

## The Shared Competence for Criminal Law

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*As part of the area of freedom, security and justice the criminal law has explicitly been assigned to the “shared competences” in the sense of Art. 2 II TFEU by Art. 4 II lit. j TFEU.<sup>1</sup> Thus, the Union and the Member States may both legislate and adopt legally binding acts in the area of criminal law, according to Art. 2 II 1 TFEU. Clause 2 and 3 of the provision further specify that the Member States shall exercise their competence only to the extent that the Union has not exercised its competence and shall again exercise it to the extent that the Union has decided to cease exercising its competence. Thereby a preemptive effect of Union law for national law is described.*

*The meaning of this preemptive effect triggered by the assignment of an area of legislation to the shared competences of the EU and the Member States has been discussed controversially by many scholars in general, but so far it has not attracted scholarly attention specifically with regard to the area of freedom, security and justice and with it, the criminal law. This article, therefore, first poses the general question of the correct understanding of shared competences in the sense of Art. 2 II, 4 I, II TFEU and, in a further step, tries to identify the implications that the classification of criminal law competences, as shared ones, has for the development of a criminal law system on the basis of the Treaty of Lisbon.*

### I. The meaning of shared competences in the sense of Art. 2 II TFEU

As stated above, according to Art. 2 II 2 TFEU, Union law triggers a preemptive effect for national law in an area of shared competences. The existence of this preemptive effect is plainly visible from the wording of Art. 2 II 2 TFEU. However, what is disputed and entails farreaching consequences is the question of the correct base of this preemptive effect.

In this regard, some argue that the preemptive effect provided for in Art. 2 II 2 TFEU eventuates from the precedence of Union law.<sup>2</sup> According to the principle of precedence of Union law, directly applicable Union law automatically renders inapplicable any conflicting provision of existing national law and precludes the valid adoption of new national laws that would conflict with Union provisions.<sup>3</sup> Thus, not the mere exercise of a competence by the EU, but the concrete content

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<sup>1</sup> See Heger, ZIS 2009, 406, 409; Mansdörfer, HRRS 2010, 11, 14.

<sup>2</sup> Folz, in: Fastenrath/Nowak (eds.), Der Lissabonner Reformvertrag, 1st ed. 2009, p. 65, 67; see Becker, in: Jopp/ Matl (eds.), Vertrag über eine Verfassung für Europa, 1st ed. 2005, p. 187, 198; Eilmansberger, in: Hummer/Obwexer (eds.), Der Vertrag von Lissabon, 1st ed. 2009, p. 189, 196 et seq.; Scharf, Die Kompetenzordnung im Vertrag von Lissabon – Zur Zukunft Europas: Die Europäische Union nach dem Vertrag von Lissabon, in: Beiträge zum Europa- und Völkerrecht, issue 3 2009, p. 16 (available at <http://www2.jura.uni-halle.de/telc/Heft3.pdf> (6 January 2016)).

<sup>3</sup> *Amministrazione delle finanze dello Stato v. Simmenthal*, C-106/77, Judgement of 9 March 1978, para. 17; as foundational judgement regarding the precedence of Union law see also *Costa v. E. N. E.L.*, C-6/64, Judgement of 15 July 1964, Reports 1964, p. 587, 593 et seq.

of an EU provision suppresses the national legislative competences insofar as their exercise results in national laws conflicting with Union law.<sup>4</sup> Representatives of this opinion, eventually, treat shared competences in the sense of Art. 2 II, 4 I, II TFEU as parallel competences,<sup>5</sup> because the latter ones are characterised precisely by the fact that the exercise of a Union competence does not prevent the Member States from legislating, provided that they refrain from adopting legislative acts conflicting with Union laws.<sup>6</sup>

By contrast, the opinion prevailing by now regards shared competences in the sense of Art. 2 II, 4 I, II TFEU as an equivalent to concurrent competences<sup>7</sup> as they were formerly called in times of the European Community<sup>8</sup> and as they are foreseen for example by Art. 72 of the German Grundgesetz<sup>9</sup>. These competences are characterised by an “either/or” relationship in the sense that they are alternatives to one another but cannot coexist.<sup>10</sup> Representatives of this opinion consequently criticise the labeling of this kind of competences as “shared” instead of “concurrent” by the Treaty of Lisbon.<sup>11</sup> According to them, not the precedence of secondary Union law suppresses the Member States’ competences, but the mere exercise of a “shared” competence in the sense of Art. 2 II, 4 I, II TFEU triggers a preemptive effect stemming from the Treaty itself.<sup>12</sup>

Admittedly, proponents of the first-mentioned opinion are right in arguing that the wording of Art. 2 II 2 TFEU can casually be construed in the sense that not the

<sup>4</sup> *Eilmansberger*, in: Hummer/Obwexer (eds.), *Der Vertrag von Lissabon*, 1st ed. 2009, p. 189, 196.

