

## Danish criminal law and the EU

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*Danish criminal law has always had an ambivalent and complicated relationship to the EU and EU law and, for that reason, Denmark has a judicial 'opt-out'. The ambivalent and complicated relationship has not been scaled down following the entering into force of the Lisbon Treaty – quite the contrary. This is due to the fact that Denmark, on the one hand, does not participate in the EU supranational co-operation in criminal law matters, while on the other hand, it is still bound by the acts adopted before the Lisbon Treaty's entry into force under the then-applicable Title VI of the TEU (the old third pillar) – even if the other EU Member States have abolished these acts. It is also due to the fact that it has not been clarified whether Denmark is still covered by the judicial co-operation in criminal matters which the European Court of Justice in its two judgments regarding environmental protection and ship-source pollution determined fell within the old first pillar. To this can be added that Denmark seems to want its criminal law to be in accordance with the other EU member states' criminal law and therefore, in spite of the 'opt-out', "implements" new directives based on Art.'s 82(2) and 83 (1) TFEU.*

### I. Introduction

Danish national criminal law has always had a relationship to the EU and EU law that has been – if not outright hostile, then – particularly ambivalent. The principal reason for this is that criminal law is very national in its anchoring, which in brief has to do with the perception of what defines a state as a sovereign state and in a more abstract, Danish, legal cultural self-understanding.<sup>2</sup>

Five months after Denmark rejected the Maastricht Treaty on 2 June 1992, seven political parties in the Danish Parliament signed an agreement called 'The National Compromise'.<sup>3</sup> The document formed the basis for what – in December later that year – became the Edinburgh Agreement and thus also for Denmark's 'opt-outs' and the Danish referendum of 18 May 1993. The agreement states, among other things, that

*'Denmark is an independent state in the sense defined in the Danish Constitution and applied by the institutions – Parliament, Government, courts and Monarchy – rooted in the constitution...*

*[wherefore]*

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<sup>2</sup> This perception is not uniquely Danish but has been expressed by many other EU Member States, among other places in connection with the judgment of the European Court of Justice (ECJ) in Case C-176/03 (Protection of the environment, Community competence), for which no fewer than 11 of the Member States at that time intervened in support of the Council (against the Commission). For more details, see margin no 27 et seq.

<sup>3</sup> [http://www.eu-oplysningen.dk/emner\\_en/forbehold/](http://www.eu-oplysningen.dk/emner_en/forbehold/)

*Denmark cannot agree to transfer sovereignty in the area of justice and police affairs, but can take part in the intergovernmental co-operation which has existed to-date. This means that Denmark cannot agree to parts of the third pillar being transferred to the area of supranational co-operations in the first pillar.'*

The chapter on the Danish criminal law's ambivalent relationship with EU law was not closed with the Lisbon Treaty in conjunction with Articles 1 and 2 of the Protocol on the position of Denmark. Instead, it is an enduring ambivalence sustained by the fact that Denmark – as did the other EU Member States – surrendered competence in criminal matters to the EU back when it joined the EU (at that time, the EC) even though Denmark may not have been aware of this surrender at the time. Denmark's ambivalence should also be viewed in the context of its desire to be in the vanguard of EU law while maintaining its special status within, among other things, criminal law – albeit without necessarily wishing to have different laws regulating criminal matters than the other EU Member States. In other words, Denmark's EU relationship as regards criminal law is highly complicated.

In the following, I will analyse and describe the significance of the Lisbon Treaty with respect to Danish criminal law. Since the current relationship of Danish criminal law to the EU and EU law cannot be described and analysed without an understanding of the roots of that relationship,<sup>4</sup> a brief outline of the history of Denmark's criminal law within the context of EU law shall be provided. The paper will then describe and analyse the most recent criminal law measures within the area of EU law, and, by way of conclusion, offer a final perspective.

## II. EU History of Danish criminal law

Until the European Court of Justice handed down the Judgment of Environmental Protection through Criminal Law in 2005,<sup>5</sup> the Danish people commonly assumed that Denmark stood completely outside the supranational EU co-operation with respect to criminal law. Put differently, EU criminal law co-operation was solely perceived to be a third pillar endeavour under which all measures required unanimity and which rested exclusively on an intergovernmental basis. Acts adopted within this part of the EU co-operation could not be applied directly in Member States. Thus, within this area Denmark was only obligated in terms of international law—although, by virtue of its being an EU cooperation, it was an international co-operation of a particularly obligatory nature.

That the supranational EU co-operation was not regarded as having direct implications in terms of criminal law does not change the fact that a lot of the Danish ordinary legislation substantively was and remains to this day implemented

<sup>4</sup> See similar *Thomas Elholm*, *Det strafferetlige og politimæssige samarbejde*, in Bugge Thorbjørn Daniel et al. (eds.), *Grundlæggende EU-RET. EU efter Lissabontraktaten*, 2. ed., 2011, p. 355 et seq. and *Paul Craig*, *The Lisbon Treaty, Law, Politics and Treaty Reform*, 2010, p. 361.

<sup>5</sup> ECJ in Case C-176/03. See further below.

EU regulation – and that violations of that legislation are sanctioned with criminal penalties. This is because many e.g. EU directives set out very specific substantive standards but leave it up to Member States to establish appropriate measures for infringing such standards. Based on the Danish regulatory tradition, determining criminal penalties for the infringement of such standards often consists in ascertaining the most adequate sanctions while remaining as consistent as possible with the principle of equivalence.<sup>6</sup> This is not, however, the result of supranational cooperation but of Denmark's choosing 'appropriate measures' for infringing on the directive in accordance with the common Danish regulatory tradition.

