

Editorial

The fight against fraud—often discussed under the heading: „The protection of the financial interests of the European Communities/Union”—has long since been a key area when it comes to the development of European Criminal Law. It was within this area that the European Court of Justice delivered its judgements in C-68/88 *Commission v. Greece* (providing us with the principle of assimilation and the requirement of effective, proportionate and dissuasive sanctions) and in C-240/90 *Germany v. Commission* (which made it clear that the former EC had competence to introduce administrative sanctions, such as exclusions and surcharges within the agricultural area). Within this area, we were provided with interesting, thought provoking and much debated proposals, such as the *Corpus Juris* as well as different legislative initiatives from the Member States and the Institutions of the EU, most notably the Convention on the protection of the European Communities' financial interests with its two additional protocols (on corruption and on money laundering).

The area was also central as regards the debate on possible EU criminal law competence under the first pillar. Article 280 TEC, and especially its fourth subsection with its somewhat unclear reservation as regards criminal law—measures taken on the basis of Article 280 TEC were not supposed to “concern the application of national criminal law or the national administration of justice”—was subject to many different interpretations. According to some, the purpose of the fourth subsection was precisely to exclude criminal law from the competences conferred upon the EU. Others, however, argued that the reservation did not exclude criminal law from the measures available to the EU legislator, but merely meant that national law would not be secondary (but applicable in parallel) to EU rules in the area. This discussion culminated in 2001 when the Commission proposed two first pillar directives with criminal law content: one on the protection of the financial interests of the EU and one on the protection of the environment by means of criminal law. The latter led to the groundbreaking judgement in C-176/03 *Commission v. Council* in which the European Court of Justice for the first time found that the EU had legislative criminal law competence. The prior directive was, however, never adopted, the main reason for this being that the Member States opposed the proposal by reference to the lack of criminal law competence under Article 280 TEC.

Yet here we are again, however, albeit this time in a new constitutional setting. In July this year, the Commission published a proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law.

This time the most interesting question is not whether the EU is competent to adopt such a directive at all, but rather whether this could be done under Article 325 TFEU (this is the legal basis upon which the Commission built its proposal) or whether it must be built upon Article 83.1 or 83.2 TFEU. This question actually brings to the fore one of the most central questions in respect of the criminal law competence conferred upon the EU under the Lisbon Treaty:

Should Article 83 TFEU be understood as the sole legal basis for harmonization of substantive criminal law or is there also criminal law competence outside of title V chapter 4 TFEU?

It seems clear that there is no general criminal law competence outside of Article 83 TFEU, but there are a couple of articles that arguably could be understood as conferring criminal law competence. Article 325 (former Article 280 TEC) is, since the reservation concerning criminal law has been deleted, the most obvious of these.

The question whether Article 325 confers criminal law competence is of utmost importance since it not only decides whether the special features of Article 83 TFEU—most notably the possibility for the Member States to pull the emergency brake and the fact that the competence under Article 83 TFEU is limited to directives and to minimum rules—will apply but also whether the instrument will (without further ado) also bind

Denmark, Ireland and the United Kingdom, *i.e.* the states that have special legal arrangements as regards the Area of Freedom, Justice and Security. That this is not a purely theoretical question is reflected by the fact that the Council Legal Service has produced an opinion (22 October 2012, 15309/12) according to which "[t]he correct legal basis for the proposed Directive is Article 83(2) TFEU."

A second interesting feature of the proposed directive is that it not only contains articles which require the Member States to introduce a certain minimum-maximum level of penalties at national level, but also a minimum-minimum requirement, *i.e.* the instrument requires the Member States to introduce a minimum penalty for certain specified variations of fraud. In earlier criminal law instruments (framework decisions and directives), minimum-minimum penalties have been avoided, partly due to the fact that some Member States were not familiar with the concept of minimum penalties. Thus, it will be most interesting to see how the Member States react to the proposal and how the negotiations will finally end.

Whilst writing this editorial, we have been informed that at least one parliament (Sweden) has found that the proposal is based on the wrong legal basis (according to the Swedish Parliament the correct legal basis would be Article 83.2) and that the proposal as regards Articles 8 (imprisonment thresholds), 12.2 (interruptions to prescription period) and 12.3 (penalty prescription) is not in compliance with the principle of subsidiarity. Having regard to the procedure provided for in the protocol on subsidiarity and proportionality, this statement does not necessarily have big consequences, but it shows there may well be heated debate both on the legal basis for the proposal and on the principles of subsidiarity and proportionality.

Here, we have only been able to touch briefly on two aspects of the proposal, but it is, of course, most interesting in other perspectives as well. In the contribution by Professor Kaiafa-Gbandi (see p. 319) the extent to which the directive is consonant with fundamental criminal law principles is comprehensively discussed.

In addition to Prof. Kaiafa-Gbandi's evaluation of the directive, this issue of the European Criminal Law Review contains a number of most interesting articles on, *e.g.*, important principles such as the principle of legal reserve, the principle of mutual recognition and the principle of *ultima ratio*. There is also an article written as an intervention in an ongoing case, C-396/11 *Radu*, concerning the possibilities (and duties?) not to execute a European Arrest Warrant (the case is pending for a decision before the European Court of Justice), in addition to much more.

We sincerely hope that you will enjoy this issue of European Criminal Law Review!

The Editors