<sup>5</sup> *L. Neumann*, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 210; in this sense arguably also *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 28 et seq.

<sup>6</sup> *Von Bogdandy/Bast*, *EuGRZ* 2001, 441, 450; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 28, Art. 4 para. 7.

<sup>7</sup> *Bauerschmidt*, *EuR* 2014, 277, 285; *Braams*, in: Pernice (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 1st ed. 2008, p. 115, 121; *Callies*, in: Callies/Ruffert (eds.), *EUV/AEUV*, 4th ed. 2011, Art. 2 TFEU para. 16; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 25, 29, Art. 4 TFEU para. 6 et seq.; *Nettesheim*, in: von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2nd ed. 2009, p. 389, 427; *Obwexer*, in: Von der Groeben/Schwarze/Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. 2015, Art. 2 TFEU para. 31, Art. 4 para. 7; *Vedder*, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 1st ed. 2012, Art. 2 TFEU para. 17; *Weber*, *EuZW* 2008, 7, 11; *Weigend*, *ZStW* 116 (2004), 275, 280; see also *Blanke*, in: ELSA (ed.), *Europäische Verfassung, Was kann sie, was schafft sie für ein Europa von heute und morgen?*, 1st ed. 2004, p. 39, 63 (regarding the Constitutional Treaty); *Görlitz*, *DÖV* 2004, 374, 375; *Nettesheim*, *EuR* 2004, 511, 529 (regarding the Constitutional Treaty).

<sup>8</sup> *Görlitz*, *DÖV* 2004, 374, 375; *Vedder*, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 1st ed. 2012, Art. 2 TFEU para. 17.

<sup>9</sup> *Nettesheim*, *EuR* 2004, 511, 529; *Weigend*, *ZStW* 116 (2004), 275, 280; see *Blanke*, in: ELSA (ed.), *Europäische Verfassung, Was kann sie, was schafft sie für ein Europa von heute und morgen?*, 1st ed. 2004, p. 39, 63; *Callies*, in: Callies/Ruffert (eds.), *EUV/AEUV*, 4th ed. 2011, Art. 2 TFEU para. 16; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 26; *Weber*, *EuZW* 2008, 7, 11.

<sup>10</sup> *Vedder*, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 1st ed. 2012, Art. 2 TFEU para. 17.

<sup>11</sup> *Callies*, in: Callies/Ruffert (eds.), *EUV/AEUV*, 4th ed. 2011, Art. 2 TFEU para. 16 with further references; *Obwexer*, in: Von der Groeben/Schwarze/Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. 2015, Art. 2 TFEU para. 31; see *Vedder*, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 1st ed. 2012, Art. 2 TFEU para. 17.

<sup>12</sup> *Nettesheim*, *EuR* 2004, 511, 529 (regarding the Constitutional Treaty); *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 27; see *Bauerschmidt*, *EuR* 2014, 277, 297; *Blanke*, in: ELSA (ed.), *Europäische Verfassung, Was kann sie, was schafft sie für ein Europa von heute und morgen?*, 1st ed. 2004, p. 39, 63: „Sperrwirkung kraft Verfassungsvertrags“.

mere exercise of a Union competence, but only a concrete provision of secondary Union law that substantially conflicts with national laws and hence only the precedence of Union law triggers a preemptive effect for the Member States' legislative competences.<sup>13</sup> Nonetheless, such an understanding of the shared competences covered by Art. 2 II, 4 I, II TFEU is incompatible with the legislative framework provided for by the Lisbon Treaty<sup>14</sup> as well as with the correct understanding of the principle of precedence of Union law itself.

Regarding the legislative framework provided for by the Lisbon Treaty it is obvious from the pure existence of the Protocol on the exercise of shared competence<sup>15</sup> that the EU legislator has thought it necessary to further regulate the extent of the preemptive effect triggered by the Union's action in an area of shared competence. The sole article of the protocol tries to specify the exact extent of the preemptive effect. Thus, the protocol would be superfluous if the extent of the preemptive effect already followed from the principle of precedence of Union law and hence from the existence of a concrete case of conflict of national and Union law.<sup>16</sup>

That the precedence of Union law cannot serve as a principle of delimitation of competences in areas of shared competence in the sense of Art. 2 II, 4 I, II TFEU is even more obvious from the legislative framework provided for by the Lisbon Treaty itself. In Art. 4 III, IV TFEU the Treaty establishes parallel competences<sup>17</sup> in the conventional and proper sense by stating that the exercise of a competence of the Union shall not result in Member States being prevented from exercising theirs. This wording explicitly excludes the preemptive effect of Union law for national law provided for in Art. 2 II 2 TFEU for parallel competences.<sup>18</sup> However, in areas of parallel competences, the principle of precedence of Union law is also applicable.<sup>19</sup> More specifically, in these areas it even serves as the decisive provision for coordination<sup>20</sup> that triggers a factual suppression of national law by Union law.<sup>21</sup> If, however, for the competences foreseen by Art. 4 III, IV TFEU the principle of precedence of Union law is entirely applicable, but at the same time the preemptive effect provided for in Art. 2 II 2 TFEU is expressly excluded, that preemptive effect for systematic reasons cannot be equal to the principle of precedence of Union law.<sup>22</sup>

<sup>13</sup> *Eilmansberger*, in: Hummer/Obwexer (eds.), *Der Vertrag von Lissabon*, 1st ed. 2009, p. 189, 196.