The Danish choice of regulatory tradition has major implications with respect to criminal law, since it is the Court of Justice that establishes definitively the contents and the validity of all EU rules. This also applies to, for example, questions of interpretation in criminal cases.<sup>7</sup> This means that in criminal proceedings, the Danish courts must interpret EU rules in accordance with the Court of Justice's case law, and thereby observing the Court of Justice's principles of interpretation – inter alia the principle of precedence of EU law, of interpreting national legislation in conformity with EU law, *etc.* In criminal proceedings, the Danish courts must also take into account inter alia the principle of legality in criminal law and the principle of not interpreting legislation *contra legem*.<sup>8</sup>

In the Judgment of Environmental Protection through Criminal Law, followed by the 2007 Ship-Source Pollution Judgment, the Court of Justice determined that – if the Community legislator found penalty provisions (criminalisation) necessary to ensure that the acts adopted by the Community legislature in an EU policy area were fully effective – the EC Treaty (the old first pillar) also contained competence for the EU to establish provisions regarding criminal law of Member States.<sup>9</sup> As the Court of Justice stated on the matter in its Ship-Source Pollution Judgment:

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<sup>6</sup> Cf. ECJ in Case C-68/88 (1989) – "The Greek Maize Case" – in which the Court of Justice stated in margin no 24: "For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."

<sup>7</sup> See e.g. the Danish case (U 2009.2142 H) on infringing the ban set out in the Danish Act on dealing in transferable securities (insider information). During the proceeding before the Danish district court, reference for a preliminary ruling (case C-384/02) was made regarding the scope of the 'Insider dealing' Directive's derogations relating to the permission to disclosing "inside information to any third party" (unless such disclosure is made in the normal course of the exercise of his employment, profession or duties) (Article 3[a] of Council Directive 89/592/EEC of 13 November 1989). In the judgment (margin no 28) the Court of Justice stated: "The criminal nature of the proceedings brought against Mr Grøngaard and Mr Bang and the principle that penalties must have a proper legal basis applicable in such proceedings does not affect the strict interpretation to be given to Article 3(a) of Directive 89/592. As the Advocate General maintains in point 24 of his Opinion, the interpretation of a directive's scope cannot be dependent upon the civil, administrative or criminal nature of the proceedings in which it is invoked."

<sup>8</sup> See e.g. ECJ case C-384/02, margin no 29-30. For more details about the interpretation of rules origination in the EU in a criminal law context, see *Trine Baumbach*, *Det strafferetlige legalitetsprincip: hjemmel og fortolkning*, 2008, p. 274 et seq. See also *Petter Asp*, *The Substantive Criminal Law Competence of the EU*, 2012, p. 225 et seq.

<sup>9</sup> Cf. ECJ case C 176/03, margin no 44 et seq and ECJ case C-440/05, margin no 53 et seq.

*'Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence ... the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective...'*<sup>10</sup>

On the other hand and in the same case, the Court of Justice also established that the Community did not have the competence to determine the type and scope of criminal penalties.<sup>11</sup>

*'The Environmental Protection Case was an action for annulment brought by the Commission of the European Communities against the Council of the European Union. It pertained to a framework decision that defined criminal environmental offences.'*<sup>12</sup> *The framework decision had been adopted by the Council on the basis of Title VI of the EU Treaty on police and judicial co-operation in criminal matters (the former third pillar). However, in the Commission's perception, the criminal provisions on environmental offences should be adopted on the basis of the EC Treaty's section on the environment (Article 175 EC – first pillar). Under Article 35(6) of the EU Treaty, the Court of Justice had competence to determine matters related to the delimitation between the pillars. Eleven Member States (including Denmark) of the – at that time – fifteen Member States submitted statements in intervention supporting the Council's position. The European Parliament submitted a statement of intervention in support of the Commission. The Court of Justice gave judgment in favour of the Commission by finding that, generally, the purpose of Article 1-7 of the framework decision was to protect the environment, which was the reason the regulation could and should have been adopted based on the EU Treaty.'*<sup>13</sup>

*Since criminalisation and regulation of criminal sanctions (the type and level of the applicable criminal penalties) are two different competence-related issues, the judgment left some questions unanswered: For example, had the EU on the basis of the EC Treaty only competence to define what should or should not be considered a criminal offence? Or, did the EU on the same treaty basis, too, have the competence to adopt joint specific maximum penalties. These questions – and whether the competence to define what should be considered a criminal offence covered the full scope of the EC Treaty – were clarified by the Ship-Source Pollution Judgment.*

*The Ship-Source Pollution Judgment, too, was an action for annulment brought by the Commission of the European Communities against the Council of the European Union. The European Parliament intervened in support of the Commission and nineteen Member states, including Denmark, intervened in support of the Council. This proceeding also pertained to a framework decision'*<sup>14</sup> *that the Council had adopted on the basis of Title VI of the EU Treaty*

<sup>10</sup> Cf. ECJ case C-440/05, margin no 66. See also ECJ case C-176/03, margin no 48.

<sup>11</sup> Cf. ECJ case C-440/05, margin no 70-71.

<sup>12</sup> Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law.

<sup>13</sup> In other words, the EC Treaty took precedence over the EU Treaty.

<sup>14</sup> The Council's Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.

on police and judicial co-operation in criminal matters. The judgment established (or confirmed) two things in particular: (1) That, on the basis of the EC Treaty, the EU had the competence to define which acts or omissions should be defined as criminal offences and to order Member States to prosecute such offences in a manner that was effective, proportional and dissuasive with regard to the entire scope of the EC Treaty; but (2) that, on the basis of the EC Treaty, the EU did not have the competence to adopt specific penalty frameworks for criminal offences which the EU might order the Member States to make punishable. In the event EU Member States wanted to introduce joint penalty frameworks, these would have to be adopted on the basis of the EU Treaty's police and judicial co-operation in criminal matters (the former third pillar).

The judgments – especially the Judgment of Environmental Protection through Criminal Law – caused uproar, not least in Denmark where – by virtue of Denmark's opt-outs which had been the subject of the referendum on 18 May 1993 – the Government now had some explaining to do. And this, regardless of the separate issue of whether the opt-outs should be abolished or not. However, things soon calmed down, and as one leading government official pragmatically stated: “The judgment was pretty hard to digest; but this is the applicable law now so we'll just have to fall in line!”

