Second Commission Report on the Implementation of the Convention for the Protection of the European Communities' financial interests and its protocols, 14. 2. 2008, COM(2008) 77 final .

on this basis.[6] The 2012 proposal will, if passed, set a precedent enabling future use of regulations as instruments of EU criminal law.[7] This is not envisaged in the express criminal competence provision, which calls for directives. The 2012 proposal, unlike EU criminal law instruments thus far, requires minimum penalties.[8] These have historically been opposed by Member States: their compulsory introduction was forbidden by a Declaration to the Treaty of Amsterdam. Thus, the proposal potentially represents some of the final steps towards directly applicable EU criminal law. The choice of legal basis has wide-reaching implications beyond the prospect of directly applicable criminal law. It is hard to envisage how a uniform EU criminal law could be satisfactorily enforced by decentralised institutions.[9] This is not a model which has commended itself to other states. Federal crimes are not often heard in state courts.[10]

Implied ancillary criminal competence, criminal competence based on other substantive provisions in the Treaty such as the competence to protect the environment or transport, was recognized before the Lisbon Treaty by the Court of Justice.[11] Implied ancillary criminal competence was available even if the EU could have passed a third pillar instrument on the basis of an express criminal law competence in the Treaty on European Union. The Treaty of Lisbon entered into force on 1. 12. 2009, merging the separate EC and EU pillars. Article 83.2 establishes express ancillary competence for 'minimum rules with regard to the definition of criminal offences and sanctions' to be established by directives where 'essential to ensure the effective implementation' of an EU policy. Article 83.1 provides express competence in relation to some 'eurocrimes': it calls for directives to be used to establish 'minimum rules concerning the definition of criminal offences and sanctions' in named areas of 'particularly serious crime with a cross-border dimension'. Thus, there is no doubt that even under a restrictive interpretation, the EU possesses a wide, if contingent, range of criminalization powers under express legal bases.

The key question is whether Article 83.2 exhausts implied ancillary criminal competence similar to that previously found under the EC environmental legislation judgments. According to the Commission, ancillary criminal competence can

[6] Final report of Working Group X 'Freedom, Security and Justice' CONV 426/02, p. 20. *J. Vogel*,, 'The European Integrated Criminal Justice System and its Constitutional Framework' 2005 Maastricht Journal of European Criminal Law (MJ) pp. 129-147 at 143, fn.55, citing their continued discussion at the Ministerial Meetings in 2004. See, currently, the proposals for an EU public prosecutor: *K. Ligeti* (ed), Towards a Prosecutor for the European Union Volume I, 2013.

[7] SWD (2012) 195 11. 7. 2012, Commission Staff Working Paper Impact Assessment (Part I) 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. 29 and 39-42.

[8] COM(2012) 363 final, p. 19, article 8. Minimum penalties are also proposed in COM(2013) 42, proposal for a directive of the European parliament and of the council on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, 5. 2. 2013, p.16, article 5 of the proposal.

[9] The reverse is also implied by Article 86.1 TFEU.

[10] See e. g. European Parliament Study: Harmonisation of Criminal Law in the EU, 2010, available at http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=30499 .

[11] CJEU, *Commission/ Council (Environmental legislation litigation)* Case C-176/03 [2005] ECR I-7879, then in relation to transportation policy, CJEU, *Commission/Council (Ship-source pollution)* Case C-440/05 [2007] ECR I-9097, with a key limit on the types and level of penalties, left at margin no 70 to Member States.

be implied by substantive polices, and can overlap with express ancillary competence in Article 83.2 TFEU. It has maintained both before and after the Treaty of Lisbon entered into force that criminal law measures could be taken on the basis of Article 325.4 TFEU alone.[12]

The choice of legal basis matters. The 'ordinary legislative process' is less onerous. Member States do not have recourse to the Article 83.3 'emergency brake'. Subsidiarity control by national parliaments requires more votes than under the AFSJ. Article 325 does not allow AFSJ opt-ins or outs. An instrument would also be binding on those states that could avoid the legal effects of an Article 83 measure. Most importantly, if the choice of 325.4 is retained, future acts may be proposed in the form of directly applicable regulations.

The process leading up to the Lisbon Treaty suggests criminal law competence was intended to be exhaustively regulated under Article 83 alone. All ancillary criminal competence would then be expressly regulated under Article 83.2. Nevertheless, recent judgments of the Court of Justice suggest its choice of legal basis case law applies with few changes after the Lisbon Treaty. A recent judgment accepting implied ancillary competence in the energy sector raises many parallels with implied ancillary criminal competence arguments both before and after Lisbon. If it can be applied by analogy, then implied ancillary competence to invoke criminal law also exists outside the express ancillary competence in Article 83.2.This is unlikely to be accepted by all national constitutional courts, for reasons best brought out in the Bundesverfassungsgericht *Lisbon* judgment.[13]

The Commission attempted a proposal similar to the PFI proposal in 2001. This was unanimously rejected by Member State representatives in Council. The 2012 proposal can be seen as the Commission's attempt to reopen this criminalisation competence battle, without engaging directly in the more controversial discussion of how far that competence can be used. Judging from the response to the 2012 directive proposal, resistance remains high among member States. However, unlike the general tenor of the 2001-2002 discussions, objections are now expressed as more nuanced, technical reasons. Some important statements linked to both this and the 2001 proposal, such as Council Legal Service opinions on legal basis, remain secret. It is unclear how this can be in the public interest.

II. Can implied competence lead to directly applicable EU criminal law?

1. PFI as a test case

The choice of legal basis of the PFI proposal establishes an important precedent. From the perspective of the Union's constitutional arrangements, it is now foresee-

[12] See the 2001-2002 PFI proposals, COM(2001) 272 and COM(2002) 577, discussed below.

[13] BVerfG 2 BvE 2/08, 30. 6. 2009, (hereafter *Lisbon judgment)* available in English at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, discussed in detail below.

able that a regulation could be passed which both established offences and penalties. Under implied competence, it could be drafted in such a way that it is directly applicable.

2. Perceived obstacles to directly applicable criminal law

Four distinct obstacles exist in the path of directly applicable EU criminal law. None seem persuasive. First, the suggestion Article 83 exhausts all EU criminal competence is hard to defend in the light of post-Lisbon case law on choices of legal basis. Secondly, the Treaty no longer contains the key reason for previous claims to this effect, that Article 325.4 TFEU measures should not 'concern the application of national criminal law or the national administration of justice'. Thirdly, Declaration 8 to the Treaty on Amsterdam, which prevented minimum penalties from being harmonized, has been dropped in the new Treaty system. Fourthly, judicial limits to the use of regulations in criminal law have, it is submitted, been misinterpreted as more restrictive than is the case.

a) Choice of legal basis after Lisbon

The Commission has typically proposed broad interpretations of Treaty legal bases. Ancillary competence has been examined under i. a. the Corpus Juris, the 2001 and 2012 directive proposals, and the 2005 and 2007 criminal competence case law. In the period after the environmental crime case, the Commission interpreted that case broadly.[14] Its 2005 Communication on the effects of *Commission/Council* (Case C-176/03) proposed a number of legal bases in the EC treaty for criminal law measures. By then, it had also reversed its restrictive reading of the 2002 revised PFI proposal. As the 2012 directive proposal demonstrates, the Commission retains this view in the post-Lisbon setting.

This conclusion is supported by recent case law of the Court of Justice. In C-490/10 *Parliament/Council,*[15] the Court accepted ancillary competence to collect information under the energy provisions in Article 194 TFEU, to the exclusion of express competences in Articles 337 TFEU and 187 EA. This case raises many of the same issues as ancillary criminal competence outside Article 83, and is discussed further below. Both EU[16] and national judicial authorities[17] have suggested

[14] See the helpful table in the annex to the COM(2005) 583 final/2, 24. 11. 2005, 'Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (case C-176/03 Commission v Council)', pp 7-9, where the Commission laid out tentative plans to recast framework decisions as directives.

[15] CJEU, *Parliament/Council (Energy Information)* Case C-490/10 Judgment of the second chamber 6. 9. 2012, not yet published.

[16] See e. g. Advocate General Mazak in the pre-Lisbon *Commission/Council (Ship-Source Pollution)* C-440/05 (fn.10), margin nos 67-72 and 103-108. Following Mazak's reliance on ECHR definitions of 'criminal charge', criminal competence probably exists also in areas where the Union imposes administrative penalties. Mazak's views on the limits are at least partly obsolete after Lisbon, since penalties are clearly a matter for ancillary criminal competence, at least under 83.2.

[17] BVerfG 2 BvE 2/08, 30. 6. 2009, (hereafter *Lisbon judgment)* available in English at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, discussed in detai below.

criminal law may be a special case. The Court's future judgment on this point, in the context of the post-Lisbon Treaty framework, may be the last remaining legal obstacle.

b) Treaty limits in Articles 280.4 and 135 EC

The second obstacle to a complete criminal law regulation came in the form of the ambiguous limitation in Articles 280.4 EC and 135 EC. These provided that measures on those legal bases 'shall not concern the application of national criminal law or the national administration of justice.'[18] Lisbon removed this express limitation. The 2001-2002 PFI proposals demonstrate that the Commission has never considered this a complete bar, even though Council documents suggest every single Member State disagreed.[19] In the recent proposal, the Commission argues its removal supports ancillary criminal competence. However, the limit was removed by Convention on the Future of Europe in circumstances where it is hard to justify drawing such conclusions.

c) Minimum penalties as Member State reservations?

