Articles

The Post-Lisbon approach towards the main features of substantive criminal law: developments and challenges

Maria Kaiafa-Gbandi[1]

Since the entry into force of the Lisbon Treaty, there have been two important developments concerning the activity of the EU in the field of substantive criminal law: (1) the EU institutions that participate in the legislative procedure have formed rules and principles guiding the exercise of the competence deriving from Article 83 TFEU; (2) the directives adopted to approximate the definitions of criminal offences and sanctions often exceed the limits of the competence of the EU, despite the broad scope of Article 83 TFEU. In view of the EU's obligation to respect the nature and the fundamental principles of substantive criminal law, as well as the limits of its competence, this paper initially highlights and assesses the positive and the negative points of the guidelines set by the Commission and the European Parliament. Subsequently, it concentrates on the most problematic features of the EU directives concerning the approximation under Article 83 TFEU, and in particular on the infringements of the fundamental principles of substantive criminal law, the insufficiently justified interventions in the field of sanctions, and on the recent tendency to adopt rules with regard to issues of the general part of criminal law. The paper concludes with a concise presentation of key proposals on reorienting EU activity in the field of substantive criminal law towards protecting the fundamental rights of citizens.

I. Introductory remarks – The object of the presentation

Almost five years after the implementation of the Lisbon Treaty[2], the recent development in criminal law within the EU context is characterized by two significant features: (1) the increased activity of the Union in the field of criminal procedural law due to the promotion of the Stockholm programme[3] and EU's lag in providing guarantees for persons undergoing criminal procedures, and (2) the decisions on the possibility to amend standing EU legal instruments, especially with respect to substantive criminal law, where the earliest EU interventions occurred. If not modified within 5 years from the implementation of the Lisbon Treaty, they still

[1] Prof. Dr. Maria Kaiafa-Gbandi is University Professor at the Aristotle University Thessaloniki (Greece), co-editor of the EuCLR and founding member of the European Criminal Policy Initiative.

[2] The Lisbon Treaty was set into force on 1st December, 2009.

[3] Council doc 17024/09.

remain in force and acquire the binding powers of directives that specify minimum limits of EU-required punishability within the national legal orders of Member States[4]. Moreover, this approach is complemented in the field of procedural law through the current EU efforts to establish a European Public Prosecutor's Office[5], and in the field of substantive criminal law through the ongoing activities towards a proposal for a directive on combating fraud against the financial interests of the EU[6]. Both these legislative initiatives highlight the EU's efforts to protect its own legal interests, and it is only natural that their attributes are quite significant for what is today described as European Criminal Law.

The article will focus on substantive criminal law for the following reason: right now, all post-Lisbon EU interventions in substantive criminal law that do not relate to entirely new issues have stemmed from a re-evaluation of previous legal instruments (conventions and framework-decisions) they intend to replace[7]. This allows us to imply that the relevant EU interventions are more mature, carry past experience, and possibly express new aspirations, all of which depict a substantial evolutionary process that should also be, as such, evaluated itself. On the other hand the following major aspect should not be overlooked at this point: the object of substantive criminal law is to define criminal acts and provide for sentences serving at the same time not only as a means of protecting fundamental interests, but also as a yardstick of civil liberties[8]; however, the said object is hardly served when the elements of crimes conceal considerations pertaining to judicial cooperation in criminal matters as opposed to fundamental substantive principles, which have to be respected in a liberal and democratically legitimized state authority[9]. As the Manifesto on a European Criminal Policy of the ECPI has made clear, unfortunately such an instrumentalization of substantive criminal law for the purposes of judicial cooperation has not been avoided[10]. Thus it seems to remain important to rethink some of the main problems of substantive criminal law in the EU framework and try to restore it to its true essence, as an important step towards reorienting and supporting the EU in the direction of protecting the fundamental rights of citizens[11] according to its action plan of the Stockholm programme.

---

[4] See Art. 9 and 10 of Protocol 36 to the Lisbon Treaty.

[5] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final.

[6] Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final.

[7] All new directives based on Art. 83 § 1 TFEU (2011/36/EU on human trafficking, 2011/93/EU on sexual exploitation of children, 2013/40/EU on attacks against information systems, 2014/62/EU on the protection against counterfeiting) have replaced framework-decisions (2002/629/JAI, 2004/68/JAI, 2005/222/JAI and 2000/383/JAI respectively), while the directive on combating fraud will repeal the 1995 Convention on the protection of the EC financial interests and its Protocols.

[8] I. MANOLEDAKIS, "Criminal Law, General theory", 2004, p. 29; see also C. ROXIN, "The Legislation Critical Concept of Goods-in-law under Scrutiny", EuCLR 2013, pp. 16-17.

[9] M. KAIAFA-GBANDI, „Aktuelle Strafrechtsentwicklung in der EU und rechtsstaatlicheDefizite", ZIS 2006, pp. 527-529, M. KAIAFA-GBANDI/ATH. GIANNAKOULA, Memorandum, in House of Lords-European Union Committee, 22nd Report of Session 2007-08, Initiation of EU Legislation, HL Paper 150, pp. 151-152.

[10] http://www.zis-online.com/dat/artikel/2009_12_383.pdf, p. 1.

[11] See the analysis of P.-A. ALBRECHT, „Die vergessene Freiheit, Strafrechtsprinzipien in der europäischen Sicherheitsdebatte", 2003, p. 47 ff.