Outside the EU supranational co-operation and thereby within the intergovernmental area (the area of the old third pillar), Denmark remained a full co-operation partner – even often a very eager co-operation partner.

With the Amsterdam Treaty, which entered into force on 1 May 1999, this part of the co-operation (the police and judicial co-operation in criminal matters) intensified. The reason for this was that the Union was given the objective “to provide citizens with a high level of safety within an area of freedom, security and justice” by “preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud” through measures such as closer police co-operation and by the approximation of the Member States' substantive criminal rules by “progressively adopting measures establishing minimum rules for the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking”.<sup>15</sup>

The legal instrument—the framework decision mentioned above—was of special interest with respect to the area that deals purely with criminal law.<sup>16</sup> Since it was binding on Member States with respect to the long-term objective, the practice was for a framework agreement to be constructed as a directive under the first pillar; but it was left up to Member States to determine the form and funds for its transposition.<sup>17</sup> As with directives, the framework agreement specified a time limit within which the framework decision had to be transposed into national law. However, a framework decision is not a directive; and a framework decision would therefore not have any direct effect—which was stated explicitly in Article 34(2)(b) *in fine* of

<sup>15</sup> Cf. Article 29 and 31(1) of the EU Treaty.

<sup>16</sup> Listed in Article 34(2) of the EU Treaty.

<sup>17</sup> Cf. Article 34(2)(b) of the EU Treaty.

the EU Treaty.<sup>18</sup> In other words, it required transposition into national law, in order to be normative for the legal position of the citizens. Moreover, as already mentioned, a framework decision would need to be adopted by unanimity.

The corollary of the framework agreement's status as an intergovernmental instrument was that – if implementation of a framework decision into national law required a legislative amendment – the Government would first have to obtain the consent of the Danish Parliament under section 19 of the Danish Constitution before Denmark could participate in the adoption of a framework agreement in the Council of the European Union. The status of the framework decision also entailed that the Court of Justice would not have exclusive interpretative authority within this area. Under Article 35 of the EU Treaty, the Member States did have the option of granting the Court of Justice authority by declaration to decide preliminary questions on the validity and interpretation of framework decisions but Denmark had never issued such a declaration.<sup>19</sup>

If a framework decision's goal was to criminalise or amend the scope of a punishable area, a framework decision – in addition to establishing detailed rules for the objective (*actus reus*) or subjective (*mens rea*) liability conditions in relation to the act or omission in question – could set out rules on the minimum level of the maximum penalties. For example, such rules might obligate Member States to have a maximum penalty for an offence of *at least* eight year's imprisonment.

For example, section 262a was included in the Danish Penal Code in 2002, in order to, among other things, implement the EU's framework decision on combating trafficking in human beings.<sup>20</sup> It was the opinion of the Danish Ministry of Justice that Denmark already complied with the requirements set out in the framework decision with respect to the criminalisation component at the time of transposition.<sup>21</sup> However, the framework decision also contained a requirement for the maximum penalty for human trafficking according to a range of enumerated aggravating circumstances to be at least eight years' imprisonment. Denmark did not comply with this requirement at the time of implementation—and this necessitated the inclusion of section 262a.

Thus, before the entry into force of the Lisbon Treaty, Denmark had, by virtue of the Edinburgh Agreement, opt-outs, but, if the conditions under the Judgment of Environmental Protection through Criminal Law and The Ship-Source Pollution Judgment were met, Denmark had at the supranational level transferred criminal

<sup>18</sup> As suggested, codified at the initiative of Denmark to prevent the European Court of Justice from developing a doctrine on direct effect as occurred within the area of directives.

<sup>19</sup> Italy did issue this type of declaration, which is the reason the European Court of Justice was able to issue a decision in the Pupino Case (ECJ case C-105/03, Preliminary Ruling) in 2005.

<sup>20</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA). Section 262a also implemented the United Nation Palermo Protocols (*cf.* Order No 11 of 19 February 2004 of the UN Protocol of 15 November 2000 to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children to supplement United Nation Convention of 15 November 2000 against Transnational Organised Crime). For more details, see *Trine Baumbach, Menneskehandel — en ny forbyrdelse under afklaring*, Tidsskrift for Kriminalret (TfK), 2009, p. 165 et seq.

<sup>21</sup> An assumption that does not seem obvious and which was ruled out in the Danish Supreme Court Judgment published as U 2009.1439 H. For more details on the judgment, see *Trine Baumbach, TfK 2009*, p. 165 et seq.

law competence already upon its first joining the EC in 1973. In addition, because of the Danish regulatory tradition, Denmark often established (and still establishes) penalties as an “appropriate measure” for infringements of implemented EU law and EU law which is directly applicable. Furthermore, within the intergovernmental area, Denmark was a full partner in the co-operation with respect to criminal law at the EU level. One might say, broadly speaking, that – until the Lisbon Treaty entered into force – Denmark’s criminal law opt-out had no value whatsoever, since Denmark’s position within that area was completely identical to the other EU Member States’ position. However, in order to clear the Maastricht Treaty’s path through the 18 May 1993 referendum, Denmark acquired a criminal law reservation which, until the Lisbon Treaty went into force, had no judicial significance for Denmark or the Danish transfer of sovereignty. However, this circumstance changed radically in several ways when the Lisbon Treaty entered into force.

### III. Danish Criminal Law after Lisbon

#### 1. Introduction

The Lisbon Treaty<sup>22</sup> entered into force on 1 December 2009. EU justice and home affairs co-operation was one of the policy areas that was most affected by the Lisbon Treaty, among other things, because the intergovernmental judicial and police co-operation in criminal matters was transferred to the supranational co-operation and the old third-pillar co-operation was therefore ‘abolished’. Within this area, in principle, proposals are thus submitted on the basis of the supranational co-operation rules on justice and home affairs set out in Part Three, Title 3, of the Treaty on the Functioning of the European Union (TFEU).<sup>23</sup> This means that, to a large extent, new criminal justice measures must be adopted by a qualified majority in the Council as co-decisions with the European Parliament (ordinary legislative procedure).<sup>24</sup>

In principle, the legislative right of initiative – *inter alia* the right to submit proposals within the justice and home affairs area – rests with the Commission. However, within the areas of criminal justice and police cooperation a shared right of initiative is preserved by the Commission and the Member States, *cf.* Article 76 (TFEU).