The post-Lisbon Treaty framework contains no successor to Declaration 8 to the Treaty on Amsterdam.[20] This provided that what became Article 31 TEU, after Lisbon Article 83 TFEU, would not oblige 'a Member State whose legal system does not provide for minimum sentences to adopt them'. The wording of the new express ancillary competence, whilst suggesting that the EU will have had to regulate the matter before imposing criminal sanctions, also expressly provides for 'minimum' rules on penalties, contrary to the outcome of the *Ship-Source Pollution* litigation.[21] The Commission has proposed minima in both the 2012 PFI proposal and the 2013 counterfeiting proposal.[22]

d) X/Rolex

Finally, it is sometimes suggested that some case law of the Court of Justice prevents directly applicable criminal law rules. It is submitted that these arguments fail on the basis of the statement in paragraph 62 the leading case, C-60/02 *X/Rolex*. There, the Court of Justice declined to recognize direct effect. However, this was on the basis of an analogy between the regulation in question and directives: because the provision required Member States to impose penalties in national law, it

[18] See also Article 33 TFEU, where a similar limit in the preceding Article 135 EC has been removed.

[19] Council Document, 10596/03, 18. 6. 2003, p. 5

[20] Declaration on Article K.3(e) of the Treaty on European Union, which reads: 'The Conference agrees that the provisions of Article K.3(e) of the Treaty on European Union shall not have the consequence of obliging a Member State whose legal system does not provide for minimum sentences to adopt them'. Although the declaration is numbered according to the Maastricht system, it was annexed to the Amsterdam Treaty which also renumbered this provision as Article 31 TEU (now 83 TFEU).

[21] CJEU, *Commission/Council (Ship-Source Pollution)* (fn. 11), margin no 70. See also the opinion of AG Mazak, points 103-108, citing i. a. subsidiarity concerns – but not the Declaration 8 to the Amsterdam Treaty.

[22] COM (2013) 42 (fn. 8 above).

was 'possible to transpose… the Court's reasoning in respect of directives'. It has not had the opportunity, as of yet, to consider a criminal law regulation to which this qualification did not apply.

The key to the debate on directly applicable criminal law remains, as before the Lisbon Treaty, on whether a legal basis also exists elsewhere. Is there ancillary criminal competence? If so, can it be invoked without at least joint recourse to Article 83.2?

III. What was intended by Treaty revision? The path of EU criminal law provisions from the Convention on the Future of Europe to Lisbon

It has often been argued that the text of Article 83 TFEU is, or should, be exhaustive. The process how the Convention on the Future of Europe, and its Working Group X on "Freedom, Security and Justice" came to propose the criminal law competences in the Treaty Establishing a Constitution for Europe, supports this claim.[23] The Convention and Working Group provided the text for the Treaty establishing a Constitution for Europe (hereafter CT). Although it was not successfully ratified, this text was adopted, with few amendments, into the AFSJ provisions in the post-Lisbon framework. It is the blueprint on which the present provisions are founded.[24]

Four conclusions emerge from the evidence. First, Declaration 8 attached to the Amsterdam Treaty which precluded harmonizing minimum penalties was omitted without discussion. Secondly, limits in Article 280.4 and 135 EC preventing measures from affecting 'application of national criminal law and the national administration of justice' were removed, but not, as some suggest, in order to facilitate criminal law under those competences. This revision was accepted because criminal law competence was presumed to exist only in express competences now in Article 83 TFEU. Thirdly, at several other stages, the drafting process of the criminal law provisions proceeded on the expressed basis that substantive EU criminal competence would be exhausted by those express provisions now in Articles 83.1 and 83.2 TFEU. Suggestions that implied ancillary criminal competence could be found in legal bases outside the express criminal competence were dismissed on several occasions during the Convention. Fourthly, the choice of directives in those provisions has been material in agreeing to extend EU competence in this way. This was also linked to the ancillary competence question in Article 280.4 EC. The Convention was, it is submitted, convinced of the exclusivity of express criminal competence now in Article 83 TFEU, and that it should only be exercised by directives.

[23] On process, see *J-C. Piris*, The Constitution for Europe: A Legal Analysis, 2006, pp. 38-55. The Court of Justice is not known for considering the *travaux* of Treaties. Therefore, their legal effects are presently developing, at best: *A*, *Arnull,* The European Union and Its Court of Justice, 2nd ed. p. 614-615, also anticipating a change on this point.

[24] *Mitsilegas*, (fn. 2) pp. 36-37.

1. Overview of the Convention proceedings

The convention proceeded on several levels. The presidium, responsible for directing the overall process, also in practice drafted the AFSJ articles. For this purpose, it relied on preliminary work by Working Group X; its final report provided ideas, but not a preliminary draft as such. Not all of the Working Group's views were incorporated, particularly as regards the scope and limits of criminal competence. The Praesidium draft was not substantially amended despite many calls to do so. In fact, every important issue discussed below was proposed for amendment or clarification, but no such amendments followed. Thus, although Working Group X was formally tasked with preparing a draft of new AFSJ provisions, including criminal law competence, its role should be seen as deliberative rather than legislative. So, too, the Convention, which was perhaps too distracted with key institutional issues to pay sufficient attention to the implications of AFSJ redrafting. Working Group X was limited to AFSJ provisions, and could not fully consider the implied ancillary criminal competence. A working group of legal representatives from the EU institutions had a broad remit but was prevented from examining these. No one, it seems, was able to both understand the implications of the whole, and if it raised issues, to express a forceful position.

2. Working Group X

The mandate of the working group concerned at first stepping up, rather than clarifying, cooperation in criminal matters.[25] However, a revised mandate was formally more in line with the Laeken declaration:[26] to explore how the Union could more simply and clearly define EU competence in criminal matters.[27] The revised mandate suggested as criteria '…for example, the transnational dimension of a crime or of its consequences, the effects of existing disparities in national laws on transnational or organised crime, or the need to prosecute certain types of crime through cooperation at Union level…'.[28] Harmonisation of substantive criminal law on the definition of offences, *minimum and maximum* penalties, was suggested 'necessary only to a more limited extent',[29] where mutual recognition would not suffice. Thus, minimum penalties were already on the table at this stage. Whilst the mandate did not specify regulations, it did suggest the WG should 'consider the advantages of a possible use of *some of the legal instruments* developed in Community law'.[30]

[25] CONV 179/02, 9. 7. 2002, 'Working Group on the area of freedom, security and justice': 'What improvements would have to be made to the Treaties in order to promote genuine, full and comprehensive implementation of an area of freedom, security and justice?' Also repeated in CONV 206/02, 19. 7. 2002, 'Working Groups: Second Wave', p. 6.

[26] Declaration 23 on the Future of Europe attached to the Treaty of Nice, Article 5, and the envisaged Laeken Declaration, December 14-15 2001.

[27] CONV 258/02 12. 9. 2002 Mandate of Working Group X "Freedom, Security and Justice", p. 5-6.

[28] CONV 258/02, p. 5.

[29] CONV 258/02, p. 6, emphasis added. The mandate of WG X seemed to ignore Declaration 8.

[30] CONV 258/02, p. 4.

A presidium progress report issued in May 2002 catalogued JHA measures to date and provided some guidelines for future deliberation.[31] It did not mention Declaration 8 in the context of discussing penalties. Instead, it provided a generous reading of the competence provisions. Noting that there was no exhaustive list or cross-border requirement for criminalisation competence, it boldly suggested that '… the Community and the Union may legislate to penalise the infringement of their own rules (for instance, environmental or Community financial legislation can provide for the introduction of criminal penalties in the event of infringement).'[32] The Convention seemed to support the Commission's position on EC ancillary criminal competence, but at the same time asked directly if '[i]n criminal law matters, is it possible to devise a simpler, clearly discernible formulation of EU competence, assigning limited, but precisely defined, competence at European level?'[33] The progress report was surprisingly frank about the political motives of Member State initiatives at EU level. The report therefore called for a clearer division of competences so that the need for EU-level action would have to be demonstrated.[34] Framework decisions' lack of direct effect is coupled with a discussion of the benefits of directly applicable regulations;[35] they were simply not 'effective' enough.[36]

The final report of Working Group X, delivered December 2002, noted that 'according to widespread view, the Treaty could provide that approximation of substantive criminal laws should be carried out in the form of directives (or their successor) only'.[37] The working group proposed the substantive competence which is now present in Article 83 TFEU. One legal basis should be capable of use in two circumstances: serious crimes with cross–border dimensions; and criminalisation powers linked to the exercise of other substantive competences. Protection of the financial interests of the Union was listed in this second category, together with counterfeiting the euro; both were therefore intended at least by WG X to form part of the express ancillary criminal competence.[38]

3. Main proceedings of the Convention

The Convention itself began with a modest framework document.[39] Its structure offers one explanation to the circumstances in which Articles 280.4 and 135 EC were modified. The preliminary draft sketched the structure of the CT but included no detail on the competence then in Article 13 of 'Common foreign and security policy; common defence policy; policy on police matters and crime.' When the

[31] CONV 69/02, 31. 5. 2002, 'Justice and Home Affairs – Progress report and general problems',
[32] CONV 69/02, pp. 4-5, 9.
[33] CONV 69/02, p. 13.
[34] CONV 69/02, p. 9.
[35] CONV 69/02, p. 10.
[36] CONV 69/02, p. 14.
[37] CONV 426/02,2. 12. 2002, 'Final report of Working Group X "Freedom, Security and Justice" ', p.10.
[38] CONV 426/02, p.10, point bb.
[39] CONV 369/02, 28. 10. 2002, 'Preliminary draft Constitutional Treaty'.

draft articles eventually emerged in March 2003,[40] the explanations clarified that 'fraud against the Union's financial interests' was intended to be covered by the express ancillary competence.[41] This, in turn, could only be exercised using 'framework laws', i. e. the equivalent of directives.[42] At this stage, Article 280.4 EC had not yet been considered.