II. The Commission's Communication on an EU Criminal Policy (COM 2011, 573 final) and the relevant European Parliament resolution (2010/2310 (INI)) in light of the Manifesto of the ECPI

The first predominant feature in substantive criminal law developments relates to a post-Lisbon approach by both the Commission and the European Parliament. In realizing the magnitude of EU interventions in member-states' substantive criminal law, these two institutional EU bodies have expressed themselves officially with regard to the general principles and the goals that the use of criminal law should serve. Those of you who happen to know the Manifesto on European Criminal Policy of the ECPI-group can easily understand first of all the merits but also the shortcomings of the Commission's Communication to the European Parliament and the Council on "Ensuring the effective implementation of EU policies through criminal law"[12]. This document enhances the Council's decisions on "Model criminal provisions" and on "The approximation of penalties" (adopted in 2009 and 2002 respectively[13]) in a variety of aspects.

First of all one, should stress the utmost importance of the Commission's Communication as it tries to express an EU institutional body's understanding with regard to European criminal policy and to clarify its objectives even though the Communication is restricted to the adoption of criminal law directives to ensure the implementation of EU policies that have been subject to harmonisation measures (i.e. to matters falling under Art. 83 para 2 TFEU). In other words, the importance of the Communication lies in its attempt to set up *a general framework* that answers questions such as "if" and "when" the EU can employ its harshest means – *i.e.* criminal law – by binding its Member States to criminalise conduct in areas where it has competence[14]. Thus the Commission's Communication initiates a Union-wide discussion that needs to be held in considerable detail. Especially worth mentioning is the general acknowledgement in the Communication of principles that are to be respected by the EU, such as the subsidiarity principle, the application of criminal law as a last resort, the proportionality principle as well as respect for fundamental rights[15].

Let me focus on certain central issues in the Communication, which generate questions or could be highlighted from another point of view, in comparison with the European Parliament's relevant resolution on an EU approach to criminal law, trying to serve the main objective – documented as such in the Charter of Fundamental Rights of the E. U.[16] – *i.e.* to place the individual at the heart of its activities.

---

[12] COM (2011) 573 final.

[13] Council docs 16452/2009, 16798/2009, 16826/2/2009 and 9141/2002. The Council's text on "Model criminal law provisions", which aimed at achieving coherent and consistent criminal law provisions, is characterised by flexibility and is meant to be only a starting point for further development; see also H. NILSSON, "25 years of Criminal justice in Europe", *EuCLR*, 2/2012, pp. 106-22.

[14] See also "Editorial", EuCLR, 3/2011, pp. 209-211.

[15] COM (2011) 573 final, pp. 6-7. Cf. the European Parliament's resolution on a EU approach on criminal law, 2010/2310(INI), 22 May 2012 (see also the report of the Committee on Civil Liberties, Justice and Home Affairs A7-0144/2012, Rapporteur: *Cornelis de Jong*), which deals with the fundamental principles for European criminal legislation much more substantially (paras 1-6, 12).

[16] See the Preamble of the Charter.

1. The added value of EU criminal law

First of all, it should be stressed that the added value of EU criminal law is unilaterally determined in the Commission's Communication. This added value should not only be seen as "tackling gaps and shortcomings ….. in view of the cross-border dimension of many crimes, ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes"[17], but also in safeguarding the fundamental rights of suspects and defendants, whose prosecution is now greatly facilitated on a Union-wide basis. In other words, the Commission's vision for an EU criminal law as "an important tool to better fight crime … and ensure the effective implementation of EU policies"[18] is too feeble compared to the European legal civilization and also stands in opposition to the rule of law, according to which criminal law should be a tool for protecting fundamental interests as well as civil freedoms at the same time. This *double function* of criminal law should expressly determine its added value in the framework of the EU and is much better served in the framework of the European Parliament's resolution on an EU approach on criminal law[19].

2. The function of common minimum rules: serving more than strengthening mutual trust

On the other hand, according to the Commission, common minimum rules are essential to enhance mutual trust between Member States and national judiciaries[20]. Their importance, though, should be seen primarily as determining a minimum punishability of certain behaviour according to the *ultima ratio* principle for protecting fundamental legal interests and in simultaneously safeguarding all the basic principles of a liberal criminal law, which are referred to in the ECPI Manifesto[21]. In other words, *mutual trust between Member States and judiciaries can be derived from the respect expressed in common minimum rules for fundamental principles of criminal law and is not independent from the quality of such rules*[22]. Thus it would be a great loss for the European legal system to come up with common minimum criminal law rules simply as a tool for strengthening mutual trust and facilitating the mutual recognition of judicial measures. Fortunately, the European Parliament's resolution adopts a wider view on the matter than the Commission's stance.

---

[17] COM (2011) 573 final, pp. 2-3.

[18] *Ibid*., p. 12.

[19] See arguments concerning the notion that criminal law is a *special* field of law, i. e. that there are special features that *must* be taken into account by the EU when dealing with the approximation of criminal law, in P. ASP, "The Substantive Criminal Law Competence of the EU", 2012, pp. 75-78, A. KLIP, "Definitions of harmonisation", in A. KLIP/H. VAN DER WILT (eds.), "Harmonisation and harmonising measures in criminal law", 2002, pp. 27-28, U. NELLES, "Definitions of harmonisation", in A. KLIP/H. VAN DER WILT (eds.), "Harmonisation and harmonising measures in criminal law", 2002, pp. 39-40.

[20] COM (2011) 573 final, p. 5.

[21] http://www.zis-online.com/dat/artikel/2009_12_383.pdf, p.1.