Under the Lisbon Treaty, the entire co-operation on justice and home affairs was placed under the control of the European Court of Justice – for criminal justice and police-related cooperation only after the expiry of a transitional period of five

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<sup>22</sup> The Lisbon Treaty on amending the Treaty of the European Union and the Treaty establishing the European Communities.

<sup>23</sup> See Articles 82–86 (TFEU) on the provisions relating to criminal justice co-operation and Articles 87–89 (TFEU) on the provisions on police co-operation.

<sup>24</sup> Great Britain and Ireland have a special opt-in scheme under which they can decide whether they wish to participate on a case-by-case basis. Great Britain and Ireland can also join new measures subsequently. For more details, see the Lisbon Treaty’s Protocol on the position of the United Kingdom and Ireland.

years.<sup>25</sup> However, the Court would have full control of amending measures from their entry into force but the control would only be applicable to the Member States to which the measures apply.<sup>26</sup>

In order to convince the most resistant of Member States to apply the ordinary legislative procedure to certain policies, where they had previously applied the rule of voting by unanimity, and to ensure the smooth transition from unanimity to a qualified majority, the Lisbon Treaty has introduced a special emergency brake clause under which Member States can block a proposal, if they believe it will affect fundamental aspects of their criminal justice system, *cf.* Article 82(3) and 83(3) of the TFEU.<sup>27</sup> However, Member States that wish to proceed have special discretion to introduce a strengthened cooperation within the area in question—the so-called ‘brake-accelerator clause.’<sup>28</sup>

In a sensational judgment of 30 June 2009, the German Federal Constitutional Court (*das Bundesverfassungsgericht*) placed conditions, based on the German constitution, on among other things EU judicial co-operation in criminal matters.<sup>29</sup> The legal and practical consequences of the judgment remain uncertain.<sup>30</sup>

As a result of the Danish judicial opt-outs, Denmark does not participate in the Council’s adoption of measures proposed under Title V, Part Three of the TFEU and none of the measures adopted under the above-mentioned provisions are binding on or apply to Denmark.<sup>31</sup> However, the EU acts adopted before the Lisbon Treaty’s entry into force under the then-applicable Title VI of the TEU still remain binding on and apply unchanged in Denmark on an intergovernmental basis.<sup>32</sup> But in principle, Denmark does not have the option to participate in the

<sup>25</sup> However, the Court will not have authority to hear proceedings on the validity or proportionality of operations conducted by the police of a Member State or other law enforcement authorities or the exercise of the Member States’ powers with respect to upholding law and order and the protection of internal security.

<sup>26</sup> Article 10 of Protocol (36) on transitional provisions.

<sup>27</sup> A Member State in whose assessment a proposal within the criminal justice or police co-operation will affect fundamental aspects of its criminal justice system may request that the proposal be referred to the European Council. The debate in the Council and the Parliament will then be suspended for four months within which the European Council may decide either to request that a new proposal be put forward or return the proposal for debate in the Council. For more details, see below.

<sup>28</sup> The Lisbon Treaty also enables the EU to create a European Public Prosecutor’s Office by a decision adopted unanimously by the Council after approval in the European Parliament, *cf.* Article 86 (TFEU). The scope of the European Public Prosecutor’s Office will, in principle, be focused on offences harmful to the financial interests of the EU. But the European Council may expand the powers of European Public Prosecutor’s Office to also concern serious crime having a cross-border dimension. There is also a certain expansion of the duties of Eurojust to initiate investigation of criminal cases, *cf.* Article 85 of the TFEU.

<sup>29</sup> For more information, see the Constitutional Court’s judgment of 30 June 2009: Zustimmungsgesetz zum Vertrag von Lissabon mit Grundgesetz vereinbar; Begleitgesetz verfassungswidrig, soweit Gesetzgebungsorganen keine hinreichenden Beteiligungsrechte eingeräumt wurden, margin no 249, 252 E, 293, 351ff., 355ff., 358ff., 363ff. and 419.

<sup>30</sup> For more details, see *Per Lachmann*, ‘Bundesverfassungsgerichts Lissabon-dom — og grundlovens § 20,’ in Henning Koch *et al.* (eds.), *Europe. The New Legal Realism: Essays in honour of Hjalte Rasmussen*, 2010, p. 351 et seq.

<sup>31</sup> *Cf.* Articles 1 and 2 of the Protocol on the position of Denmark, *cf.* more below. With the Lisbon Treaty, Denmark was given the opportunity to replace its existing judicial opt-out with an opt-in scheme (like the one the United Kingdom and Ireland have), *cf.* Article 8 of the Protocol. See especially Article 4 on the Schengen co-operation.

<sup>32</sup> Protocol on the position of Denmark, Article 2 *in fine*.

further development of this cooperation, including any future acts superseding or amending applicable acts within the area.

Thus, Denmark's general criminal law position seems clear; but if one looks closer at the Treaty's provisions vis-à-vis the Protocol on the position of Denmark, there are some pivotal items that remain vague or at the very least uncertain.

## 2. EU Judicial Cooperation in Criminal Matters

The provisions on the substantive judicial cooperation in criminal matters are set out in Article 83 of the TFEU.<sup>33</sup> The wording of the provisions is as follows:

### *Article 83*

*Minimum harmonisation of criminal offences and penalty frameworks:*

1. *The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*

*These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.*

*On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.*

2. *If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.*

3. *Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.*

*Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.'*

<sup>33</sup> See further Asp (fn 8), p. 70 et seq. and Elholm (fn 4), p. 376 et seq.

As seen, Article 83(1) is a continuation and, to a certain extent, an expansion of the old third-pillar cooperation as set out in Article 31(1)(e) of the EU Treaty.<sup>34</sup> In particular, it is the final section of the provision that paves the way for a far more developed co-operation within the area of 'classic' criminal law. Denmark stands completely outside this co-operation, *cf.* more below.