<sup>14</sup> *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 29.

<sup>15</sup> OJEU 2012 No. C 326/307.

<sup>16</sup> *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 29.

<sup>17</sup> *Bauerschmidt*, EuR 2014, 277, 287 et seq.; *Becker*, in: Jopp/Madl (eds.), *Vertrag über eine Verfassung für Europa*, 1st ed. 2005, p. 187, 198 et seq., and *Görlitz*, DÖV 2004, 374, 375 regarding the Constitutional Treaty; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 32, and Art. 4 TFEU para. 26.

<sup>18</sup> *Bauerschmidt*, EuR 2014, 277, 288; see *Nettesheim*, in: von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2nd ed. 2009, p. 389, 427 et seq. read in conjunction with footnote 141 (p. 427).

<sup>19</sup> *Bauerschmidt*, EuR 2014, 277, 288; *Von Bogdandy/Bast*, EuGRZ 2001, 441, 450; *Nettesheim*, in: von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2nd ed. 2009, p. 389, 428; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 33.

<sup>20</sup> See *von Bogdandy/Bast*, EuGRZ 2001, 441, 450.

<sup>21</sup> *Nettesheim*, in: von Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2nd ed. 2009, p. 389, 428; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 33.

<sup>22</sup> *L. Neumann*, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 215; cf. *Bauerschmidt*, EuR 2014, 277, 288.

Furthermore, to equate the preemptive effect described in Art. 2 II 2 TFEU with the principle of precedence of Union law would contravene the correct understanding of the latter principle itself. In fact, this principle does not refer to the distribution of competences, but rather defines the legal consequences of a conflict of national laws and Union laws both enacted in accordance with the respective competences of the Union and the Member States.<sup>23</sup> According to Art. 2 II 2 TFEU, however, the Member States lose their authority to exercise their competence to legislate if and to the extent that the Union has exercised its competence.<sup>24</sup> Consequently, Art. 2 II 2 TFEU deals with the distribution of competences between the Union and the Member States or with the authority to exercise given competences of both entities and hence concerns a question that has to be answered in order to know if the principle of precedence of Union law can take effect at all.<sup>25</sup>

To illustrate this point, it is useful to explicitly differentiate between the enactment of national laws *before* and *after* the enactment of Union laws in an area of shared competence.<sup>26</sup> The question affected by the preemptive effect provided for in Art. 2 II 2 TFEU is whether the Member States are entitled to exercise their competences in an area of shared competence *after* the Union has exercised its respective competence – and it is answered in the negative. As said, according to Art. 2 II 2 TFEU the Member States lose their authority to exercise their competences if and to the extent that the Union has already made use of its competence. Consequently, if the Member States legislate nonetheless, they violate the concrete provision that vests them with the competence in principle in conjunction with Art. 2 II 2 TFEU; hence, the respective national laws are inapplicable because of the preemptive effect triggered by the Treaty itself.<sup>27</sup> By contrast, if the Member States legislate *first* and in accordance with their competences, the Union also keeps its competence to legislate in the same area of shared competence to the full extent. No preemptive effect is triggered in that case. Thus, whenever the Union decides to legislate in an area of shared competence already regulated by national laws it nonetheless acts perfectly in accordance with its still given competences. Only in this situation the principle of precedence of Union law takes effect and renders the national laws that already exist inapplicable if and to the extent that they actually conflict with the new Union provisions.<sup>28</sup> This factual suppression of national law,

<sup>23</sup> Von *Bogdandy/Bast*, EuGRZ 2001, 441, footnote 101 (p. 450); *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), Recht der EU, 56th supplement 2015, Art. 2 TFEU para. 33.

<sup>24</sup> Cf. *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), Recht der EU, 56th supplement 2015, Art. 2 TFEU para. 25.

<sup>25</sup> Cf. *L. Neumann*, Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU, 1st ed. 2014, p. 214; cf. also *Bauerschmidt*, EuR 2014, 277, 281 with further reference.

<sup>26</sup> Cf. *Obwexer*, in: Von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 2 TFEU, footnote 61 regarding para. 29; for a respective differentiation see *Obwexer*, in: Von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 2 TFEU para. 29; *Streinz*, in: Streinz (ed.), EUV/AEUV, 2nd ed. 2012, Art. 2 TFEU para. 11.