[22] Similarly the European Parliament's resolution on an EU approach on criminal law, paras 2-3.

3. Safeguarding coherence and consistency of criminal law rules on both levels (European and national)

The coherence and consistency of criminal law rules[23] is also a key issue in the Commission's Communication. It is imperative, however, to stress that coherence and consistency of criminal law provisions is not only a fundamental principle for the EU legal order. It is also a fundamental value that should be respected by the EU when intervening in the criminal law system of its Member States[24]. For this purpose, prior to any EU approximation of criminal law rules for a specific field of criminality, a detailed and carefully adjusted analysis of existing national criminal law provisions in the respective field is needed so that the EU avoids compelling individual Member States to constantly increase sanctions, broaden punishability or disregard the proportionality principle in their national framework.

4. The Commission's two step approach in EU criminal law legislation

With regard to the proposed two-step approach to EU criminal law legislation that the Commission introduced in its Communication of 2011[25], the methodological structure of this approach can be evaluated in a positive way.

Nevertheless, the first step, i. e. referring to the decision as to whether to adopt criminal law measures at all[26], reveals a serious shortcoming. The question regarding the conditions under which to employ criminal law as a last resort for the implementation of an EU policy cannot be sufficient. Prior to such a question, we need to pay heed to the existence and need for the protection of a fundamental interest, which can be derived from the EU's primary legislation and which should be significantly damaged or jeopardised through punishable activities[27], as criminal law is not supposed to be reduced to a mere instrument for the implementation of *any* policy, even when used as a last resort. One can deduce the same basic stance from para. 3 of the European Parliament's relevant resolution[28].

Through the second step, referring to the principles guiding the decision on the kind of criminal law to adopt[29], aside from the general assessment that the Commission downgrades the actual implementation of fundamental principles of criminal

[23] Ibid.. See also the European Parliament's resolution on an EU approach on criminal law, recitals H, N, O and paras 6, 11,13.

[24] P. ASP, "The importance of the principles of subsidiarity and coherence in the development of EU criminal law", EuCLR 2011, p. 47.

[25] COM (2011) 573 final, p. 7 and f.

[26] ibid., p. 7.

[27] Compare also the European Parliament's resolution on an EU approach on criminal law, para. 3.

[28] See also the Opinion of the European Economic and Social Committee on the COM (2011) 573 final (OJ C 191, 29.6.2012. p. 97 ff.) paras 1.2-1.5 and especially 1.4: "The conduct in question must also constitute a serious violation of an interest which is considered to be fundamental"; also M. KAIAFA-GBANDI, "European Criminal Law and the Treaty of Lisbon", 2011, pp. 68-69, and C. ROXIN, "The Legislation Critical Concept of Goods-in-law under Scrutiny", EuCLR 2013, pp. 3-4.

[29] COM (2011) 573 final, pp. 7-9.

law when describing its view on the possible concrete content of EU minimum rules[30], four critical remarks are in order:

- When introducing common minimum criminal law rules, the EU legislator is obliged to respect the principle of legal certainty as far as *the minimum content* of punishability is concerned to such a degree that its provisions leave *no doubt* about it and thus satisfy the *lex certa* requirement[31]. Otherwise, the national legislators will not be able to transpose the EU common minimum rules into their domestic legal order correctly.
- Regard should be paid to the fact that in the frame of introducing common minimum rules, the EU is not granted competence to introduce a general part of European criminal law[32].
- Mere statistical data outlining the status and trend of criminality in particular fields within individual national legal orders[33] does not suffice as adequate proof for the definite requirement of a new set of EU rules for criminal law. One also has to take notice of the reasons for the respective situation in every Member State and be aware of the fact that these reasons are often related to the implementation of the relevant rules and not to the existing legislation itself[34].
- There is an urgent need for the EU to rethink its strategy on introducing minimum rules on penalties. I will elaborate further on this problem later on.

5. EU policy fields and the possible inevitability of EU criminal law

Last but not least, let me make some observations addressing the Union's policy areas where harmonised EU criminal law rules might be needed. According to the Commission's Communication: "Where the discretion of Member States in implementing EU law does not lead to the desired effect enforcement, it may be necessary to regulate, by means of minimum rules at EU level which sanctions Member States have to foresee in their national legislation. Approximating sanction levels will in particular be a consideration, if an analysis of the current sanction

[30] cf. "Editorial" of EuCLR, 3/2011, p. 210, referring to a two-fold strategy of the Commission as the Communication makes clear that criminal law has to serve other – political and economic – ends.

[31] See COM (2011) 573 final, p. 8. Cf. the European Parliament's resolution on an EU approach to criminal law, paras 4; also A. BERNARDI, ""Nullum Crimen, Nulla Poena Sine Lege" Between European Law and National Law", in M. CHERIF BASSIOUNI/V. MILITELLO/H. SATZGER (eds.), "European cooperation in penal matters: issues and perspectives", 2008, pp. 101-102, and C. PERISTERIDOU, "The principle of lex certa in national law and European perspectives" in A. KLIP (ed.), Substantive Criminal Law of the European Union, 2011, p. 69.

[32] BÖSE, „Die Entscheidung des Bundesverfassungsgerichtszum Vertrag vonLissabonund ihre Konsequenzen für die Europäisierung des Strafrechts", ZIS 2010, p. 76 and p. 86; M. HEGER, „Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon",ZIS, 2009, p. 406 and p. 412. Cf. for this matter A. KLIP, "Towards a general part", op. cit., p. 30 and f. as well as R. SICURELLA, "Some reflections on the need for a general theory of the competence of the European Union in criminal law", in A. KLIP (ed.), Substantive Criminal Law of the European Union, op. cit., p. 234 and f.