In any case, Article 83(2) codifies the Judgment of Environmental Protection through Criminal Law and the Ship-Source Pollution Judgment with respect to EU criminalisation competence and perhaps even the expansion of such competence. Furthermore, the provision constitutes an expansion of judicial co-operation in criminal matters with respect to determining criminal penalties and the type and scope of these. In other words, with Article 83(2) the EU has positively acquired the competence on a supranational basis which—before the entry into force of the Lisbon Treaty—the European Court of Justice in its Ship-Source Pollution Judgment established was the sovereign authority of Member States.

As suggested by the wording, the article only deals with minimum harmonisation, with respect to both criminalisation and the determination of the type of criminal penalties and the scope of it. It should be noted that the European Union does not have a legal definition of what constitutes a penalty.<sup>35</sup> The provision is worded in such general terms that there is nothing to prevent the creation of a directive that also establishes more detailed (minimum) rules for the fixing of the concrete penalty and, in relation to that, a definition of what is considered aggravating or extenuating circumstances.<sup>36</sup>

The EU's competence in matters relating to criminal justice includes, according to the wording of the provision, all EU policy areas covered by harmonisation measures, with no requirement that the area be important or essential to the EU cooperation. This means that the EU's judicial competence in criminal matters under Article 83(2) covers all policy areas—from the customs union, the internal market, to protection of the environment. However, under the provision criminal justice measures must be 'absolutely necessary.' What the implications are of this requirement remains unknown. Within a purely criminal and police justice context, a requirement for 'absolutely necessary' is a very stringent requirement,<sup>37</sup> but within the context of the EU judicial system it is not to be taken for granted that this requirement will be interpreted as strict as in these classic legal fields.<sup>38</sup>

<sup>34</sup> "Common action on judicial cooperation in criminal matters shall include: ... progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking."

<sup>35</sup> Cf. section 31 of the Danish Penal Code under which the common penalties are imprisonment and fines.

<sup>36</sup> Which in general is done in chapter 10 of the Danish Penal Code (on determining penalties).

<sup>37</sup> Cf. the rules on the lawful use of force in Articles 2 and 3 in the European Convention of Human Rights and the case law of the European Court of Human Rights regarding the articles.

<sup>38</sup> As I have been informed, after the entry into force of the Lisbon Treaty, the Commission has not yet, in e.g. the area of the internal market, referred to Article 83 (2) TFEU where there is a reference to Article 114 TFEU. The reason for this is presumably that the Council's Legal Service believes that one cannot specify in the same act the legal bases on which Denmark, the United Kingdom and Ireland participate while also specifying the legal basis on which these countries are not participating due to their judicial opt-outs.

It should be observed that, under Article 83, a directive that has not been implemented into national law within the time frame or has been implemented incorrectly cannot, in principle, gain direct effect because typically it would not create rights for the citizens but, on the contrary, obligations.

In the Communication of 20 September 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled ‘Towards an EU Criminal Policy: Ensuring the effective implementation of the EU policies through criminal law’, the Commission set out its policy on the topic.<sup>39</sup> This communication makes it clear that the Commission—not surprisingly—is ambitious within this area. In the communication, the Commission makes reference, among other things, to views on law enforcement and to ‘Eurobarometer 75’ from the spring of 2011 that seem to make clear that in the view of the citizens of EU, the fight against crime is one of the most important problem areas which EU institutions should address.

The communication also states that the Commission will place special emphasis on its ‘new’ area of competence set out in Article 83(2). Under the header ‘The added value of EU criminal law,’ the Commission writes:

*‘Certainly, criminal law is a sensitive policy field where differences amongst the national systems remain substantial, for example regarding sanction types and levels as well as the classification of certain conduct as an administrative or criminal offence. However, the EU can tackle gaps and shortcomings wherever EU action adds value. In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes.’*

As a more detailed justification for expanded EU judicial co-operation in criminal matters, the Commission noted that such co-operation would strengthen the mutual trust among Member States and the national justice systems and that such co-operation would facilitate the effective transposition of EU policies. The communication asserted that the new judicial co-operation in criminal matters would respect the Member States’ various legal systems and traditions,<sup>40</sup> and that EU criminal law should reflect the fundamental values, customs and choices made in a given society.

The Commission also outlines that the Lisbon Treaty has enabled the EU institutions and the Member States to establish a coherent and consistent EU criminal law which at the same time effectively protects the rights of suspected and accused persons and victims and promotes the quality of justice. The communication also emphasises the Charter of Fundamental Rights – which became legally binding with the Lisbon Treaty<sup>41</sup> – and the limits that the Charter provides for EU in this field.

<sup>39</sup> Cf. COM(2011) 573 final.

<sup>40</sup> Cf. Article 67(1) of the TFEU: “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.”

<sup>41</sup> Cf. Article 6(1) of the TEU.

Regarding the ‘absolutely necessary’ requirement the communication underlines that, since criminal law could have a stigmatising effect, criminal legal measures should only be adopted as a means of last resort – “*ultima ratio*.” According to the communication, this requirement is expressed in the general proportionality principle contained in Article 5(4) of the EU Treaty as well as in Article 49(3) of the Charter of Fundamental Rights. The communication moreover suggests that the requirement for *ultima ratio* entails that before a matter is criminalised, the EU legislature must carefully examine if measures other than those found in criminal law could adequately ensure the transposition of EU policies or whether the adoption of criminal law measures is required to handle the problems effectively.