By April 2003, a lengthy list of amendments had been proposed.[43] Although the draft on substantive criminal law did not expressly mention fraud against the Union, some members proposed that European laws, i. e. regulations, should be available since the ancillary competence also covered fraud.[44] A summary of proposed amendments, published in May, suggested that fraud against the Union's interests was considered part of the express ancillary competence.[45]

When the May 2003 draft text emerged, express ancillary competence, now linked to the power to approximate, was also connected with the pre-existence of prior approximation.[46] Thus, ancillary competence, as envisaged by the plenary which adopted these amendments, could only be exercised if the EU could harmonise the field, and *had already done so*.[47] This would ensure that criminalization was truly necessary.[48] Finally, the ancillary competence was to be used following the same legislative procedure as its parent non-criminal competence.[49]

Article 280.4 EC or its successor had not yet been considered by either a working group or a plenary at the stage when the AFSJ provisions were discussed. As a result, the May draft expressly provided that 'This chapter was drafted on the basis of the corresponding articles of the TEC amended in the light of the articles on finances contained in Part One of the Constitution and the conclusions of the discussion circle on the budgetary procedure.'.[50] The same part claimed that paragraph 4 of Article III-317 protecting the financial interests of the Union, formerly Article 280.4 EC, 'has been brought into line with draft Articles 24 et seq. and the draft Title on the area of freedom, security and justice.'[51]

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[40] CONV 614/03, 14. 3. 2003, 'Area of freedom, security and justice – draft Article 31, Part One – draft articles from Part Two'.

[41] CONV 614/03, p. 26.

[42] CONV 614/03, p. 24.

[43] CONV 644/03, 1. 4. 2003 'Summary of proposed amendments regarding the area of freedom, security and justice: Draft Article 31 (Part One) and draft Articles from Part Two'; CONV 644/03 COR 1, 2. 4. 2003.

[44] CONV 644/03 p. 34, amendment 25. Little detail was recorded of the debates in the plenary session which discussed this draft: CONV 677/03, 9. 4. 2003, 'Summary report on the plenary session – Brussels, 3 and 4 April, 2003' p. 7.

[45] CONV 644/1/03 REV 1 7. 5. 2003, 'Summary of proposed amendments regarding the area of freedom, security and justice: Draft Article 31 (Part One) and draft Articles from Part Two' pp. 33-34, on 34 listing a proposed amendment to 'delete the second indent (adding, in most of these amendments, several other areas of crime to the list contained in the first indent, such as environmental crime, fraud and offences against the financial interests of the Union)'.

[46] CONV 727/03, 27. 5. 2003 'Draft sections of Part Three with comments' together with CONV 727/03 cor 1 and cor 2, both 28 .5.2003.

[47] CONV 727/03, p. 32.

[48] 'The legislator must in fact assess whether criminal sanctions prove essential to ensure the effective implementation of the policy;'. CONV 727/03, p. 32.

[49] CONV 727/03, p. 33.

[50] CONV 727/03, p. 97.

[51] CONV 727/03, p. 99.

This is, however, untrue. In the same document, Article II-317(4) proposes that ' A European law or framework law shall establish the necessary measures in the fields of the prevention of and fight against fraud affecting the Union's financial interests with a view to affording effective and equivalent protection in the Member States. It shall be adopted after consultation of the Court of Auditors.'[52] Thus, the proposed successor to Article 280.4 EC, Article III-317 CT, contained no express limit and also allowed the equivalent of regulations. Proposed amendments by legal experts and individual members of the Convention demonstrate that the issues linked to substantive criminalisation were not omitted simply because criminal law could be based on Article 280.4. According to one proposal, consistency with the criminal law provisions required that only directives, or framework laws, should be used to combat fraud.[53] Another proposal was also tabled to reinsert the 280.4 limit.[54]

4. Rejection of key amendments

Two separate reports were also drawn up by a small committee of legal experts nominated by the EU institutions. In the first report, tabled March 2003,[55] Article 280.4 would have allowed 'measures' but prevented those which 'concern the application of national criminal law or the national administration of justice'.[56] This was also the case for customs cooperation.[57] AFSJ measures in this draft were based on TEU provisions, and not considered by the experts as drafting, AFSJ was reserved for the convention. The mandate of the institutions' expert group was later restricted so that its second report did not consider Article 280.4 EC.[58] However, a similar limit was present in the institutions' May draft for customs cooperation.[59]

By June 2003, the Convention was drawing to a close. Many of the provisions on AFSJ seem at this stage to have developed in the strict guidance of the praesidium: Although provisions proposed by institutions, the working group, and amendments proposed by members are all noted, they do not appear to have much impact on the final outcome. The June 12 draft presented by the Convention included a provision on customs cooperation, but, without explanation, omitted the limit in Article 135 EC.[60]

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[52] CONV 727/03, p. 105.

[53] Amendment proposed by *G.M. de Vries* and *T.J.A.M. de Bruijn*, http://european-convention.eu.int/docs/Treaty/pdf/894/Art%20III%20317%20Vries%20EN.pdf.

[54] CONV 821/03, 27. 6. 2003, 'Reactions to draft text CONV 802/03 – Analysis 'p. 20. A similar limit was present in the Institutions' may draft for customs cooperation: CONV 729/03 12. 5. 2003 p. 52; the whole article had simply been omitted from the initial draft document 28 October 2002.

[55] CONV 618/03, 13. 3. 2003, 'Part Two of the Constitution – Report by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission'

[56] CONV 618/03, pp. 128 and 145.

[57] CONV 618/03 pp. 25 and 56, where the legal experts reinserted 135 EC, previously completely missing from the Convention's draft.

[58] CONV 729/03, 12. 5. 2003 'Part Two of the Constitution – Second report by the working party of experts nominated by the Legal Services of the European Parliament, the Council and the Commission' p. 9.

[59] CONV 729/03, p. 52.

[60] CONV 802/03, 12. 6. 2003. 'Draft Constitution, Volume II – Draft revised text of Parts Two, Three and Four', p. 35 'Article III-38 (ex Article 135) : Within the scope of application of the Constitution, a European law or framework law shall establish measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.'

The similar Article 280.4 limit was also absent.[61] Substantive criminal competence in Article III–167.1-2 used the same form of words, now Article 83.1-83.2 TFEU.[62] Despite specific proposals from the institutions and Working Group X, nothing conclusive is recorded from the plenary session concerning these drafts.[63]

In the reactions to this draft,[64] many amendments were reintroduced.[65] According to the analysis of the amendments, the limit previously in 280.4 EC had been removed as 'a result of the provisions concerning an area of freedom, security and justice.'[66] This suggests express ancillary competence was intended to be exhaustive. The presidium's general analysis of the substantive amendment proposals can be read almost as a complaint: 'Only certain Articles, in particular Articles III-163 (immigration), III-166 (judicial cooperation in criminal matters), III-167 (substantive criminal law) and III-170 (European Public Prosecutor) continue to attract a higher number of amendments. On those Articles, Convention members usually resubmit positions contrary to those they adopted at the previous reading.'[67] Nevertheless, this shows considerable unease on those provisions, including the scope of criminalization competence.[68] In the July 2003 draft,[69] no substantive changes were made.[70] Provisions outside the AFSJ on customs and fraud remained without the proposed limit.[71]

5. From the Convention to the Treaty on the Functioning of the European Union

The convention text was the basis of Intergovernmental Conference papers from 2003-2004. A first draft of the present Article 83 TFEU included express criminal competence for 'terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime'. Express ancillary competence to 'establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned 'would be available 'If the approximation of criminal legislation proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'.[72] The successors to Articles 135 EC and 280.4 EC