[33] COM (2011) 573 final, p. 8.

[34] For the importance of the factor of implementing existing legislation see Council doc 9959/99, 12, T. ELHOLM, "EU Criminal Cooperation – Increased Repression", European Journal of Crime, Criminal Law and Criminal Justice 2009, p. 221, K. NUOTIO, "Harmonization of criminal sanctions in the European Union – Criminal law science fiction", in E.J. HUSABØ/A. STRANDBAKKEN (eds.), "Harmonization of criminal law in Europe", 2005, p. 92.

legislation of administrative or criminal nature reveals significant differences amongst Member States and if those differences lead to an inconsistent application of EU rules"[35]. However, such a situation does not at all render the approximation of criminal laws in different EU policy fields *essential* as the Treaty provides. The relevant decisive questions here are the ones concerning the fundamental interests to be protected and the punishable activities causing significant damage to society or individuals. Unfortunately, these questions are not discussed in the Commission's Communication. Besides, it is important to stress that a common understanding of the guiding principles underlying EU criminal law legislation – as opposed to the Commission's view[36]- goes far beyond the interpretation of basic legal concepts used in criminal law and the added value that criminal law sanctions can provide, referring to the safeguarding of fundamental principles of criminal law and respect for human rights.

Due to all the these deficits in the Commission's understanding of the fundamentals of establishing minimum rules, but also due to the dismissal of the European Parliament's proposal for an inter-institutional agreement between itself, the Commission, and the Council, that could establish a lasting rule-of-law EU approach on criminal law, it is not surprising that crucial problems persist in Union directives requiring Member States to introduce or extend punishment of different acts. For example, such lack of respect for the ultima ratio principle is detected in the Commission's proposal for the protection of the financial interests of the EU, where the necessity for new fraud-related offences (art. 4 § 1) is not specifically justified, even though they obviously broaden the scope of punishability.[37] Furthermore, a considerable deficit appears as regards the safeguarding of the n. c. n. p. s. l. certa principle, since fraud against the financial interests of the EU is defined as any act or omission simply "*relating* to: (i) the use or presentation of false, incorrect or incomplete statements or documents" etc. However, the concept of "related" acts remains extremely vague[38] and therefore cannot even minimally defend the legal certainty essential to the deprivation of freedom. Critical problems also linger in relation to the principles of proportionality and, consequently, of guilt. In general, it is apparent (even from the relevant EU provisions on aggravating circumstances for various offenses) that the current EU trend lies in the introduction of stricter penalties and in the simultaneous restriction of Member-States' discretion to define them. The proposed Directive on the criminal protection of EU financial interests against fraud makes clear that the EU legislator now sets the least maximum penalty for Member States to impose in the form of an absolute inelastic numerical value, rather than a range.[39] This obviously obstructs Member States from exhaustively

[35] COM (2011) 573 final, p. 10.

[36] Ibid., p. 12.

[37] See M. KAIAFA-GBANDI, "The Commission's Proposal for a Directive on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law (COM (2012) 363 final) – An Assessment Based on the Manifesto for a European Criminal Policy", EuCLR 2012, pp. 326-327.

[38] Op. cit., pp. 331-332.

[39] Op. cit., p. 328.

adhering to the principle of proportionality in their national legislations. Moreover, there are cases where the least maximum penalty enforced on the national legislator is a single numerical value, although it concerns acts that are completely diverse as to their demerit. For instance, proportionality cannot justify the identical penalty envisaged for EU frauds and briberies of officials that are detrimental to the financial interests of the EU, as proscribed in the abovementioned proposal for a directive.

The above analysis demonstrates that the EU still has a long way to go in respecting the fundamental principles that should govern the establishment of minimum rules for the introduction or re-definition of criminal behaviour in Member States.

III. EU-competence for the introduction of minimum rules on crimes and sanctions: testing the limits of Member-States' tolerance

Another noteworthy aspect relates to the limitations of EU competence as regards the introduction of minimum rules that define the scope of crimes and the range of possible sanctions. According to Article 83 TFEU, these restrictions are based on the very serious cross-border criminality on one hand (Art. 83 § 1 TFEU), and the essential need to ensure the effective implementation of an EU policy in areas which have been subject to harmonization measures (Art. 83 § 2 TFEU). Regardless of the interpretation problems owing to the vagueness of terminology used in the above provisions or to their wording[40] (which allows for criminal law to appear as an annex promoting an EU policy), it remains a fact that the EU does not always respect the undeniable conceptual core of these limitations, while the practices it has generally adopted –with the tolerance of its Member-States– do not promote such an appreciation.