The *ultima ratio* principle can, however, be traced back to various criminalisation theories in which the requirement is typically understood very restrictively and refers by no means only to proportionality and effectiveness. More precisely, one could say that the principle of *ultimo ratio* seems to contain a requirement that criminalisation and application of penalties is to be reserved for particularly serious criminal offences involving bodily harm and that criminalisation and criminal convictions cannot be applied merely because a certain conduct may result in adverse effects for other citizens or society—even if such conduct cannot be effectively prevented by other means.<sup>42</sup>

By referring to the principle of *ultimo ratio* in the communication and also—in passing—to the proportionality and effectiveness principles, the Commission seems to wish to ‘reassure’ EU criminal law sceptics that the criminal law competence will not be misused while at the same time attempting to seize the principle and render it toothless. This is an interesting manoeuvre, but one which may turn out to be counterproductive. In any event, the inclusion of the principle seems to be completely superfluous, both because neither Article 83, the general Lisbon Treaty, nor the Charter contain any requirements for *ultima ratio*. Furthermore, no legal benefits are attained by mixing the various principles (the principles of *ultima ratio* and proportionality)—even if the proportionality principle may be said to be one of the *ultima ratio* principle's many sub-principles. Additionally, the communication's overall main focal point is the effectiveness of EU law (the “added value” of criminal law) – the focal point is *not* to limit the use of criminal law measures.<sup>43</sup>

*‘The fact that it is solely the effectiveness of EU law that is the focus of the Commission is confirmed by the Commission’s proposal to the European Parliament and Council Directive on criminal sanctions for insider dealing and market manipulation,’<sup>44</sup> where in reality the*

<sup>42</sup> See e. g. Nils Jareborg, *Kriminalisering som ultima ratio regis?* In: Nils Jareborg, *Inkast i straffområdet*, 2006, p. 29 et seq., where on p. 43 it is specified that criminal offences such as murder, serious rape, armed robbery, gross mistreatment, serious espionage, meet the condition for becoming criminalised.

<sup>43</sup> See also the communication's comment that criminal law measures may be necessary to “stress strong disapproval in order to ensure deterrence.”

<sup>44</sup> Cf. COM(2011) 654 final of 20 October 2011. See also COM(2012) 420 final of 27 July 2012 (amended proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation).

*application of criminal law measures are only substantiated by the claim that Member States' implementing measures have proven "insufficient".*<sup>45</sup>

### 3. More on the Position of Denmark

The Protocol on the position of Denmark sets out the following specifics regarding Denmark's criminal justice reservation:

*Article 1*

*Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Chapter IV of Title III of Part III of the Constitution. The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously.*

...

*Article 2*

*None of the provisions of Chapter IV of Title III of Part III of the Constitution, no measure adopted pursuant to that Chapter, no provision of any international agreement concluded by the Union pursuant to that Chapter, and no decision of the Court of Justice of the European Union interpreting any such provision or measure shall be binding upon or applicable in Denmark; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of Denmark; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to Denmark.'*

Article 83 is set out in Title V of Part Three (Chapter 4 on judicial co-operation in criminal matters).

According to the wording of Articles 1 and 2 of the Protocol, Denmark's position is very categorically stated and leaves little room for misunderstanding—"Denmark shall not take part..." (Art. 1); "None of the provisions... no measure... no provisions... and no decision... shall be binding upon or applicable in Denmark...", *etc.* (Art. 2[1]).

But is Denmark's position with respect to criminal matters quite so simple? This question is relevant in spite of the categorical wording of Articles 1 and 2, first sentence because Article 2, first sentence, second and third indents, in conjunction with the fact that Article 83(2), as mentioned, partially codifies the EU competence, which the European Court of Justice in its Judgment of Environmental Protection through Criminal Law and its Ship-Source Pollution Judgment established Denmark had transferred to the EU (EC) upon joining the Community and which already then, in 1973, had been placed under the supranational co-operation (the old first pillar).

In other words, the question is whether Denmark is not still covered by the judicial co-operation in criminal matters which the European Court of Justice in its two judgments determined should be placed under the supranational co-operation,

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<sup>45</sup> See Introductory consideration (5).

and which was codified in Article 83(2), first indent of the Lisbon Treaty (“minimum rules with regard to the definition of criminal offences”). If not, this means that the Lisbon Treaty *returned* to Denmark some of the competence the State surrendered in 1973.

This kind of indirect or tacit restoration of competence seems unlikely, among other things, for the following reasons: First, the restoration was not debated at all as part of the Lisbon Treaty negotiations.<sup>46</sup> Secondly, Article 2, first sentence, second indent, explicitly states that Article 2, first sentence, first indent, shall not affect any of the “competences, rights and obligations” Denmark already enjoyed before the Lisbon Treaty’s entry into force just as Denmark continues to be bound by already applicable Community legislation or EU law. And, thirdly, because the explication in Article 2, second sentence – that the “EU acts within the area of police and judicial cooperation in criminal matters” adopted before the entry into force of the Lisbon Treaty and which will be amended, remain binding upon and applicable in Denmark unchanged – is not an exhaustive enumeration of what remains applicable in Denmark but is solely a necessary<sup>47</sup> special emphasis of the fact that, within criminal law, Denmark remains bound by any intergovernmental EU laws by which Denmark was bound before the entry into force of the Lisbon Treaty – even if Denmark, following a EU legislative amendment in this area, is the only country still bound by the old act.

Moreover, the assumption of a tacit return is unlikely in view of the EU’s common development and the European Court of Justice’s undaunted integration-friendly interpretive style – a fact that must be deemed relevant, since any subsequent dispute regarding this question could very easily end up before this very court.

To the author’s knowledge, there are no sources of law that have contributed any relevant interpretations on this matter—possibly because it did not occur to anyone at the time the Lisbon Treaty and the Protocol on the Position on Denmark were drafted, and because no one was mindful of the consequences of consolidating the EU’s competence on criminal law in one chapter of the Treaty on the Functioning of the European Union. Clarification on this competence question will therefore depend on how EU law develops within this area, and how Denmark chooses to act when directives are adopted based on Article 83(2). If Denmark withdraws its judicial opt-out, the question becomes irrelevant. If Denmark does not withdraw its opt-out but instead decides, without raising any objections, to implement such directives into Danish law, irrespective of whether Denmark feels required to do so, it is possible that no conflict will arise that can clarify the question. That Denmark would choose this kind of regulatory strategy is far from unthinkable, not least

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<sup>46</sup> The question whether the new provision read in conjunction with Denmark’s judicial opt-outs meant that competence returned to Denmark was also *not* discussed in the Danish Government’s Section 20 Memorandum of 4 December 2007 on Denmark’s Ratification of the Lisbon Treaty (section 4. 3. 19.1, p. 78–79).