[61] CONV 802/03 p. 173, calling for 'European laws or framework laws'.
[62] Article 83.1 and 83.2 differ in so far as they do not concern 'European framework law' but directives.
[63] CONV 783/03, 16. 6. 2003, 'Summary report on the plenary session – Brussels, 30 and 31 May 2003' pp. 10-11.
[64] CONV 821/03 27.6 2003 'Reactions to draft text – Analysis' and CONV 821/03 COR 1, 2. 7. 2003.
[65] CONV 821/03, pp. 20 and 161.
[66] CONV 821/03, p. 161.
[67] CONV 821/03, p. 71.
[68] CONV 821/03 pp. 90-91 (substantive criminal law).
[69] CONV 850/03 Draft Treaty establishing a Constitution for Europe, 18. 7. 2003.
[70] CONV 850/03 pp. 138-139.
[71] CONV 850/03 pp. 74, 213.
[72] CIG 4/03, 6. 10. 2003, 'IGC 2003 – Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document' pp.325-326, then labelled Article III-172. Suggestions made (p. 327) were technical and did not concern the scope of criminalisation competence. No change on these points in CIG 4/03 REV 1, 6. 10. 2003. See also the final draft CIG 50/03, ' 2003 IGC – Draft Treaty establishing a Constitution for Europe (following editorial and legal adjustments by the Working Party of IGC Legal Experts) ' 25. 11. 2003 pp.161, 232.

remained without their previous limits.[73] Declaration 8 was sent by the IGC secretariat to a working group of legal experts.[74] However, as the cover note observed, the decision on reissuing any of the declaration was 'by its nature, political. The Working Party of IGC Legal Experts would therefore not be able, from a purely technical point of view, to select those declarations which should be renewed.'[75] Nothing further is recorded on Declaration 8.[76] From this stage until the final outcome in the Lisbon Reform Treaty, no substantive changes were made to any of these provisions.[77] Key changes on substantive criminal law suggested by the CT were simply cut-and-pasted into the draft Lisbon Treaty.[78]

6. Reception of the CT and LT AFSJ provisions

When commentators began to examine the AFSJ provisions, many focused on the specific choices made within this area. It seemed implied that the new provisions, now in Articles 83.1 and 83.2 TFEU, contained all EU criminal competence. *Jean-Claude Piris*, head of the Council's Legal Service at the time of both the CT and LT negotiations, thought the redrafting which ultimately resulted in the TFEU 'results in a more precisely defined scope and therefore a more limited competence for the Union'.[79] He noted the Article 83.1 'exhaustive list of areas' and 'cross-border dimension' requirement significantly limits EU criminal competence, whilst ancillary competence is clarified by the wording in Article 83.2 TFEU that permits only 'minimum rules' if they 'prove essential'. According to *Piris*, Article 280 EC did not allow 'criminal law measures'.[80] He declined to expressly consider whether the removal of its limit led to the opposite conclusion.

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[73] CIG 4/03, pp. 192 and 478. Article III-321 was amended, but not on this point: p. 479.

[74] CIG 47/03, 10. 11. 2003 'IGC 2003 Declarations annexed to the Final Acts of the intergovernmental conferences which adopted the EC and EU Treaties and the Treaties and Acts which amended them' p.109.

[75] CIG 47/03, p.5. Sources present at this and subsequent IGCs suggest this is an accurate reflection of the negotiations.

[76] No equivalent to Declaration 8 could be found in 2004 or 2007, either: CIG 87/04 ADD 2, 6. 8. 2004, 'Declarations to be annexed to the Final Act of the Intergovernmental Conference and the Final Act'; CIG 3/07, 23. 7. 2007, 'IGC 2007 Draft declarations'.

[77] CIG 4/03, 6. 10. 2003, 'IGC 2003 – Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document' pp. 327-327, 478-479; CIG 50/03, 25. 11. 2003, '2003 IGC – Draft Treaty establishing a Constitution for Europe'pp. 102 (no customs cooperation limit), pp. 232 (ex-280(4) EC without a limit). See also CIG 51/03, 25. 11. 2003, 'the Chairman's report', which provides a list of dates when the working party met, p.3; CIG 60/03 ADD 1, 9. 12. 2003, 'IGC 2003 – Intergovernmental Conference (12-13 December 2003) ADDENDUM 1 to the Presidency proposal', pp. 26-27. See also CIG 52/03 ADD 1, 25. 11. 2003,' 'IGC 2003 – Naples Ministerial Conclave: Presidency proposal' p. 20; CIG 73/04, 29. 4. 2004, 'IGC 2003 – Meeting of Focal Points (Dublin, 4 May 2004) working document' 29. 4. 2004 pp.53-54. CIG 75/04 13. 5. 2004, 'IGC 2003 – Discussion at Ministerial Meeting, 17/18 May 2004' pp. 23-24; CIG 86/04 25. 6. 2004 '2003/2004 IGC – Provisional consolidated version of the draft Treaty establishing a Constitution for Europe', pp. 198-199 and 304-305.

[78] CIG 1/1/07 REV 1, 5. 10. 2007 'IGC 2007 Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community' p.53, point 45 removed the qualification on customs cooperation; point 276, p. 143 did the same for Article 280(4) EC; p 34, pt 50 cut-and pasted the provisions: 'Articles 29 to 39 of Title VI of the EU Treaty, which relate to judicial cooperation in criminal matters and to police cooperation, shall be replaced by Articles 61 to 68 and 69 e to 69l of the Treaty on the Functioning of the European Union; they shall be amended as set out in Article 2, points 64, 67 and 68, of this Treaty. The heading of the Title shall be deleted and its number shall become the number of the Title on final provisions.'.

[79] *J-C Piris,* The Lisbon Treaty: A Legal and Political Analysis, 2010 p. 181.

[80] *Piris* (fn. 78) p. 187.

Academic commentary on the post-Lisbon competences also sometimes considered Article 83 exhausts EU criminal competence.[81] This does not seem the prevailing view. *Mitsilegas* has suggested Article 83.2 may not have been sufficient without an additional legal basis, but also noted that the deletion of the 280.4 EC limit might enable 325.4 to be used independently of Article 83.2.[82] *Ester Herlin-Karnell* has envisaged centre of gravity conflicts despite *lex specialis*.[83] *Petter Asp* recently 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.[84] German doctrine cited in the Commission's proposal is likewise broadly positive.[85] However, the strongest evidence of implied ancillary criminal competence is perhaps presented in an analogy from the recent CJEU judgment in *Parliament/Council (Energy / Information)*.

IV. Ancillary implied competence before the Court of Justice: Analogies from Case C-490/10 *Parliament/Council (Energy/Information)*

Moves towards qualified majority and enhanced cooperation in the Lisbon system mean it is now more likely that instruments may be passed. Given less unanimity required at EU level, they will contain more specific obligations.[86] However, given the special legislative process of 83 TFEU and its limits on legal instruments available, it is not significantly less likely that the legal basis of such an instrument might be challenged.[87] National courts and the CJEU may hold opposing views on the extent of EU competence, but only the CJEU is able to declare an EU instrument invalid.[88]

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[81] *S. Peers*, 'EU Criminal Law and the Treaty of Lisbon' 2008 p. 507 et seq. at p. 18: The previous CJEU judgments on ancillary competence are in his view irrelevant 'because the current legal framework would be fundamentally altered by the Treaty of Lisbon in order to introduce a specific legal base dealing precisely with this issue'.

[82] *Mitsilegas* (fn. 2), pp. 108-109.

[83] *E. Herlin-Karnell,* 'EU Competence in Criminal Law after Lisbon' in *A. Biondi, P. Eckhout, and S. Ripley,*. (eds), EU Law after Lisbon, 2012 p. 331et seq., pp. 338-341.

[84] *P. Asp* The Substantive Criminal Law Competence of the EU, 2012, p. 153 and 233.

[85] SWD (2012)195 (fn. 7) p. 27, fn. 96, citing: *Heintschel von Heinegg* in: *Vedder/Heintschel von Heinegg*, Europäisches Unionsrecht, 2012, Art. 325 at para 6; *Satzger* in: *Streinz*, EU-Recht, Kommentar, Second Edition, 2012, Art. 325 at para 21; *Waldhoff* in: *Calliess/Ruffert*, EUV/AEUV, Munich 2011, Art. 325 at para 18.

[86] *H. Nowell-Smith*, 'Behind the Scenes in the Negotiation of EU Criminal Justice Legislation' (2012) 3-4 New Journal of European Criminal Law p. 381 et seq, p. 383-385.

[87] See a similar dispute in CJEU, *Commission v Parliament and Council* C-43/12, OJ C 98/18 31. 3. 2012, pending, with issues discussed in *G. C. Langheld,* '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 EuCLR p. 276 et seq.

[88] Article 263 TFEU, and the line of cases from Case 314/85 *Foto-Frost* [1987] ECR 4199 margin nos 12-20, recently cited in Case 199/11, *Europese Gemeenschap/Otis and Others*, judgment of the Grand Chamber, 6. 11. 2012, not yet reported, margin no 53. It is highly controversial when national courts appear to do this: see e. g. *J. Komarek*, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII' European Constitutional Law Review 2012 p. 323 et seq.