<sup>27</sup> *Obwexer*, in: Von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 2 TFEU para. 29; *Streinz*, in: Streinz (ed.), EUV/AEUV, 2nd ed. 2012, Art. 2 TFEU para. 11.

<sup>28</sup> *Obwexer*, in: Von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 2 TFEU para. 29; *Streinz*, in: Streinz (ed.), EUV/AEUV, 2nd ed. 2012, Art. 2 TFEU para. 11.

however, is based on a rule of conflict resolution and not on the rule of coordination of the exercise of competences provided for in Art. 2 II 2 TFEU.

In light of this, the principle of precedency of Union law can under no account constitute the base of the preemptive effect described by Art. 2 II 2 TFEU. By contrast, the fact that the EU tried to concretise the extent of this preemptive effect by means of the Protocol on the exercise of shared competence heavily points to the assumption that this preemptive effect is independent from institutes already established, but stems from the Treaty itself so that its meaning still has to be specified.<sup>29</sup>

In conclusion, we should follow the prevailing opinion that regards shared competences in the sense of Art. 2 II, 4 I, II TFEU as an equivalent to concurrent competences and, in the areas covered by those competences, assumes a preemption of national law by Union law based on the Treaty itself and to an extent that still has to be concretised.

## **II. Consequences for Criminal Law**

Having settled the question of the correct understanding of “shared competences” in the sense of Art. 2 II, 4 I, II TFEU, criminal law scholars have to pose the question of the implications of such an understanding for the criminal law as part of the area of freedom, security and justice and, hence, according to Art. 4 II lit. j TFEU, as an element of an area of shared competences.

### **1. Different impacts on different types of competences**

To start and structure the respective scrutiny it is useful to differentiate the types of action the EU can take in the field of criminal law.

#### **a) Existing types of competences in the criminal law area**

On the one hand, the EU is empowered to establish minimum rules by directives. Insofar, Art. 83 I TFEU provides the EU with the competence to establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a crossborder dimension listed in para. 1 subpara. 2 and amendable according to subpara. 3. Art. 83 II TFEU, furthermore, enables the EU to enact minimum rules with regard to the definition of criminal offenses and sanctions in areas which already have been subject to harmonisation measures. Finally, Art. 82 II TFEU empowers the EU to establish minimum rules in the field of criminal procedure concerning the subject matters conclusively listed in the same paragraph. On the other hand, according to the prevailing opinion, the EU may, already by now, enact supranational criminal law in the proper sense by regulations directly applicable in the Member States in restricted areas. Respective competences

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<sup>29</sup> L. Neumann, Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU, 1st ed. 2014, p. 215; see *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 29.

are entailed in Art. 325 IV TFEU to counter illegal activities affecting the financial interests of the Union,<sup>30</sup> in Art. 33 TFEU concerning custom matters and arguably also in Art. 79 II lit. c and lit. d TFEU concerning illegal immigration and trafficking in persons.<sup>31</sup> Most<sup>32</sup> of these provisions, by expressly enabling the EU not only to enact regulations but to enact “measures” or “provisions” or to take “action” etc. in general, also and *a fortiori* entail an EU competence to enact directives.<sup>33</sup>

Consequently, the EU has a wide-ranging competence to enact directives in the field of criminal law as well as a narrowly structured competence to enact supranational criminal law by means of regulation. The first mentioned competence has been and is constantly used by the EU whereas the latter one has not been put into practice so far.

Regulations and directives differ clearly regarding the extent of their respective binding effect for the Member States. The former ones, according to Art. 288 subpara. 2 TFEU, are binding in their entirety and directly applicable in all Member States, whereas the latter ones, according to Art. 288 subpara. 3 TFEU, are binding only as to the result to be achieved, but leave to the national authorities the choice of form and methods. Because of this difference the consequences of the assignment of the criminal law to the shared competences of the EU and the Member States might differ fundamentally as well for directives on the one hand and regulations on the other hand.

## b) Impact on harmonisation competences

As stated above, harmonisation competences as described in Art. 288 subpara. 3 TFEU only allow to prescribe a specific result which has to be achieved by the Member States’ legislation implementing the respective directives. Competences of this kind can logically only be exercised by the EU itself<sup>34</sup> and not by the Member States. The latter ones are rather asked to implement the objectives set by the EU. In this sense, harmonisation envisages European and national legislation as being complementary. Put otherwise, in the field of harmonisation there are no competences of the EU and the Member States that are of an equal type, but only competences complementing one another. Consequently, there can be no concur-

<sup>30</sup> Sceptical in this regard *Asp*, *The Substantive Criminal Law Competence of the EU*, 1st ed. 2012, p. 150 et seq.

<sup>31</sup> Regarding the EU competences to enact supranational criminal law by regulation see in detail e.g. *Ambos*, *Internationales Strafrecht*, 4th ed. 2014, § 9 para. 5 et seq.; *L. Neumann*, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 175 et seq.; *Safferling*, *Internationales Strafrecht*, 1st ed. 2011, § 10 para. 41 et seq.; *Satzger*, *Internationales und Europäisches Strafrecht*, 7th ed. 2015, § 8 para. 18 et seq., or *Satzger*, *International and European Criminal Law*, 1st ed. 2012, § 6 para. 24 et seq. – all with further references.