<sup>47</sup> The reason for this is that, in terms of the regulatory system, a framework decision amended after the Lisbon Treaty’s entry into force is repealed and replaced by a directive. For more information, see below on the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

because such an approach would be in accordance with the previously mentioned Danish regulatory tradition and since Denmark seems to have chosen such a strategy with respect to acts adopted on the basis of Article 83(1) – even though, undoubtedly, Denmark is not obligated to do so, *cf.* below. However, if Denmark decides not to follow the judicial development once such a directive is adopted, a conflict could arise (e.g. if the Commission brings proceedings against Denmark before the European Court of Justice) that might not only clarify the specific question – whether Denmark should implement the specific act into Danish law – but also shed light on the general and politically sensitive question about whether – in spite of the wording of Articles 1 and 2, first sentence, of the Protocol – Denmark is covered by the judicial cooperation in criminal matters with respect to establishing ‘minimum rules for what should be considered criminal offences’ across all EU policy areas covered by harmonisation measures. Such a clarification presupposes, naturally, that someone will take notice of this particular problem – which, so far, does not seem to be case.

As mentioned above, the Commission has brought forward a proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation<sup>48</sup> and in that regard has referred as the legal basis to Article 83(2).<sup>49</sup> Recital 22 of the Preliminary Remarks states that Denmark, as a result of its judicial opt-out, shall not participate in the adoption of the directive. There is therefore no reason to believe on the basis of this proposal that the Commission has considered or noticed whether the interpretation of Article 83(2) should be conducted according to the judicial competence in criminal matters which, according to the Judgment of Environmental Protection through Criminal Law, Denmark surrendered already back in 1973. This position could be changed if, once the directive is adopted, Denmark does not amend its legislation where appropriate on its own initiative.

Since the Ship-Source Pollution Judgment established that it did not fall within the Community’s competence to establish the type and scope of penal measures, involvement of Denmark in the judicial co-operation in criminal matters under Article 83(2) would not mean that Denmark would be bound by a directive’s provisions on the type and scope of sanctions. Denmark did not surrender this competence upon joining the EC in 1973 and, by virtue of its judicial opt-out, has not ceded it subsequently.

#### IV. Classic Danish Criminal Law and the EU

As mentioned above, Denmark was a full participant in the old intergovernmental judicial co-operation in criminal matters (under the old third pillar). This meant that Denmark took part in the adoption of framework decisions on substantive

<sup>48</sup> *Cf.* COM(2011) 654 final of 20 October 2011 in conjunction with COM(2012) 420 final of 27 July 2012.

<sup>49</sup> The Commission did not also refer to Article 114 of the TFEU as the legal basis (formerly Article 95 of the TEC).

criminal law—e.g. the 2002 Framework Decision on combating trafficking in human beings,<sup>50</sup> which formed the basis for incorporating section 262 a into the Danish Penal Code.

As outlined above, this part of the EU judicial cooperation in criminal matters is unequivocally covered by Denmark's judicial opt-out. However, under Article 2, second sentence, of the Protocol on the position of Denmark, Denmark remains bound by the old intergovernmental co-operation in the sense that it is still bound by the acts that were adopted based on the old third pillar, even if the other Member States abolish the acts that were adopted at the time based on this regimen. Thus, Denmark's position is that it remains bound by, e.g. a framework decision, even if the other EU Member States abolish the framework decision by, for instance, adopting a directive for the regulation of the relevant legal area.

And as mentioned, this is exactly what has occurred with respect to the framework decision on trafficking in human beings, since the European Parliament and the Council – based on Articles 82(2) and 83(1)—adopted Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA.

The Directive deals with a broader notion of human trafficking in Article 2 than what was found in the framework decision, and the Directive requires that the maximum penalty for trafficking in human beings, under enumerated specified detailed aggravating circumstances, be set at a minimum of 10 years. Additionally, the Directive contains provisions relating to liability for incitement, aiding and abetting and attempt, on jurisdiction, seizures, confiscation and prosecutorial competence, *etc.* Moreover, the Directive contains provisions relating to the protection of and assistance to victims.

Finally, Article 18 of the Directive contains a provision that requires Member States to make the preventing and combating of trafficking in human beings more effective by discouraging demand. In this regard, Member States are imposed to consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred in the Directive's Article 2. The imposition only relates to exploitation with the knowledge that the person is a victim of human trafficking.

Denmark already met the requirements of the Directive in several ways; except for the provision in Article 2 (definition of trafficking in human beings), the penalty level requirement in severe cases of human trafficking and the Directive's jurisdiction requirement (on Danish jurisdiction in respect of offences related to crimes committed outside Denmark without requiring dual criminality). To this background, the Danish Minister of Justice introduced a Bill to amend section 262 a of the Danish Penal Code in October 2011.<sup>51</sup>

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<sup>50</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA).

<sup>51</sup> Lovforslag L 57. Forslag til lov om ændring af straffeloven (Udvidet definition af menneskehandel mv.) [Bill L 57. Bill to amend the Danish Penal Code (Expanded definition of trafficking in human beings, *etc.*)]. [Act 275/2012]. With respect to Article 18 of the Directive on preventive measures, the Minister of Justice referred to the Standing Committee on Criminal Law (Straffelovrådet) and its general review of Chapter 24 of the Danish Penal Code on vice crimes.

The legislative bill states directly that its purpose is to bring Danish criminal legislation into accordance with the Directive, even if the Directive is not binding upon or applicable in Denmark due to the judicial opt-out – and even though Denmark did not take part in the Council’s adoption of the Directive.<sup>52</sup> During the Danish Parliament’s debate, several questions were put to the Minister of Justice on this matter.