1. Express criminal competence

From the EU perspective, criminal competence now exists, in one form or another.[89] It is possible to add indefinitely to the list of eurocrimes in Article 83.1. Article 83.2 offers criminal competence in any field where approximation is 'essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'.[90] Ancillary implied competence may even be available without recourse to Article 83.2 in the same way as in the pre-Lisbon case law.[91] Thus, the criminal competence question which arises in relation to the 2012 proposal is most likely a matter of 'choice of legal basis' between express criminal competence and other potential legal bases. Often similar choices are a matter of legislative discretion in the view of the Court of Justice of the European Union.

2. *Titanium Dioxide* principles applied

The choice of legal basis is considered in a great deal of case law both before[92] and after the well-known *Titanium Dioxide* judgment.[93] Typically, the institutions are required to recognize one legal basis as the 'main or predominant purpose', to which others are merely ancillary. In this case, the choice of legal basis must be based on 'objective factors amenable to judicial review, which include the aim and content of the measure.'[94] This choice of legal basis is especially important if the procedures differ so that they cannot be reconciled: Incompatible procedures cannot be cumulated even if the measure pursues several aims.[95] Procedures are incompatible at least when unanimity in Council is required for one, and qualified majority for another proposed joint legal basis.[96] A number of features in Article 83.2 suggest it is difficult to use as a joint legal basis with another basis outside the AFSJ.[97]

Herlin-Karnell has demonstrated that the Court of Justice did not subject pre-Lisbon choices of legal basis to a strict standard of review.[98] Although it required

[89] From a CJEU-centric point of view, see *E. Herlin-Karnell,* The Constitutional Dimension of European Criminal Law, 2012 especially pp. 83-109; *S. Miettinen*, Criminal Law and Policy in the European Union, 2013, 50-60.

[90] *J. Öberg,,* 'Union Regulatory Criminal Law Competence after Lisbon Treaty', European Journal of Crime, Criminal Law and Criminal Justice 2011 p. 289 *et seq*. *Öberg* considers 83.2 TFEU 'essentiality' requires strict proportionality control. If so, the case for implied ancillary competence on general efficacy grounds is even stronger.

[91] This seemed difficult to justify politically, but not difficult as a matter of treaty interpretation alone. For some possible criteria, see *CJEU, Commission v Council* Case C-440/05 [2007] ECR I-9097 margin nos 60,68 and 69.

[92] CJEU, *Commission v Council (Generalized Tarriff Preferences)* Case 45/86, [1987] ECR 1493 margin no 11.

[93] CJEU, *Commission v Council (titanium dioxide*) Case C-300/89 [1991] ECR I-2867.

[94] Recently CJEU, *Parliament/Council (Energy and Information Collection)* Case C-490/10, Judgment of the second chamber 6. 9. 2012, not yet published, margin no 44.

[95] E.g. CJEU, 19. 7. 2012, *Parliament/Council* Case C-130/10 not yet published margin no 49; CJEU, 1. 10. 2009 *Commission v Council (Endangered Species)* Case C-370/07 ECR [2009] I-8917 margin no 48. A purely formal defect, where procedures are identical, will not result in annulment: CJEU, 10. 12. 2002 *British American Tobacco (Investments) and Imperial Tobacco* Case C-491/01 [2002] ECR I-11453.

[96] CJEU, 1. 10. 2009 *Commission v Council (Endangered Species)* Case C-370/07 ECR [2009] I-8917 margin no 48.

[97] Consider, for example, the emergency brake, and the special arrangements for Denmark, the UK, and Ireland. Joined legal bases are possible *within* the AFSJ: see e.g. Directive 2011/93, based on 82(2) and 83.1, but the procedures involved are identical.

[98] *E. Herlin-Karnell,* The Constitutional Dimension of European Criminal Law, 2012, pp. 62-109. She observes the 'battle of the pillars' choice case law may have been distinct from ordinary intra-EC disputes in requiring even less for Article 47 TEU to be engaged in favour of EC competence: 83-84.

an objective choice between competing legal bases, it did not subject the evidence to credible scrutiny. For this reason, a choice made by the institutions was difficult to challenge. *Weatherill* suggested that the rules in legal basis case law had become a 'drafting guide': so long as the institutions followed certain formulae, their discretion and assessments of fact were typically respected by the Court of Justice.[99] On rare occasions, evidence is expressly examined in a judgment. For instance, in *Vodafone*,[100] the Court examined impact assessments. It is telling that these cases could be regarded as exciting developments, signalling genuine review.[101]

3. The reasoning in Parliament/Council (Energy/Information)

One recent case illustrates principles involved in choice of legal basis and invites analogies with the issues that arise in the context of EU criminal law competence. In Case C-490/10 Parliament/Council, the EP challenged the choice of legal basis for an instrument which sought the collection of information in order to further the Union's energy policy. Thus, the question arose whether, after Lisbon, the correct legal basis was the general legal basis permitting the collection of information in the TFEU, Article 337 TFEU, a similar legal basis in the EA treaty, Article 187 EA, or whether the measure should be founded on the Union's competence in the field of energy, Article 194 TFEU. In procedural terms, the stated legal basis provided only for consultation of the EP; the basis claimed by the EP in its annulment action required the ordinary legislative procedure.[102] The case turned on what the appropriate choice of these bases was, and the objective factors that pointed to that choice.

According to the CJEU, if collecting information is 'necessary' for an energy policy, then an instrument requiring its collection must be adopted on the basis of the energy policy.[103] Recourse to general information collecting legal bases was possible only if the instrument 'cannot be considered to be necessary for the achievement of the specific objectives' of the substantive policy.[104] This was the case even though energy competence appeared to be residual; Article 194 TFEU power is 'without prejudice to the application of other provisions of the Treaties'.[105] Furthermore, Article 337 TFEU appeared to provide an express ancillary competence for information collection "required for the performance of the tasks entrusted" to the Commission.

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[99] *S. Weatherill*, 'The limits of legislative harmonization ten years after Tobacco Advertising: how the Court's case law has become a "drafting guide" ' German Law Journal 2011 p. 827 et seq.

[100] CJEU, *Vodafone,* Case C-58/08 [2010] ECR I-4999.

[101] Herlin-Karnell 2012 (fn.92), p. 97, citing *D Keayerts*, 'Ex ante Evaluation of EU Legislation Intertwined with Judicial Review? Case Comment' European Law Review 2010 p. 869 et seq.

[102] CJEU, *Parliament/Council (Energy and Information Collection)* Case C-490/10, Judgment of not yet published, margin no 23.

[103] CJEU, *Parliament/Council* (fn. 93), margin nos 68 and 77.

[104] CJEU, *Parliament/Council* (fn. 93), margin no 77.

[105] *CJEU, Parliament/Council* (fn. 93), margin no 38.

4. Analogies between Articles 194 and 325 TFEU

This judgment invites several analogies to the choice of legal basis issues involving implied ancillary competence outside Article 83. First, it shows clearly that an express competence in one area of the Treaties, even a general ancillary competence applicable in its own right, does not preclude implied ancillary competence elsewhere in the Treaties. Following this analogy, it is difficult to accept that the *Environmental Legislation*[106] and *Ship-source pollution*[107] judgments were exhaustively incorporated into Article 83.2 TFEU. Ancillary competence could be implied elsewhere as well. Secondly, implied ancillary competence can take precedence over express competence. Implied ancillary competence to collect information could, if 'necessary', be attached to the energy competence even though an express competence to collect information was available elsewhere in the Treaties. Thirdly, the trigger for implied competence is a 'necessity' of the measures. This reinforces widely held concerns on the difficulty of containing EU criminal competence. Fourthly, a case for 'necessity' can be identified in the drafting of the measure itself,[108] validating Weatherill's 'drafting guide' hypothesis. Finally, the Court appears to show a strong preference for one single legal basis: it may have been possible to combine some of the proposed bases. Parliament was in fact consulted, although this is not a requirement under Article 194 TFEU.[109]

Unless criminal law remains somehow special under the post-Lisbon framework,[110] many of these observations support the Commission's proposition that Article 325.4 TFEU could be a legal basis for measures involving the protection of the financial interests of the Union. Drawing an analogy from *C-490/10*, it is hard to see how criminal law could be excluded from implied ancillary competence where it is necessary for some other policy. This, in turn, could mean that ancillary implied competence under a substantive policy ground would take precedence over express competence or express ancillary competence under Articles 83.1 and 83.2 respectively. Much of the Court's case law on choices of legal basis suggests that when an instrument claims particular acts are 'necessary', then ancillary competence follows that necessity. If the Court relies on statements in draft legislation to that effect, then a properly drafted instrument could be nearly impossible to annul on its choice of sectoral legal bases. This is only avoided if the Court declines to apply its 'manifestly inappropriate' test to issues of criminal law.[111]

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[106] *CJEU, Commission/Council* (fn. 11).

[107] *CJEU, Commission/Council* (fn. 12).

[108] *CJEU, Parliament/Council* (fn. 93), margin nos 47-50.

[109] See, however, the previous case in this line, C-155/07, where codecision and consultation were combined successfully. There, EP involvement was at least guaranteed by both of the joined legal bases.

[110] The Bundesverfassungsgericht clearly thinks so, discussed below in detail.

[111] Öberg (fn. 90) distinguishes several lines and recommends a stricter proportionality review at p. 317-318.