<sup>32</sup> Art. 79 II lit. d TFEU constitutes an exception insofar. As Art. 83 I TFEU explicitly names the subject of this provision, namely trafficking in human being, it is *lex specialis* to Art. 79 II lit. d TFEU as far as the competence to enact directives in this field is concerned: *Satzger*, *Internationales und Europäisches Strafrecht*, 7th ed. 2015, § 9 para. 51, or *Satzger*, *International and European Criminal Law*, 1st ed. 2012, § 7 para. 71.

<sup>33</sup> *Ambos*, *Internationales Strafrecht*, 4th ed. 2014, § 11 para. 10; *Satzger*, *Internationales und Europäisches Strafrecht*, 7th ed. 2015, § 9 para. 51, or *Satzger*, *International and European Criminal Law*, 1st ed. 2012, § 7 para. 70; cf. *Safferling*, *Internationales Strafrecht*, 1st ed. 2011, § 10 para. 68; cf. *Grünewald*, *JZ* 2011, 972, 973 et seq. and *Hecker*, *Europäisches Strafrecht*, 5th ed. 2015, chapter 8.2 para. 46 regarding Art. 325 IV TFEU; for a different point of view see *Böse*, *ZIS* 2010, 76, 87.

<sup>34</sup> *Eilmansberger*, in: *Hummer/Obwexer* (eds.), *Der Vertrag von Lissabon*, 1st ed. 2009, p. 189, 197.

rence between European and national competences<sup>35</sup> and therefore no preemptive effect<sup>36</sup> with regard to the legislative action as such.

This is true not only for the *minimum* harmonisation competences provided for in Art. 83 I and II TFEU and Art. 82 II TFEU that dominate the criminal law area these days, but also for *full* harmonisation competences that are at least contained in most provisions empowering the EU to enact supranational criminal law<sup>37</sup>. The difference between these types of harmonisation competences concerns the question of the extent of prescriptions the EU can make regarding the result to achieve by the Member States' legislative acts. Thus, it is a question of the substantial extent of the respective regulations that cannot possibly influence the basic structural relationship of the underlying competences. These competences remain complementary instead of replaceable, irrespective of the content.

It follows that, with regard to the legislative action as such, there can be no preemption neither in case of minimum harmonisation competences nor in case of full harmonisation competences. Since, however, the preemptive effect of Union law for national law is exactly the feature characterising concurrent competences in the sense of Art. 2 II, 4 I, II TFEU, we can conclude that the competence type provided for in Art. 2 II, 4 I, II TFEU has not been developed with an eye to harmonisation competences and does not fit this category<sup>38</sup> insofar as legislative activity as such is concerned.

Only in terms of content the exercise of harmonisation competences by the EU can trigger a preemptive effect in the sense that it suppresses the Member States' competence to decide on the content of the respective legislative acts. This competence is suppressed comprehensively whenever the Union makes use of full harmonisation competences. By contrast, if the Union only exercises minimum harmonisation competences the Member States always keep broad decision-making power as to the content of the respective laws, meaning that there can never be a full-blown preemptive effect as to the competence to decide on the content of provisions. It has, therefore, even been proposed to entirely exclude minimum harmonisation competences from the concurrent competences covered by Art. 2 II, 4 I, II TFEU.<sup>39</sup>

In the area of criminal law, however, minimum harmonisation competences prevail by far and, to date, the EU has only made use of these competences. Consequently, the assignment of the area of freedom, security and justice to the "shared competences" in the sense of Art. 2 II, 4 I, II TFEU has not had a relevant impact on criminal law competences so far. This might explain why, until now, there has not been a deeper analysis of the consequences of the assignment of the area of freedom, security and justice to the "shared competences".

<sup>35</sup> Eilmansberger, in: Hummer/Obwexer (eds.), Der Vertrag von Lissabon, 1st ed. 2009, p. 189, 197.

<sup>36</sup> Eilmansberger, in: Hummer/Obwexer (eds.), Der Vertrag von Lissabon, 1st ed. 2009, p. 189, 197; von Bogdandy/Bast, CMLR 39 (2002), 227, 243, albeit only with reference to "harmonization minimum standards".

<sup>37</sup> Cf. supra footnote 33.

<sup>38</sup> Eilmansberger, in: Hummer/Obwexer (eds.), Der Vertrag von Lissabon, 1st ed. 2009, p. 189, 197.

<sup>39</sup> Von Bogdandy/Bast, CMLR 39 (2002), 227, 243.