Questions 1, 3 and 4 read:

*‘What is it that makes the Minister believe that Denmark should follow the EU Directive, when we have a judicial opt-out that specifies that we do not need to do so?’*

*‘Would the Minister please clarify whether the sole reason for this act is to modify Danish legislation to fit the EU Directive so that there will not be a big difference with respect to EU legislation later when, at some point down the road, we have another referendum on the judicial opt-out?’*

*‘Why will the Minister not respect the fact that, through a referendum, the Danish people have made it clear that they do not wish to take part in the judicial area in the EU – which is not respected if the Danish legislation is standardised in accordance with that of the EU purely for the sake of standardisation?’*

The Ministry of Justice provided, inter alia, as his answer to these questions:

*‘The Government prioritises combating human trafficking very highly.*

*Trafficking in human beings often takes place across borders, and combating this monstrous form of crime effectively therefore requires, in the opinion of the Government, close international co-operation, including a joint European effort...’*

As seen, the Government’s grounds for Denmark’s adjusting to the regulation of the EU in this area contain two counts: 1) the criminality in question has a transnational dimension and 2) combating such criminality effectively requires close international co-operation and a joint European effort.

These grounds are nearly identical to the justification for having Article 83(1) of the TFEU in the first place.<sup>53</sup> This therefore suggests that the justification can be generalised to include the entire scope of Article 83(1) of the TFEU. If this is true, the legal situation will be that Denmark will regularly bring its legislation on criminal matters into accordance with the Directives of the European Parliament and the Council within substantive criminal law and thus act as if Denmark did not have an opt-out regarding judicial co-operation in criminal matters – but without, one should add, Denmark having the ability to take part in the Council’s adoptions of such acts.

It is quite obvious that there is nothing to prevent Denmark from choosing this adaptive legislation strategy within substantive criminal law (on the condition that

<sup>52</sup> Cf. Bill’s general comments, Item 1.1 (Act 275/2012).

<sup>53</sup> Which, as we know, in addition to trafficking in human beings, specifies terrorism, 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.

the new criminal law efforts are intensified and that no policy of lower sentences is implemented or de-criminalisation occurs, so that Denmark can continue to meet its old third-pillar obligations).<sup>54</sup> However, from a criminal justice viewpoint, such a strategy does not seem satisfactory. This is because Denmark, in that case, would be letting its criminal law be bound by the EU without having any influence on its framing. Denmark used the sovereignty argument back when it acquired its judicial opt-out. By choosing an adaptive legislative strategy, as occurred with the human trafficking directive, Denmark has fundamentally surrendered more sovereignty than if Denmark did not have a judicial opt-out and thereby took full part in the supranational EU co-operation in this area.

## V. Conclusion and Perspective

In many ways, 18 May 1993 was a landmark day for Denmark. This was the day the referendum was held on the Edinburgh Agreement and the Maastricht Treaty in Denmark. The day ended with widespread civil unrest at Nørrebro in Copenhagen. The disturbances grew so violent that street fighting broke out between protesters and the police, which among other things, resulted in the police's firing 113 shots at the protesters. There were many legal implications to the 'cleanup' after these events, not least in terms of administrative procedural law and police law but most decidedly also in terms of criminal law.

From the viewpoint of criminal law, however, it was the ballot theme that resulted in the most far-reaching implications. This was because the Edinburgh Agreement signalled a new open ambivalence between criminal law and EU law. It is an ambivalence that does not seem to want to be clarified. On the contrary, the ambivalence is continuously sustained by the European integration that is becoming ever tighter and by the fact that Denmark politically, also within criminal law, seems to desire full integration. Yet, for judicial reasons, Denmark has undertaken a leg iron with a chain not long enough for it to reach the high-table – the table where the decisions are taken. The result is a paradox that does not bode well for Denmark and for criminal law.

Generally, the Danish criminal law EU ambivalence is quite incomprehensible. As laid out in this article, Denmark has a regulatory tradition with the potential to assume a vanguard position in the EU co-operation. When an EU act leaves it to Member States to establish suitable measures for infringing on the act's substantive standards, Denmark chooses substantially and almost without exception to establish penalties for infringements of such standards. When the classic judicial co-operation in criminal matters fell under the intergovernmental co-operation, Denmark was a

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<sup>54</sup> The situation is different for acts, where Denmark cannot unilaterally transpose EU acts to Danish laws (e.g. acts based on the principle of mutual recognition, reciprocal exchange of information, *etc.*) and where an intergovernmental agreement – a parallel agreement – is therefore necessary. For more information, see the Ministry of Justice's response to Question No 7 regarding Bill of 10 February 2012 to amend the Danish Penal Code and Question 501 (Reg. Part) of 17 April 2012.

very eager partner that frequently took initiatives within the area – and Denmark would always, for immediate legislative initiatives, implement adopted acts into Danish law. Now, where Denmark – possibly – stands completely outside the judicial co-operation in criminal matters, it has continued its practice of establishing penalties as “appropriate measures” just as it is in the forefront when bringing criminal legislation into compliance with the acts adopted by the other EU Member States on the basis of Article 83(1). With this kind of criminal law approach to EU law, it is difficult to understand why Denmark maintains its judicial opt-out.

That Denmark failed to notice that the Lisbon Treaty (possibly) returned to it the part of EU's criminal law competence that Denmark had transferred when it joined the EC back in 1973, is also evidence that the Danish judicial opt-out is not a opt-out that Denmark, in reality, has great feelings for one way or the other – instead it seems to be a opt out that Denmark prefers not to be mentioned.

From a purely criminal justice perspective, it is not satisfactory that major parts of Danish criminal policy – even within the area of classic penal law – are decided outside Denmark's borders without Denmark having any decision-making influence. As the ‘National Compromise’ shows, there is a close link between a country's sovereignty and its policy on criminal matters. This link, however, is severed once a country does not wish to take part in a supranational judicial co-operation in criminal matters while letting that same supranational forum determine the development within criminal law. In other words, if Denmark still wishes to fly its sovereignty flag high – and is concerned with criminal law – it must take a clear position and ‘suffer’ the consequences thereof.