It is characteristic, for example, that the directive on attacks against information systems[41] covers all but minor unlawful acts of access or interference to information systems and data theft. The important question that has to be asked is therefore, do acts that are just over what one would call minor transgressions qualify as very serious crimes that allow the EU to enforce criminalization? This is clearly not the case, and it presents an excess of EU competence, as both the criteria of Art. 83 § 1 TFEU are cumulative. On the other hand, one could also pose another question: is, for instance, any sexual exploitation of a minor a cross-border crime? Obviously not, nevertheless the relevant Directive makes no distinction whatsoever, nor does it

[40] See M. KAIAFA-GBANDI, "European Criminal Law and the Treaty of Lisbon", 2011, pp. 30-31, p. 67, H. SATZGER, "International and European Criminal Law", 2012, pp. 75-76, P. ASP, "The Substantive Criminal Law Competence of the EU", 2012, p. 90, H. NILSSON, "25 years of Criminal Justice in Europe", EuCLR 2012, p. 117, K. AMBOS/P. RACKOW, „Erste Überlegungen zu den Konsequenzen des Lissabon-Urteils des Bundesverfassungsgerichts für das Europäische Strafrecht", ZIS 2009, p. 402, F. ZIMMERMANN, "The implications of the Treaty of Lisbon on Criminal Law", in P.M. HUBER (ed.), "The EU and National Constitutional Law", 2012, p. 71, HOUSE OF LORDS, The Treaty of Lisbon: an impact assessment, 10th Report 2007-08, p. 114.

[41] See critical analysis of the directive in M. KAIAFA-GBANDI, "Criminalizing attacks against information systems in the EU – The anticipated impact of the European legal instruments on the Greek legal order", European Journal of Crime, Criminal Law and Criminal justice 2012, pp. 59-79.

howsoever introduce the cross-border feature in the minimum elements of the crime it defines. Thus, the EU often appears to regulate even at a national scale a range of basic crime forms through its minimum rules, while Member-States have delegated specific and limited powers to the EU to regulate aggravated forms of particularly serious and cross-border criminality. In my view, these elements should be included in the EU minimum rule provisions with which the Union requires its Member States to introduce relevant crimes, as this is the case in the U.S. federal criminal law. This requirement is even stronger today, considering the binding -for Member-States- nature of directives on minimum levels of EU defined punishability, and the shared competence regime that gives precedence to EU initiatives. Whether Member States would adopt the elements of the minimum rules for the relevant, not particularly serious or nationally restricted acts would be their own decision to make, and they would definitely not be bound as regards the sanctions for the regulated offenses, except for those that actually fall under EU competence.

The same applies to the competence on minimum rules according to Art. 83 § 2 TFEU. Once more, as the Federal Constitutional Court of Germany held[42], a narrow interpretation of the term "essential" need of EU minimum rules which introduce new offences or broaden their scope and define their sanctions in order to ensure the effective implementation of an EU policy in an area which has been subject to harmonisation measures is undoubtedly required. This necessity should be sufficiently substantiated by the EU when introducing the relevant legal instruments[43].

Under the current regime, however, it is in my opinion clear that Member-States are not bound by directives that exceed EU competence and can opt not to pursue the minimum rules prescribed by the Union in areas of criminality beyond its competence in the above sense, carrying, of course, the risk of a different ECJ interpretation and a possible imposition of penalties for failure to comply with the relevant directives. Therefore, it is imperative to raise this issue during the preparation of draft directives when the national parliaments are asked to express their opinion on them[44].

IV. The escalation of interventions in the general part of substantive criminal law

The third significant issue, principally recorded in EU provisions instigating the development of substantive criminal law, is the escalating intervention of the EU to regulate issues or institutions of the general part of substantive criminal law.

---

[42] See BVerfG 2 BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09, 30.6.2009, paras 361-362.

[43] See proposals to determine the borders of the competence founded in Art. 83 § 2 TFEU in ATH. GIANNAKOULA, "The development of substantive criminal law in the European Union: approximation concerning the definition of criminal offences and sanctions in the area of freedom, security and justice", Doctoral thesis, 2014, pp. 433-440;

[44] According to the procedure of Art. 5 and 6 of Protocol 2 to the Lisbon Treaty.

No explicit EU competence is acknowledged in this area, thus any intervention could be legitimate only when really dictated as essential by the regulated offenses for which intervention competence is acknowledged[45]. Therefore, the EU was initially rather skeptical to introduce in individual directives minimum rules referring to issues of the general part of substantive criminal law. For example, it required explicitly the criminalization of attempt or participation, which is justified when considering that some Member-States only punish attempt in offenses expressly envisaged for. In contrast, the provisions for Member-State's jurisdiction in the prosecution of offenses introduced with minimum rules are not always equally vindicated. For example, while such provisions are crucial in the criminal repression of fraud against the financial interests of the EU, them being legally protected interests of the Union itself, and being reasonable for the EU to intend to identify the "extraterritorial" expansion of Member-States' criminal jurisdiction for the sake of uniformity, it is not equally necessary in, e. g., sexual abuse of minors. Of course, if the restriction for EU regulating only serious cross-border criminality was actually upheld, the EU intervention for matters of jurisdiction would seem more legitimate. In any case and in terms of content, the EU once again did not introduce here –generally speaking- provisions of excessive breadth. Beyond the principle of territoriality, normally it only imposes to the Member States the introduction of the principle of active citizenship.