### c) Impact on competences to establish supranational criminal law

If the Union chooses, however, to make use of its competences to issue regulations containing supranational criminal law in the proper sense the categorisation of the area of freedom, security and justice as an area of “shared competences” will make a real impact: Regulations establishing supranational criminal law will be directly applicable in all Member States and therefore will be effective for all EU citizens in the same way as the national criminal laws that are directly applicable to them as well. Consequently, there will be two sets of criminal laws that will compete with one another as do the respective legislative competences of the EU on the one side and the Member States on the other side. These competences are of an equal nature and, therefore, could potentially replace one another. Hence, the enactment of a regulation by the Union can trigger a preemptive effect with regard to the legislative action of the Member States as such and therewith, of course, also with regard to the competence to decide on the content of provisions.

Thus, as soon as regulations containing supranational criminal law will be enacted the question of the concrete extent of the preemptive effect described by Art. 2 II 2 TFEU will arise with urgency. It has been labeled as one of the most difficult questions relating to the delimitation of competences between the EU and the Member States.<sup>40</sup> In order to be prepared, it should be addressed already now.

## 2. Determining the extent of Union preemption

Unfortunately, Protocol No. 25 on the exercise of shared competence<sup>41</sup> which basically was intended to clarify the extent of the preemptive effect triggered by Art. 2 II 2 TFEU effectively does not accomplish this purpose.<sup>42</sup> In its sole article the protocol states that the scope of the exercise of the Union’s competence in an area of shared competence in the sense of Art. 2 II TFEU “only covers those elements governed by the Union act in question and therefore does not cover the whole area”. If the term “whole area” is intended to refer to the areas of shared competence in the sense of Art. 4 I and II TFEU, the protocol only states a matter of course:<sup>43</sup> That *any* exercise of a Union competence in one of the areas of shared competence in the sense of Art. 2 II, 4 I, II TFEU could exclude legislative action of the Member States in the *whole* respective field is not seriously thinkable. As competences by now are mostly shared between the EU and the Member States<sup>44</sup> such an understanding would imply a very quick takeover of virtually all regulating

<sup>40</sup> *Bauerschmidt*, EuR 2014, 277, 286.

<sup>41</sup> OJEU 2012 No. C 326/307.

<sup>42</sup> Cf. *Braams*, in: Pernice (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 1st ed. 2008, p. 115, 121 et seq.; *Weber*, EuZW 2008, 7, 12; *Calliess*, in: *Calliess/Ruffert* (eds.), *EUV/AEUV*, 4th ed. 2011, Art. 2 TFEU para. 19 with further references.

<sup>43</sup> *L. Neumann*, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 216.

<sup>44</sup> Cf. *Lenski*, in: *Lenz/Borhardt* (eds.), *EU-Verträge Kommentar*, 6th ed. 2013, Art. 2 TFEU para. 8; *Nettesheim*, in: *Grabitz/Hilf/Nettesheim* (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 23; *Streinz*, in: *Streinz* (ed.), *EUV/AEUV*, 2nd ed. 2012, Art. 2 TFEU para. 8 (shared competences as “Normalfall” or “Regelfall”).

power by the EU. This, however, would not only overcharge the Union but in the final analysis would disregard the principles of conferral and subsidiarity that, according to Art. 5 I EUV, constitute the basis of the distribution of competences between the Union and the Member States.

At least Protocol No. 25 makes it plain that the Member States only lose their legislative competences due to the preemptive effect referred to in Art. 2 II 2 TFEU with regard to the “elements governed by the Union act in question” and thus only to the extent that the concrete provisions of a certain Union act reach.<sup>45</sup> However, the essential question in order to clarify the extent of the preemptive effect exactly is how the term “elements governed by the Union act in question” in Protocol No. 25 has to be understood.<sup>46</sup> This question has seemingly not been answered so far. Scholars rather only mark it as a very difficult one and state that the interpretation of the protocol is going to cause considerable problems in this regard.<sup>47</sup>

Indeed, to determine the limits and define the scope of the elements covered by a Union act is a more than difficult exercise because it calls for an investigation of the intent of the Union legislator<sup>48</sup> that constitutes the decisive criterion in this respect. His motivation has to be explored by asking to what extent he intended to regulate an area conclusively.<sup>49</sup> This task, however, is associated with enormous insecurities<sup>50</sup> and therefore gives a wide leeway not only to scholars, but also to the European Court of Justice that ultimately will have to clarify the question of interpretation of the treaty provisions and of the protocol in question.<sup>51</sup> Regarding other areas than criminal law that are also assigned to the shared competences in the sense of Art. 2 II, 4 I, II TFEU the Court of Justice has already determined the extent of the preemptive effect of Union regulations on a case by case basis and has found it to be very different from case to case.<sup>52</sup>

### 3. Implications for the European criminal law system as a whole

With regard to the criminal law as an element of the area of freedom, security and justice the insecurity in determining the intent of the Union legislator for the purpose of specifying the extent of Union preemption can have farreaching

<sup>45</sup> *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 26.