V. Will national legal systems accept implied ancillary competence?

National legal systems may be uncomfortable with implied ancillary competence. Although the relationship between EU law and national law can be viewed from a Eurocentric point of view, not all national legal orders have unconditionally accepted this perspective. Among the most thorough recent judgments on EU competence, the Bundesverfassungsgericht *Lisbon* judgment suggests several reasons why ancillary implied criminal competence, if accepted by the Union legislature, will eventually be brought before at least one national constitutional court.

1. German conditions for EU criminal law?

The Bundesverfassungsgericht *Lisbon* judgment suggested several conditions applied to EU criminal law from the point of view of the German constitution: the principle of democracy, the statehood of the Federal Republic of Germany and the principle of the social state.[112] The Court recognised that the Treaty of Lisbon would extend criminal competence.[113] It also seems to substitute an objective test of necessity for the usual subjective CJEU assessment.[114]

According to the Bundesverfassungsgericht, criminal law is special. 'Essential areas of democratic formative action comprise… all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law…'.[115] 'Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law'.[116] Criminal law is linked to language and national culture. Some decisions, particularly on the level and appropriateness of penalties, are best left to national democratic decision-making processes: '…[a]ny transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonisation for specific cross-border situations on restrictive conditions…'.[117]

The judgment gives an indication of the difficulties on the road towards a Regulation based on Article 325.4 TFEU, at least from a German constitutional perspective. Criminal competence is, in its view, a decision for a polity.[118] Germany has agreed in the context of the EU to create 'provisions of criminal law and criminal procedure in specific areas which take into account the conditions of European cross-border situations'.[119] However, democratic self-determination requires the treaties to be interpreted strictly, and such powers to be justified: 'The

[112] BVerfG 2 BvE 2/08, 30. 6. 2009, (hereafter *Lisbon judgment)* margin no 167, available in English at http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, all quotations are from this text.

[113] *Lisbon judgment,* margin no 351.

[114] *C. Safferling,* 'Europe as Transnational Law - A Criminal Law for Europe: Between National Heritage and Transnational Necessities' German Law Journal 2009 p. 1383 et seq, p. 1389.

[115] *Lisbon judgment,* margin no 249.

[116] *Lisbon judgment,* margin no 252.

[117] *Lisbon judgment,* margin no 253, with references to earlier judgments.

[118] *Lisbon judgment,* margin no 355.

[119] *Lisbon judgment,* margin no 357.

core content of criminal law does not serve as a technical instrument for carrying out international cooperation but represents the particularly sensitive democratic decision on a legal ethical minimum standard.' The emergency brake, according to the court, represents this fundamental national veto,[120] and must be used by parliamentary representatives.[121] Some similar issues have been discussed by AG *Mazak* in his Ship-Source Pollution opinion.[122]

2. Only express ancillary criminal competence is acceptable

The Court did not focus on implied ancillary competence beyond Article 83, with the resulting lack of an 'emergency brake'.[123] But if it did, would it have agreed that the German constitution and EU implied ancillary criminal competence could be reconciled? Some of the judgment suggests not. Whilst the 'transfer of sovereign powers' to fight serious cross-border crime under 83.1 is not regarded as particularly problematic,[124] transferring powers available under Article 83.2 is compatible in the Court's view 'for the sole reason that pursuant to the treaty, this competence is to be interpreted narrowly.' Conferral based on 'effective implementation of union policy…. Carries the threat that it could be without limits…'.[125] The Court relied on the narrow wording of 83.2 and the case law ancillary competence as protection against such an unconstitutionally wide transfer: a transfer must be evidence-based and 'essential to ensure the effective implementation of union policy'. Likewise, it considered that minimum rules under 83.1 would leave member states substantial discretion. 'Democratic self-determination is threatened 'where a legal community is prevented from deciding on the punishability of conduct, or even on the imposition of prison sentences, according to their own values'. For this reason, Article 23(1) of the Basic Law must be exercised 'if the list of areas of crime which fall under the competence of Union legislation is extended.'.[126]

If Article 83.1 TFEU raises a German constitutional requirement, then surely so must going beyond minimum rules in 83.2 or ancillary implied competence outside Article 83 TFEU. The Court suggests harmonizing only part of an offence would protect sovereignty. This, however, means that directly applicable criminal law is out of the question.

VI. Déjà vu? Legal bases of the *Corpus Juris,* 2001 and 2012 PFI directive proposals

The 2012 proposal on the protection of the financial interests of the Union has long lineage. In 2000, the Corpus Juris implementation project examined the legal

[120] *Lisbon judgment,* margin no 358.
[121] *Lisbon judgment,* margin no 365.
[122] See AG Mazak in C-440/05 *Commission/Council* (fn. 16 above).
[123] *Lisbon judgment,* margin no 352 suggests it focused on Article 83 TFEU, but compare margin no 362.
[124] *Lisbon judgment,* margin no 359.
[125] *Lisbon judgment,* margin no 361.
[126] *Lisbon judgment* margin no 363, assessing Article 83.1.

bases for *Corpus Juris*.[127] It identified third pillar legal bases as possibilities but focused on the first pillar Articles 94, 95, 280, and 308 EC as potential candidates.[128] Even the limited number of experts involved could not agree on the appropriate legal basis.[129] This aspect has remained constant during subsequent attempts to pass similar instruments. EU institutions' views on how much harmonisation is desirable have not.

1. The 2001 PFI proposal

a) Commission proposal

In 2001, the Commission proposed a 'directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests'.[130] This proposal concerned criminalization, but made some exceptions based on limits perceived in Article 280.4. According to the Commission, the EC legal basis was suitable for approximating, rather than harmonizing, definitions and offences, 'since the transposition of the provisions into domestic criminal law and prosecution and enforcement by national authorities in respect of the offences are matters for the Member States'.[131] However, it considered the exception in Article 280.4 EC applied to certain measures that were seen as necessary in the PFI convention instruments: provisions on jurisdiction, extradition and prosecution, cooperation and *ne bis in idem*[132] were all considered within the 280.4 exception, as were provisions on mutual legal assistance in tax matters.[133] Even though the proposal was, for the most part, simply establishing the uncontroversial contents of the PFI convention within the EC legal order, both Member States and the EP objected strongly. For Member States and the Commission, the EP proposal encroached too far within the national sphere of criminal law. For the EP and the Court of Auditors, the original proposal was not prescriptive enough.

b) EP Reception: not broad enough

The November 2001 *Theato* report summarises European Parliament debate, in which 20 of 31 amendments were accepted.[134] According to the EP, the proposal ought to have been a regulation rather than a directive: 'merely approximating member States' criminal-law provisions is not enough to provide effective protection for the

[127] *M. Delmas-Marty* and *J. Vervaele*, The Implementation of the Corpus Juris, Volume I, 2000, pp. 53-59.

[128] These are now Articles 115, 114, 325, and 352 of the Treaty on the Functioning of the European Union.

[129] *P. Asp*, The Substantive Criminal Law Competence of the EU, 2012, p. 34-35, citing *Delmas-Marty* and *Vervaele*, (fn. 126 above) p. 367 et seq.

[130] COM 2001(272) final, Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests, 23. 5. 2001, OJ 240 C 28. 8. 2001.

[131] COM 2001(272) final, 23. 5. 2001, p. 7.

[132] Articles 4, 5, 6, and 7 respectively. See also the first protocol, Articles 4(4), concerning jurisdiction and procedure Article 6, concerning jurisdiction. Neither were considered within the scope of the proposed directive.

[133] 2nd protocol, Article 6.

[134] Report on the proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests (COM(2001) 272 – C5-0225/2001 – 2001/0115(COD)) A5-0390/2001, 8 November 2001 (hereafter 'Theato report').

Community's financial interests'.[135] Their protection was exclusively a matter for Community law,[136] and this also allowed harmonization of evidence and procedure.[137] The EP even extended the material scope of criminalization to cover market-rigging,[138] misappropriation of funds,[139] and conspiracy[140] so that the proposal more closely corresponded to the ambitious *Corpus Juris* proposals. Nevertheless, the EP did not endorse centralising institutions: Amendments were proposed for extradition,[141] but the EP voted against *Theato's* proposal to establish a European Public Prosecutor.[142]

c) Court of Auditors' view: just right

The Court of Auditors opinion[143] proposed more detail as regards the definition of the offences and penalties.[144] The original definition of corruption was not sufficiently wide, because it linked the offence to a breach of official duties and actual damage to the financial interests of the Union.[145] For money laundering offences, *mens rea* was too strict: it was in essence unprosecutable because intent had to be shown, rather than 'serious negligence' as proposed by the Court of Auditors.[146] The Court also wanted custodial sentences in relation 'non-serious' offences under the directive.[147]

d) Commission view on amendments: too broad

When the amendments were considered by the Commission, its concerns cantered on the limit in Article 280.4: 'these measures shall not concern the application of national criminal law or the national administration of justice.' This, in the Commission's view, precluded the use of regulations, but also detailed rules on jurisdiction, extradition and prosecution, and law enforcement cooperation.[148] The Commission also observed that 'protection of these financial interests is not exclusively a matter of

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[135] Theato report, p .5, amendment 1.