However, the picture of the depth and breadth of EU interventions in general-part institutions completely changes once the following are taken into consideration: (a) the provision for statutory limitations as it stands in the proposal for a Directive to combat fraud against the financial interests EU, and (b) the recent Directive on confiscation. In Art. 12 of the proposal for a Directive the EU not only generally expects Member-States to provide a sufficient time limitation for such offenses for reasons of effective prosecution, but it also imposes a minimum limit of five years in cases of serious transgressions. For some Member-States, the statute of limitations is (also) an institution of substantive criminal law, and a ground for releasing from criminal punishment. Its definition obeys to more general policy options of legal orders for every category of offenses, unless otherwise dictated by a specific type of crime. In property crimes such as EU-fraud, there is no need for a special provision like for example in cases of crimes against minors. Moreover, EU's legislative intervention for the sanctions to be provided by Member States in the

[45] See comments on the EU rules adopted so far in the field of the general part of substantive criminal law in P. ASP, "The Substantive Criminal Law Competence of the EU", 2012, pp. 93-102, A. KLIP, "European Criminal Law", 2009, pp. 166-167, H. SATZGER, "International and European Criminal Law", 2012, pp. 78-79, Editorial, "The Constitution for Europe and criminal law: a step not far enough", MJ 2005, p. 118, V. MILITELLO, "European Common Project to Counter Organised Crime", in M. CHERIF BASSIOUNI/V. MILITELLO/H. SATZGER (eds.), "European cooperation in penal matters: issues and perspectives", 2008, p. 144, J. VOGEL, "The European Integrated Criminal Justice System and its Constitutional Framework", MJ 2005, p. 146 (specifically about sanctions), S. PEERS, EU criminal law and the Treaty of Lisbon, E. L. Rev. 2008, p. 517 (specifically about jurisdiction), G. VERMEULEN, "Where do we currently stand with harmonisation in Europe?", in A. KLIP/H. VAN DER WILT (eds.), "Harmonisation and harmonising measures in criminal law", 2002, p. 69 (specifically about jurisdiction).

case of EU-fraud is totally unjustified for an additional reason related to primary law. The "principle of assimilation" equates the protection of EU financial interests to that of the individual Member States' (Art. 325 § 2 TFEU), and clarifies that a special regulatory requirement is not only inexistent, but also contrary to primary law, as the statute of limitations for certain offenses should correspond to the provisions governing the protection of Member-States' financial interests. Therefore, it is intolerable to draw limits for releasing criminal punishment for a category of EU crimes when this is not justified by the very nature of the offense, and without accounting for the intensity of such an intervention in national criminal law systems. This violates both the limits of EU powers, and the general obligation to ensure the preservation of the individual criminal justice systems of its Member States.

Another intensely undue approach refers to the intervention in national laws through the recent directive on freezing and confiscation of instrumentalities and proceeds of crime, which is, in terms of criminal law, a collateral sanction or security measure, depending on its individual imposition terms. First of all, Directive 2014/42/EU[46] on extended confiscation powers, which re-introduced the repealed Art. 3 of the Framework Decision of 2005 (2005/212/JHA), goes beyond organized crime and terrorism, whose severity could somehow justify special provisions deviating from the general norm.[47] Apart from organized crime and terrorism (Art. 3 e & h), the Directive now includes corruption of officials and public servants of EU Member-States (Art. 3 a), corruption in the private sector (Art. 3 f), money laundering (Art. 3 d), and almost all other offenses for which the Union has issued acts for their harmonization in the Member-States with framework decisions or directives usually associated with the acquisition of financial benefits, plus any other offense included in a future Directive that will refer to the Directive on Confiscation (Art. 3 § fin.) Moreover, once again in contrast to the Framework Decision of 2005, the offenses addressed with confiscation in the new Directive do not need incur a specific level of sanction (Art. 2 no. 6 and Art. 3). So, from the onset, a measure of proportionality for confiscation is not fundamentally warranted.

On the other hand, the Directive's specific provisions on confiscation (Art. 4), extended confiscation (Art. 5) and confiscation from a third party (Art. 6), now applicable on offenses other than organized crime, are also highly problematic. Suffice it to mention the extensive (and, therefore, disproportionate) confiscation of Art. 5, which targets proceeds of crimes other than the charged offense and also establishes a rule that substantially transfers the burden of proof upon the defendant,

[46] OJ L 127, 29.4.2014, p. 39 ff.

[47] See the ECHR decision on Silickiené v. Lithuania (2012), para 53, for the role of the gravity of organized crime as the source of the confiscated property. On the other hand, one should keep however in mind that the EU has adopted extremely problematic minimum rules in the field of terrorism, especially regarding the definitions of the "offences linked to terrorist activities" (see M. KAIAFA-GBANDI, „Terrorismusbekämpfung in der Europäischen Union und das vor-präventive Strafrecht: Neue Vorgaben für strafbare Taten nach dem Rahmenbeschluss 2008/919/JI", FS für W. Hassemer, pp. 1165 ff.).

and also the confiscation without conviction of Article 4 § 2, which violates the presumption of innocence and the guilt principle, as confiscation is in this case not a security measure but a collateral sanction. If one considers that all the above provisions do not even relate to organized crime offences, although the proposal of the Commission repeatedly invoked so on an abstract level, to justify the violation of fundamental principles of criminal law and EU institutionally established rights, it is obvious that the problem is bigger than it initially appears. That is why none may see any actual warranty in the Directive's preamble para. 38 referring to the directives' respect for the fundamental rights and observation of the principles recognized in the EU Charter of Fundamental Rights and the ECHR as interpreted in the relevant case law.[48]

As specifically evident in confiscation provisions, this intervention's extent reveals its relation to the general part of criminal law. Also, the particular characteristics of this intervention, which introduces extended confiscation powers for virtually all property crimes, irrespective to their gravity or cross-border trait, reveal that the EU not only lacked such competence, but employed this intervention to regulate areas in individual Member States that relate to the fundamental distinction between sanctions and security measures, and areas well beyond criminal law that even concern its relationship to restorative instruments of civil law, while deposing basic procedural principles. Such intense interventions are neither permitted nor justified institutionally, especially when a measure of validation exists in organized crime or terrorism.