<sup>46</sup> *L. Neumann*, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 216; cf. *Calliess*, in: *Calliess/Ruffert* (eds.), *EUV/AEUV*, 4th ed. 2011, Art. 2 TFEU para. 19; *Weber*, *EuZW* 2008, 7, 12.

<sup>47</sup> *Weber*, *EuZW* 2008, 7, 12.

<sup>48</sup> *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 4 para. 8.

<sup>49</sup> Cf. *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 4 para. 8; expressly stating the difficulty of this task: *Von Bogdandy/Bast*, *EuGRZ* 2001, 441, 448; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 2 TFEU para. 26.

<sup>50</sup> Cf. *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), *Recht der EU*, 56th supplement 2015, Art. 4 para. 8.

<sup>51</sup> The role of the Court of Justice in defining the scope of Union preemption is pointed out by *Weatherill*, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in: O’Keeffe/Twomey (eds.), *Legal Issues of the Maastricht Treaty*, 1st ed. 1994, p. 13, 18 – cited by Advocate General Colomer in his Opinion of 5 February 2009, *Budějovický Budvar National Corporation v. Rudolf Ammersin GmbH*, C-478/07, para. 93, fn. 49.

<sup>52</sup> See *Bauerschmidt*, *EuR* 2014, 277, 289 et seq., on the case law of the Court of Justice regarding the preemptive effect of Union law after the Lisbon Treaty.

consequences that could touch the whole structure of the European criminal law system. In fact, there are three conceivable constellations, all associated with considerable problems.

In the first instance, two parallel sets of substantive criminal law at Union and Member State level could emerge. This will be the case if it is regularly presumed that the Union legislator did not intend to exclude the Member States from regulating.

On the contrary, if one assumes as a rule that the Union legislator wants to regulate a wide area conclusively this will gradually trigger a wholesale preemptive effect of Union criminal law with regard to the criminal law of the Member States. In this case, it would be conceivable that, in the last instance, only one set of substantive criminal law, namely the Union's one, would "survive".

If, however, in some instances it is assumed that the Union legislator intended to exclude the Member States' regulating power to a wide extent, but in other instances it is supposed that he did not want to exclude the Member States from regulating at all, and if, in addition, no general rule can be developed regarding the question in what situation what assumption is made, the result would be an unpredictable mixture of European and national criminal laws.

Obviously, this last option is not desirable because a mixture of European and national criminal laws developing along accidental and unpredictable lines would trigger an obscure and highly confusing criminal law system that could not satisfy the requirements of the principle of legal certainty.

However, the option of a gradual total suppression of the Member States' criminal law cannot be desirable either. Rather, it could be very dangerous as it is presumable that the Member States would not simply accept the withdrawal of their regulating power regarding the criminal law that is deemed to be one of the essential areas of national democratic self-formation<sup>53</sup>.

Eventually, even the first mentioned option of having parallel sets of criminal law at a Union level and at a Member State level as a result of regularly presuming that the Union legislator did not intend to exclude the Member States from regulating, would be no less problematic. This is impressively exemplified by the American experiences. In fact, the U. S. Supreme Court holds that "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of congressional purpose'".<sup>54</sup> Thereby, the Supreme Court declares "Congress' intent"<sup>55</sup> to be the decisive criterion. However, in this respect, it established a presumption against preemption as a general rule.<sup>56</sup> As a consequence, "genuinely concurrent and diverse regulations of *precisely the same subject*" can operate in parallel

<sup>53</sup> Federal Constitutional Court of Germany, Judgement of 30 June 2009, 2 BvE 2/08, para. 269.

<sup>54</sup> U.S. Supreme Court, *Medtronic, Inc. V. Lohr*, 518 U.S. 470, 485 et seq. (1996) citing U.S. Supreme Court, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 (1992) (Opinion of Stevens, J.).

<sup>55</sup> U.S. Supreme Court, *Medtronic, Inc. V. Lohr*, 518 U.S. 470, 486 (1996).

<sup>56</sup> See U.S. Supreme Court, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) as the precedent; *Arena*, The Doctrine of Union Preemption in the EU Single Market: Between *Sein* and *Sollen*, Jean Monnet Working Paper 03/10, p. 20, with many further references to U.S. Supreme Court decisions.

as long as Congress does not manifest an intent to exclude the States' authority.<sup>57</sup> Simply put, concurrent competences that correspond to those provided for in Art. 2 II, 4 I, II TFEU have been converted into parallel competences corresponding to those provided for in Art. 4 III, IV TFEU.<sup>58</sup> In the United States, this ultimately triggered the emergence of two parallel sets of substantive criminal laws at state level and at federal level.<sup>59</sup> This, however, was associated with multiple negative consequences.<sup>60</sup> To mention just the most far-reaching one, the parallel legal orders at State and federal level triggered an outright institutionalised *forum shopping* with alarming implications not only for the defendant's rights<sup>61</sup> but for the federal structure of the criminal law system as a whole. In this system, each level originally served its own and distinct function which was complementary with the one served by the respective other level and, therefore, had its own and obvious *raison d'être*. By contrast, for parallel legal orders serving the same functions there seems to be no proper justification. Such orders might be melded into one.<sup>62</sup>

From this American experience it follows that the development of parallel sets of substantive criminal laws on a European as well as on a Member State level should be avoided. Otherwise put, in the EU we should not follow the American example of converting genuinely concurrent competences in the sense of Art. 2 II, 4 I, II TFEU in parallel ones in the sense of Art. 4 III, IV TFEU.