[136] Theato report, p. 6, amendment 3: 'Their protection must fall within the first pillar'.

[137] Theato report, p 6, amendment 4.

[138] Theato report, p. 12, amendment 14.

[139] Theato report, p. 13, amendment 16.

[140] Theato report, p. 13-14, amendment 17.

[141] Theato report, p. 22, amendment 27.

[142] Theato report, pp. 14-22, Amendments 18-26. Only 19, linked to accepted amendments 3 and 4, survived the EP vote. See also the EP LIBE report, p. 32 onwards, which urged the use of the *passerelle* in Article 42 EU to bring the entire proposal indisputably within the first pillar.

[143] Opinion 9/2001 of the Court of Auditors, OJ C 14, 17. 1. 2002, p. 1.

[144] A table lists these in considerable detail. OJ C 14, 17. 1. 2002 pp. 3-14 Not all languages are equal: for some reason this has been available in TIFF by separate request if sought in English, but directly accessible in other languages: Compare http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:014:0001:0015:FR:PDF and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:014:0001:0015:EN:PDF; it is possible to order a TIFF file http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001AA0009:EN:NOT containing the table with detailed comments to complement the short summary text available in http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001AA0009:EN:HTML .

[145] OJ C 14, 17. 1. 2002 p. 8, proposing changes to Article 4.

[146] OJ C 14, 17. 1. 2002 p. 10.

[147] OJ C 14, 17. 1. 2002 p. 12.

[148] COM(2002) 577, 16. 10. 2002,. 'Amended proposal for a European Parliament and Council Directive on the criminal-law protection of the Community's financial interests', p. 3, amendments 28-30.

Community law'.[149] The *Corpus Juris* offences added by the EP were in its view outside the scope of the EC instrument. In December 2001 the Commission presented a separate Green Paper to debate the European Public Prosecutor.[150]

e) Council Proceedings: unanimous opposition

In 2003, the Council working party on substantive criminal law observed that fourteen delegations still opposed the proposal,many because 'they did not favour the adoption of criminal law measures on the basis of Article 280.4 of the EC Treaty', with a fifteenth reserving its position.[151] At the time, there were only fifteen Member States, so opposition was almost unanimous. By then the PFI convention and protocols had either come into force or were close to being duly ratified, therefore calling into question the need for a first pillar instrument. In 2001, The Council Legal Service also provided an opinion on the appropriate legal basis of the document.[152]

The 2001 proposal was not ambitious to a fault. It did not specify minimum penalties, and was careful not to encroach on jurisdictional and procedural rules seen as part of the third pillar. However, the directive proposal emerged at a time when EC criminal competence was hotly debated. Given the expected opposition from Member States which turned out to be unanimous, it is surprising that it was formally proposed. In the face of similar opposition, internal market and competition proposals are routinely dropped before formal proposal stage.[153]

2. The 2012 proposal

The 2012 proposal is subject to fierce debate on its choice of legal basis. An amendment of a legal basis seems a precondition for passing this instrument even under the 'ordinary legislative procedure' called for under Article 325.[154]

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[149] COM(2002) 577 p. 3, point 3.2.

[150] COM(2001) 715 final, 11. 12. 2001, 'Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor'. See COM(2003) 128 final, 19. 3. 2003, 'Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor'.

[151] Council Document, 10596/03, 18. 6. 2003, p. 5.

[152] Council Document 11221/01, 25. 7. 2001, 'partially accessible to the public' until 13. 6. 2013, below, footnote 175. In fact, as of 28. 2. 2013, only three relevant documents are linked to the file: Council document 14780/01, 10. 12. 2001, 'Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests– Outcome of the first reading by the European Parliament (Brussels, 28-29 November 2001)'; Council Document 13396/02, 23. 10. 2002, 'Amended proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests' (a copy of COM (2002) 577 with the Commission's position on the EP amendments), and Council document 10596/03, 18. 6. 2003, 'Draft Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests ' (report from the working party on substantive criminal law). This search did not find a partially accessible legal service opinion, 11221/01 Brussels, 25 July 2001 http://register.consilium.europa.eu/pdf/en/01/st11/st11221.en01.pdf, which mentions both the commission proposal and the inter-institutional file number.

[153] Consider, for example, the silence following the 2008 white paper on private damages in competition law COM(2008) 165, 2. 4. 2008 and the widely leaked, 2009 draft legislative proposal, preseding COM (2013)404.

[154] Council Document 10461/13, Press Release, p. 10, and Council Document 10232/13, Presidency Note, both premised on Article 83(2).

a) The Commission's case for legislation

The premises of the proposal's choice of legal basis are simple. Member States are not sufficiently deterring crime against the EU financial interests. They do not even provide equivalent protection clearly required since *Greek Maize*. Penalties are inadequate to deter offenders.[155] These divergences diminish the 'effectiveness of the Union's policies to protect its financial interests'.[156] Therefore, the Union must both define the offences *and* set minimum penalties.

The Commission positions its proposal as 'necessary measures in the field of the prevention of and fight against fraud affecting the financial interests of the Union' within the wording of Article 325.4. The need for deterrence, effective protection, and equivalent protection, are all expressly cited in Article 325.[157] Subsidiarity, proportionality and fundamental rights are addressed.[158] The extensive recitals of the proposed instrument focus on the necessity of particular elements for the purpose of combating fraud; and when not necessary, how those elements are excluded from the proposal.[159] Article 83.1 offences are recognised as overlapping: 'coherence with such legislation should therefore be ensured'.[160] The Commission has argued that empirical criminological data on preventative effects of criminalization are simply not possible, but argues a reasonably robust estimate can be based on the assumption that criminalization will prevent crime.[161] It also provides extensive case studies where specific elements of the proposed directive would have assisted in combating fraud against the EU financial interests.[162]

The proposal appears, at face value, a credible candidate for adoption under Article 325. This is especially so if one accepts the analogy, discussed above, to the post-Lisbon choice of legal basis case *C-490/10*. However, the reasoning in the impact assessment Staff Working Document reveals a reading of legislative history which is not consistent with the circumstances of the Convention, discussed above. Relying on German doctrine,[163] the Commission proposes that removal of the limit to Article 325.4 enables its use in enacting criminal law. This is hard to square with the chronology documenting its removal, discussed above, and also with the Commission's own attempts to use 280.4 in the past. Much more credible is its later assertion that the EU needs uniform, deterrent measures because these are necessary to afford effective and equivalent protection. Their necessity points to implied ancillary competence under the C-490/10 *Parliament/Council* reasoning. Here, too, there is some room for debate. It is not clear, for example, whether criminalisation

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[155] COM(2012) 363 final (fn. 1), p. 2.
[156] COM(2012) 363 final (fn. 1), p. 3.
[157] COM(2012) 363 final (fn. 1), p. 6. Indeed, the single-article chapter is entitled 'combatting fraud'.
[158] COM(2012) 363 final (fn. 1), pp. 7-8.
[159] COM(2012) 363 final (fn. 1), pp. 12-16.
[160] COM(2012) 363 final (fn. 1), p. 13, recital 10.
[161] SWD (2012)195 (fn. 7), p 10.
[162] SWD (2012)195 (fn. 7), pp. 14-25.
[163] SWD (2012)195 (fn. 7), p. 27, fn.96: *'Heintschel von Heinegg* in: Vedder/Heintschel von Heinegg, Europäisches Unionsrecht, Baden-Baden 2012, Art. 325 at para 6; *Satzger* in: Streinz, EU-Recht, Kommentar, Second Edition, Munich 2012, Art. 325 at para 21; *Waldhoff* in: Calliess/Ruffert, EUV/AEUV, Munich 2011, Art. 325 at para 18.'.

and minimum penalties should take precedence over other measures, such as increasing the likelihood of detection. Consultations suggested weaknesses in the existing framework but also expressed concerns that criminal law should be a last resort, *ultima ratio*.[164]

b) Court of Auditors opinion

A Court of Auditors opinion[165] is broadly positive, and suggests, if anything, that the proposal is not broad enough. The Court of Auditors is concerned to ensure that fraud against financial institutions such as the European Central Bank, the European Investment Bank and the European Investment Fund, European Bank for Reconstruction and Development and the European Stability Mechanism are covered: '…the Union's financial interests relate to all assets and liabilities managed by or on behalf of the Union and its institutions, and to all its financial operations, including borrowing and lending activities.'[166] It also wants EU functionaries to be automatically considered 'public officials' subject to rules on corruption.[167]

c) EP Legal Affairs Committee opinion

The EP legal affairs committee has unanimously recommended Article 83.2 as the legal basis for the proposal.[168] It does examine some choice of legal basis case law. However, it does not consider the judgment in case *C-490/10*[169] and concludes that 83.2 TFEU replaces, rather than complements, the pre-Lisbon ancillary criminal competence cases.[170] Likewise, without addressing why the Commission expresses its choice as 'necessary measures in the fields of prevention of and fight against fraud', it proposes that their 'main purposes' are in fact 'both the strengthening of criminal law provisions in Member States with a view to improving the fight against fraud and protection of the Union's financial interests, as well as the harmonization of these provisions, together with a clarification and tidying-up exercise'.[171] This, it argues, points to Article 83.2 as a legal basis. The committee cited proceedings of Working Group X in support of the claims that Article 83.2 was *lex specialis*: the removal of limits in Articles 280.4 and 135 EC were achieved on this assumption.[172]

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[164] COM(2012) 363 final (fn. 1), p. 5.