V. The development in the field of sanctions

Nowadays, after a gradual development initiated by the first conventions on the protection of its financial interests and the fight against corruption of EU and Member-State officials, the Union also employs an intricate system of sanctions' determination via minimum rules. In its most sophisticated form, found in the directives on human trafficking, sexual exploitation of minors, and attacks against information systems (i.e. the most recent directives that followed the Lisbon Treaty), and also in the proposal for a directive on countering fraud against the financial interests of the EU, this system does not simply require Member States to establish effective, proportionate, and dissuasive sanctions (as it did in the past), nor merely to accompany this provision or alternatively prescribe that the envisaged penalties should allow for extradition, but also determines the least maximum limit of the custodial sentence that the national legislator must ascribe to specific behaviours. It also introduces aggravating forms of offenses and, in some cases, collateral sanctions, either through the special provisions in relevant directives, or through the general

[48] COM (2012) 85 τελικό, 10. See a critical evaluation concerning the proposal of the Commission for the directive on confiscation, as well as an analysis of the ECHR case-law regarding confiscation, by M. KAIAFA-GBANDI, "Confiscating proceeds of crime in the EU: The 2012 proposal of the Commission and the new challenges for the rule of law", Poinika Chronika 2013, pp. 401 ff.

terms of confiscation. It is also worth mentioning that, over time, the designation of the least maximum limit of a custodial sentence by the European legislator has become inflexible, for it is now defined by a rigid numerical value and not in the form of a range of imposable sanctions. The Commission's proposal for a directive on combating fraud against the financial interests of the Union brought forth the issue of EU competence in assigning also the least minimum sentence thresholds for Member-States to envisage[49], an option that was ultimately not accepted by the Council[50].

This state of affairs clarifies that the EU constantly advances towards the national legislature's powers to define sanctions, and in its most advanced interventions it leaves no actual option as to the their range. The relevant issues here are essentially two: a) the degree of this approach's compatibility to primary legislation, and b) the consistency of such provisions to fundamental principles of criminal and European law in general.

In enacting criminal law provisions within a two-tier system, such as the EU one, one must principally allow an adequate room for Member-State action according to the principle of subsidiarity. Thus, a highly invasive way of designing sanctions should certainly not be the first choice and should be entirely justified only for special reasons. In this sense, no problem is generated by general provisions like "Member States should provide for effective, proportionate, and dissuasive sanctions", since they only provide a general direction that is consistent with the purposes and principles of criminal law, particularly with the proportionality principle[51]. On the other hand, provisions directing the national legislator to assign a penalty that may allow for extradition essentially instrumentalize substantive criminal law to best serve judicial cooperation, and may only randomly respond to the fundamental principle of proportionality between crime and punishment, according to the guilt principle. That is why such provisions are no longer included in newer EU legal instruments[52]. This practice may serve the facilitation of judicial cooperation, which can be better achieved by the EU and not by individual Member-States, according to the principle of subsidiarity; however, in determining sanctions, the

[49] See also the comments of P. ASP in "The Substantive Criminal Law Competence of the EU", 2012, p. 126, and "The importance of the principles of subsidiarity and coherence in the development of EU criminal law", EuCLR 2011, p. 55.

[50] The Commission attempted to introduce minimum rules on minimum sanctions also in the directive concerning the protection of euro against counterfeiting (COM 2013/42). See interesting arguments questioning the usefulness of such an attempt as well as the validity of the justification of the Commission, in the Opinion of the European Economic and Social Committee of 23.5.2013 (Council doc 10719/13).

[51] See P. ASP, "Two Notions of Proportionality", in KIMMO NUOTIO (ed.), "Festschrift in honour of Raimo Lahti", 2007, pp. 215-218, for the meaning of the principle of proportionality according to Art. 49 § 3 of the EU Charter of Fundamental Rights; for the application of the principle at the EU level see A. KLIP, "European Criminal Law", 2009, p. 70, pp. 298-299, M. BÖSE, "The principle of proportionality and the protection of legal interests", EuCLR 2011, pp. 35 ff., and P.-A. ALBRECHT, „Die vergessene Freiheit, Strafrechtsprinzipien in der europäischen Sicherheitsdebatte", 2003, p. 83 ff.

[52] There is only the exception of the directive on combating human trafficking (2011/36/EU), which includes the obligation of the Member-States to ensure that inciting, aiding and abetting or attempting to commit an offence "is punishable by effective, proportionate and dissuasive penalties, *which may entail surrender*" (Art. 4 § 4).

principle of proportionality has a clear priority, and therefore it cannot be set aside for reasons of effective repression within the EU[53].

As to the establishment through EU legislation of minimum limits of penalties for specific offenses, and especially in the form of rigid numerical values, one must notice that a problem derives regarding the principle of subsidiarity. Why does the EU need to take such steps? Because there are several procedural tools that promote the principle of mutual recognition, and their application requires a specific gravity of offenses that is outlined in terms of the threatened sanctions (as, for example, in the case of the European Arrest Warrant). However, the answer still remains the same as above. Selecting a sanction cannot be oriented to facilitate processes, and the EU is justified to do so only when it is considered imperative due to the very identity of the offense and for the sake of uniformity, as in the case of purely European legal interests, such as the financial interests of the EU. In all other cases, the imposition of a minimum numerical value for the maximum limit of the threatened sanctions creates rather than solves problems, while the promotion of judicial cooperation based on procedural tools that serve the principle of mutual recognition can be achieved through general characteristics that support EU competence in substantive law, i. e. particularly serious cross-border offences.