From this conclusion, in turn, it follows that a presumption against preemption according to the American pattern should not be adopted in the EU because this presumption was exactly the reason for the emergence of parallel sets of criminal law provisions in the United States. A similar development might also take place in the EU in case of the adoption of a presumption against preemption since the European system does not have an integrated mechanism that would prevent such a development automatically, either. In particular, the principle of precedence of Union law would not attain this end on its own even though it continues to operate in the areas of shared competence.<sup>63</sup> This again is proved by the American experiences: By stating that state law is only displaced by federal law to the extent that it actually conflicts with federal law<sup>64</sup> the U.S. Supreme Court effectively

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<sup>57</sup> Gardbaum, The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption during the *Lochner* Era, in: Epstein/Greve (eds.), *Federal Preemption: States' Powers, National Interests*, 1st ed. 2007, p. 48, 67 et seq.

<sup>58</sup> L. Neumann, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 218 et seq.

<sup>59</sup> Cf. L. Neumann, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 218 et seq.; Reinbacher, *Das Strafrechtssystem der USA*, 1st ed. 2010, p. 79.

<sup>60</sup> Regarding the negative consequences of the generation of two parallel criminal law orders in the U.S. see in detail L. Neumann, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 127 et seq.

<sup>61</sup> Cf. L. Neumann, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 127 et seq.

<sup>62</sup> Cf. L. Neumann, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 147 et seq.

<sup>63</sup> On this aspect in detail L. Neumann, *Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU*, 1st ed. 2014, p. 211 et seq.

<sup>64</sup> U.S. Supreme Court, *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996).

established a principle of precedence of federal law correspondent to the principle of precedence of Union law. Nonetheless, as has been shown, parallel criminal law orders at State and federal level developed in the United States. Furthermore, the inability of the principle of precedence of Union law to prevent parallel criminal law orders also follows from the analysis of the effects of that principle itself. As it only neutralises national laws in the case of an actual conflict, *videlicet* a real contradiction between national provisions and directly effective provisions of Union law,<sup>65</sup> national criminal law provisions drafted more narrowly than potential European criminal law regulations would not be prevented by it at all; moreover, national criminal law provisions which are broader than potential European ones, would only be neutralised insofar as it would be supposed that the EU legislator wished to regulate the respective subject conclusively without allowing the Member States to supplement its regulations.<sup>66</sup> This, again, depends on an unpredictable assessment of the Union legislator's intent that cannot be conceived as a noteworthy impediment to the emergence of parallel criminal law orders.

### III. Conclusion: Problematic prospects

So far, the assignment of the criminal law as an element of the area of freedom, security and justice to the shared competences in the sense of Art. 2 II, 4 I, II TFEU has not created problems because it is not of crucial relevance for the minimum harmonisation competences that the EU has used, until now, in the field of criminal law. Only if and when the Union chooses to make use of its competence to enact supranational criminal law in the proper sense by means of regulations, the categorisation of criminal law competences as shared in the correct sense of concurrent ones will cause considerable difficulties resulting from the insecurities surrounding the interpretation of Art. 2 II TFEU and the accompanying protocol regarding the extent of the preemptive effect. The possible interpretations hereof would allow for the emergence of a single Union criminal law order, as well as for parallel criminal law orders at EU and Member State level, as well as for the development of a mixed set of Union and Member State provisions. As shown, all these options are deeply problematic in themselves. This, however, should be regarded as a call for criminal law scholars to analyse ways of determining the extent of the preemptive effect provided for in Art. 2 II 2 TFEU. Deferring this task any longer might be a dangerous decision with regard to the future development of the whole structure of our European criminal law system.

<sup>65</sup> *Satzger*, Internationales und Europäisches Strafrecht, 7th ed. 2015, § 9 para. 80; *Satzger*, International and European Criminal Law, 1st ed. 2012, § 7 para. 110.

<sup>66</sup> *L. Neumann*, Das US-amerikanische Strafrechtssystem als Modell für die vertikale Kompetenzverteilung im Strafrechtssystem der EU, 1st ed. 2014, p. 211 et seq.; on the question of the neutralisation of national criminal law provisions by European law in general see *Satzger*, Die Europäisierung des Strafrechts, 1st ed. 2001, p. 478 et seq.