[165] Opinion 8/2012, 15. 11. 2012, OJ 12. 12. 2012 2012/C 383/01. See also C-617/10 *Åklagaren/Åkerberg Fransson*, judgment of the Grand Chamber of 26. 2. 2013, not yet reported, margin nos 26-27.

[166] Ibid, margin no 7.

[167] Ibid, margin no 9.

[168] Opinion of the EP Legal affairs committee, November 29, 2012, PE500.747v02-00.

[169] EP Legal affairs committee (fn. 166), pp. 2-3, citing C-411/06 as 'the most recent' reiteration of the *Titanium dioxide* 'aim and content of the measure' mantra. See, however, Case C-490/10, already decided in September 2012.

[170] EP Legal affairs committee (fn. 166), p..4 fn2, citing Commission/Council Case C-176/03 and Commission/Council Case C-440/05.

[171] EP Legal affairs committee (fn. 166), p. 3.

[172] Ibid, p. 4-5, citing CONV 426/02 p. 10, but not post-Working Group X developments.

d) Council position on legal basis and minimum penalties

Council working documents demonstrate that Member States generally regard 83.2 as the appropriate legal basis. A February 2013 presidency note to the Working Party on Substantive Criminal Law also addresses the form of words which is relevant to the choice of legal basis case law: Article 1 of the directive proposal should in the presidency view be changed to reflect an Article 83.2 legal basis by deleting references to 'necessary measures' for the protection of fraud against the financial interests of the Union.[173] Likewise, Article 8 references to minimum penalties have raised such opposition that the presidency proposes their removal. Similar treatment awaits minimum penalties in the February 2013 directive proposal on the protection of currencies from counterfeiting.[174]A 'General approach' agreed in June 2013 is premised on these conditions.[175]

3. Council legal service opinions on legal basis: secret or public?

The Council has received legal advice on this proposal on at least two occasions. According to documents which have been requested but, which at the time of writing, have only been partially disclosed by the secretariat, the Council Legal Service considers that the correct legal basis for the proposed Directive is Article 83.2 TFEU.[176] It is striking that most of the Council Legal Service opinion on the legal basis of the 2001-2002 proposal remained secret for over a decade.[177] In this context, it is unsurprising that its legal opinions on the recent proposal remain nearly completely secret.[178] However, it is not clear whether that position will survive litigation.[179] The Council disputes the applicability of *Turco,* where the CJEU found that there was an 'overriding public interest' in the disclosure of legal advice on legal bases.[180] At least six Member States vote with some regularity in favour of more transparency.[181]

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[173] Council Document 6284/13, 11. 2. 2013, p. 2, fn1, and p. 14. See also presidency notes in Council document 18058/12, 20. 12. 2012 pp. 2 and 5, and Council document 17359/12, 11. 12. 2012, p.2 and 6.

[174] Council document 6860/13, 26. 2. 2013, note from the general secretariat of the council, p. 4, reporting on the EP Civil Liberties, Justice and Home Affairs committee 20-21 February 2013.

[175] Council Document 1046/13, p. 10.

[176] Letter from Council Secretariat, 21. 2. 2013, on file with the author.

[177] Council Document 11221/01, accessible to the public as regards its first three margin nos on page 1 (pages 2, 3 and 4 redacted). The full text was released 13. 6. 2013 despite objections registered by the UK in COREPER: Council document 8882/13, I/A note.

[178] Council Document 12979/12 27. 7. 2012, 'Proposals for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, a Regulation on insider dealing and market manipulation and other instruments regarding the harmonisation of administrative sanctions in the framework of financial services – Appropriateness of the legal basis of the Directive – Compatibility with the ne bis in idem principle' and Council Document 15309/12, 22. 10. 2012, '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 (12683/12 DROIPEN 107 JAI 535 GAF 15 FIN 547 CADREFIN 349 CODEC 1924) – Legal basis'. The existence of the documents is revealed though an 'advanced search' based on the document number.

[179] See CJEU *Miettinen/Council*, case T-303/13, lodged 4. 6. 2013, notice pending publication in the OJ.

[180] Joined Cases C-39/05 and C–52/05 P *Sweden and Turco/Council*, 2008 ECR I-4723.

[181] See Council document 7011/13, a reply to one confirmatory application, where six Member States voted in favour of disclosure. See also the Council practice on redacting details on which states hold published positions: *P. Leino*, 'The role of Transparency in building up the EU's democratic credentials', paper presented at the European University Institute, January 2013.

Some of this advice already appears in the public domain in other contexts. Petter Asp has been able to refer to some passages from the CLS opinions which shed light as to its reasons. The 2012 documents also seem to be available, in Italian, on the Italian Senato website.[182] It appears the CLS considers the deletion of the Article 280.4 limit material: "The deletion of the said sentence form the former TEC should be read in conjunction with the insertion of the new legal basis in Article 83.2 TFEU that was meant to tackle all cases where the EU legislature needs to harmonise the definition of criminal offences and sanctions in order to make other (non-criminal) law EU harmonized measures more effective".[183] In the first opinion, Asp notes that the CLS considered "rules on liability for legal persons must be read as requiring the use of criminal law sanctions" and therefore imply Article 83 TFEU.[184]

VII. Conclusions: EU criminal law may be 'necessary' – but what is the likely route?

Recent EU criminal law proposals suggest directly applicable criminal law is again contemplated as an EU legislative option. In the meantime, although the 2012 PFI proposal is itself a directive, it is sufficiently detailed to leave little room for Member States even on sensitive policy positions such as minimum penalties. As yet, neither the Council nor EP shares the Commission's interpretation of constitutional authority to legislate such rules, much less outside Article 83 TFEU. In this respect, the position has not changed a great deal from 2001-2002. However, the debate which is conducted appears more nuanced and ostensibly evidence-based. Discussion no longer centres on whether the Union can act, but where competence is located and how it ought to exercise the powers which it does have in light of the evidence on the likely impact of the legislation. Even if the EP and Council cannot yet accept Article 325.4 TFEU, minimum penalties and detailed offence descriptions are not off the table for all Member States as they were in 2001.

EU institutions should perhaps avoid overreliance on the legislative history leading to the Treaty on the Functioning of the European Union. As shown above, drafting history suggests that Article 83 TFEU was agreed by the Convention on the Future of Europe based on a combination of obfuscation and, in hindsight, misinformation. The Convention itself was hardly the epitome of democracy, but many years – and intergovernmental conferences – passed without the issues reappearing in Treaty negotiations. Declaration 8 appears to have simply been forgotten altogether, at best implied to be satisfied in a strict interpretation of 'minimum rules' in the express competence.

[182] http://www.parlamento.it/web/docuorc2004.nsf/8fc228fe50daa42bc12576900058cada/9c3990d0dd2effb3-c1257a3f00427fec/$FILE/15309-12_Lim_IT.PDF. http://www.parlamento.it/web/docuorc2004.nsf/8fc228fe50-daa42bc12576900058cada/dbd4dd138f9eec0ec1257a4c003b5cf2/$FILE/12979-12_Lim_IT.PDF [Accessed May 2, 2013].

[183] Asp 2012, p. 153, quoting Council Document 15309/12 (fn.176), para 12.

[184] Asp 2012 p. 69 fn. 113.

Whist the Treaty text is ambiguous, Member State opposition is not. In these circumstances, the 2012 PFI proposal reverts to competence control by Council politics. If negotiations were to receive a sudden and unexpected momentum so that the fraud proposal was passed, with very specific rules and minimum penalty requirements and under Article 325.4, then a choice of legal basis challenge would turn on how the proposal was drafted. Its form of words matters. The Commission would be wise to ensure the obvious main purpose of the legislation remains tied to 'necessary' measures under 325.4 TFEU as invited by recent 'choice of legal basis' case law.

Reservations expressed by the Bundesverfassungsgericht and Member States in Council suggest the EU in its present state of evolution is not ready for directly applicable criminal law. Debate has at least moved on from the outright denial of competence to an examination of evidence on how it ought to be exercised and why it might be limited. As a matter of expediency, it is tempting to suggest that the emergency brake should be available in order to ensure that the next generation of EU criminal law does not head, full speed, into the iceberg of national constitutional adjudication. A 'centre of gravity' assessment seems required on procedural incompatibility grounds if legal bases such as Article 83.2 and 325.4 might otherwise be joined. This might favour implying criminal competence outside the express provisions. However, nothing absolutely prevents the Court of Justice from refining case law in a distinctive way where criminal competence is concerned. The Bundesverfassungsgericht has offered some suggestions on how this might be done. Some sensitivity at EU level could help alleviate concerns flowing from the drafting process of the current express criminal competence provisions. Unless concerns in Member States on matters of criminal policy are acknowledged, 'necessary' measures may be stalled for a further decade whilst legislators quibble over semantics.