In any case, it should be clear that the EU has no competence to determine sentences outside the above fields of criminality (Art. 83 § 1 TFEU) or outside the field of offences that allow intervention competence due to a confirmed need for the implementation of EU policies where harmonization measures have been assumed (Art. 83 § 2 TFEU).

One of the negative side effects inherent to the determination of an inelastic numeric value as a least maximum limit for the penalty to be threatened by the national legislator, is the following: when this sanction refers to more than one behaviour with variable demerit levels, then the principle of proportionality is violated (Art. 4 of Directive 2011/36/EU on trafficking). On the other hand, the effort to overcome this handicap by providing different penalty levels for different behaviours (e.g. Directive 2011/93/EU on the sexual exploitation of minors), causes significant problems in the endo-systematic coherence of national legislations as regards compliance with the principle of proportionality. The more the distinctions in penalties, the harder it is to conform to the corresponding fields of national legislations, thus destabilizing their coherence[54].

Problems are also caused for the principle of proportionality by the EU strategy in determining sanctions, especially for aggravating circumstances. This is particularly evident with offenses committed in the frame of a criminal organization, as the

[53] M. KAIAFA-GBANDI/N. CHATZINIKOLAOU/A. GIANNAKOULA/T. PAPAKYRIAKOU, "The FD on combating trafficking in human beings. Evaluating its fundamental attributes as well as its transposition in Greek criminal law", in A. WEYEMBERGH, V. SANTAMARIA (eds.), "The evaluation of European criminal law. The example of the Framework Decision on combating trafficking in human beings", 2009, pp. 186-190.

[54] Approximating penalties at the EU level is rightly considered even harder than approximating the definition of offences – P. ASP, "Harmonisation of Penalties and Sentencing within the EU", Bergen Journal of Criminal Law and Criminal Justice 2013, 58-62, K. NUOTIO, "Harmonization of criminal sanctions in the EU", in E. J. HUSABØ/A. STRANDBAKKEN (eds.), "Harmonization of criminal law in Europe", 2005, 97-98.

mere participation in it is also a standalone crime that could be dealt with through the rules of concurrence, without requiring a particular aggravating provision for each transgression.

These objections are intensified when the EU sets minimum thresholds both for the minimum and the maximum limit of the sanction that the national legislator has to follow, as attempted in the proposal for a Directive on combating fraud against financial interests of the EU. In this case, the difficulties to respect the endo-systemic coherence of national legislations multiply, since some legal orders do not even envisage minimum sanctions, while others that do, have a very different approach as to the minimum thresholds, since attempts to ensure general prevention are mainly pursued through the delineation of maximum sanction levels. Moreover, if the principle of subsidiarity cannot suffice to endorse the designation of a least threshold for the maximum penalty, it is much more so in the cases of specifying a least threshold for both the minimum and the maximum of an offence's sentence.

Therefore, on the subject of penalties, the EU legislator should first and foremost be limited to the relevant provisions regarding his field of competence, i. e. serious cross-border criminality, or in other words their aggravated types. He should also refrain from setting minimum sanctions, even for their upper limits, as this can only be justified by the specific identity of an offense, such as its reference to legally protected EU interests. Even then, however, the least threshold for the maximum sentence should be set in the form of a range rather than an inelastic numerical value, as an only way to best serve the endo-systemic coherence of Member-States' national legislations[55].

VI. Conclusions

In a nutshell:

- It is imperative for EU bodies to adopt an inter-institutional agreement, according to the European Parliament's proposal, which would institutionalize a debate process between them and turn into practice the respect in fundamental principles of European and criminal law when setting minimum rules for establishing or re-evaluating harmonized criminal offences within the EU.
- In introducing minimum rules of criminal offences, the EU should abide by its rules of competence according to Art. 83 §§ 1 & 2, TFEU, and promote their observance, which co-determines the EU designated criminality via the minimum rules themselves it sets through its Directives.
- The EU has to reduce its interventions in the general part of the substantive criminal law, as it lacks such competence and needs to justify them only by strict

[55] See a systematic analysis of EU rules concerning criminal sanctions, and proposals on how to approximate criminal sanctions in compliance with the fundamental principles of criminal law as well the borders of EU competence, in ATH. GIANNAKOULA, "The development of substantive criminal law in the European Union: approximation concerning the definition of criminal offences and sanctions in the area of freedom, security and justice", Doctoral thesis, 2014, pp. 309-337, 477-492.

necessity due to the type of the offense through which its competence in criminal law is granted according to Art. 83 TFEU.

- Last but not least, there is an urgent need to set up a proportionality scale of penalties with reference to the fundamental interests protected on an EU level, which will serve as a benchmark against the national scale of sanctions for the relevant field of offences. National legal systems will thus not face the prospect of being dismantled through the EU's intervention in terms of their internal proportional nature. In other words, a mere decline in the degree of variation between the national systems[56] cannot establish itself as a key rationale of an EU effort to tailor sanctions to crimes. On the other hand, the EU must respect the principle of subsidiarity in setting penalties in the frame of minimum rules, and not exceed its relevant competence, but limit itself primarily to general sentencing guidelines. When such an intervention is owed to the subsidiarity principle, the Union should set minimum levels only to the upper threshold and in the form of a range, so as to facilitate the preservation of the internal coherence of national criminal legislations.

[56] However, in this way the Commission, COM (2011) 573 final, p. 9.