

European Union Criminal Law - Towards a European Criminal Code

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Abstract

EU founding states aimed the establishment of an economic and political organism. Economic and political nature of this *sui generis* organization goes hand in hand with common principles of law. Economic cooperation brought common markets and elimination of borders and this followed with added cross-border criminality. The international criminality requires international measures, but due to the different national legislations, there is a necessity to harmonize them. European Union expectations go beyond simply harmonizing the law. There is a purpose towards the unification of law and the creation of a common criminal law like a European Criminal Code. The Lisbon Treaty creates a favorable ground for such a thing.

This paper aims to make a brief analysis of this issue by addressing the Lisbon Treaty and the innovations he brought in the context of unification of criminal law and the conditions and obstacles that this process has. The questions raised are:

Does the Lisbon Treaty provide the necessary tools for further harmonization of the law? Is it possible to have a European Criminal Code and a European Criminal Procedural Code?

Is it necessary that in applying criminal law, there should be a European political union at a higher level, like a Confederation?

Keywords: European Criminal Code, harmonizing, unification, Lisbon Treaty.

Introduction

EU founding states aimed the establishment of an economic and political organism. Economic and political nature of this *sui generis* organization goes hand in hand with the common principles of law. Economic cooperation brought common markets and elimination of borders and this followed with added cross-border criminality. The international criminality requires international measures, but due to the different national legislations, there is a necessity to harmonize them in order to have an effective fight against criminality. But, European Union expectations in this field go beyond simply harmonizing the law. There is a purpose towards the unification of the law and the creation of a common criminal law like a European Criminal Code. The Lisbon Treaty creates a favorable ground for such a thing.

So, in response to the cross-border criminality that appears in more sophisticated forms, the European Union has taken measures in the field of criminal law and due to these measures it is attained a certain harmonization of definitions and levels of sanctions for some serious crimes such as terrorism, human trafficking, drug trafficking, fraud to the detriment of the financial interests of the EU.¹ These measures

¹ Framework Decision on combating terrorism (2002/475/JHA), OJ L 164/3 of 22.6.2002; Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (2004/757/JHA) of 11.11.2004; Directive on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA OJ L 101/1 of 15.4.2011; Convention on the protection of the European Communities' financial interests, OJ L

constitute the European Criminal Law common to the Member States. But on the other hand, this set of laws which is a sensitive area of politics, accept differences between national criminal legislations which remain essential, for example the types and levels of criminal sanctions and the classification of certain actions as criminal or administrative violations. Approval of the European criminal law makes the offenders not hide behind borders nor not abuse with the differences between different national legal systems.²

It is important to mention that the creation of a European Criminal Code is a complicated and sensitive issue because it shows the harmonization of national substantive and procedural systems of criminal legislations and this affects the sovereignty of states by further limiting it.

The Treaty of Lisbon innovations

Regarding the harmonization of criminal law in the European Union, it should be clarified that the Lisbon Treaty is not the first basic law that has provided the opportunity to harmonize the substantive criminal law. However, because of the lack of an explicit legal basis before the Treaty of Lisbon, only a few measures have been taken to reinforce the implementation of EU policies that.

Indeed, all multi-annual programs (Tampere 1999, The Hague 2004, Stockholm 2009) and the former treaty on the European Union, as amended by the Treaty of Amsterdam, already provided for this possibility and/or objective. Formally, only substantial harmonization was possible and only in three particular crime areas: terrorism, organized crime and illicit drug trafficking. Also, no detailed criteria were set out to explain or design a strategic direction to a future harmonization policy in the area of criminal law. In practice, however, the limitation to substantive law and to these three specific criminal areas was not respected by the Member States. Between 2002 and 2010, at least nine harmonization instruments were adopted over and above those mentioned above but were also reflected in procedural criminal law. Therefore, it is fair to say that the text of the treaty was not followed strictly. Why was it so? The answer is probably because more crime areas than those officially mentioned deserved attention at a European Union level.³

So, the Treaty of Lisbon has provided to the European Union new powers in the field of judicial cooperation in criminal matters and law enforcement cooperation, since this area has become an area of sharing competences with the Member States. In the framework of cooperation and harmonization of the legislation, there are adopted decisions, the effect of which is mixed. So there is framework decisions, which are binding referred to their purpose. They must be transposed into national law of the Member States. Besides the binding effect's decisions, there are the norms as instruments with no element of "liability". But, lack of liability lets to the 316/49 of 27.11.1995.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Brussels, 20.9.2011 COM (2011) 573 final.. Pg.3.

³ Nadja Long, Lecturer, EIPA Luxembourg 2008-2011, "European Union Criminal Law. Towards a European Criminal Law Code?".

unsatisfactorily implementation.

Harmonization of specific elements of the criminal procedure law and the definitions and sanctions for a limited number of serious crimes, is foreseen in the Lisbon Treaty, respectively in Article 82.2 for criminal procedural law and Article 83.1 for criminal material law.

The harmonization instruments are directives, which unlike the regulations are not immediately applicable in domestic legislation, but they must be transposed by each Member State. So through the Treaty of Lisbon there is introduced a new era in terms of harmonization of substantive criminal law: *"The European Parliament and the Council, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offenses and sanctions in areas of serious crimes with a cross-border dimension depending on the nature or impact of such offenses or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation women and children, illicit drug trafficking, illicit trafficking in arms, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime."*⁴

Harmonization criteria and harmonization instruments

The harmonization criteria remain undefined since there are no minimum rules for defining criminal offenses and criminal sanctions. The crimes for which harmonization is required has to meet several criteria: the international dimension, seriousness and impact. Only particularly serious crimes shall be subject to harmonization process. The definition in Article 83.1 indicates that cross-border element must be present. On the other hand the other criteria are alternative. But despite the fact that Article 83.1 provides a limited listing of crimes which are subject to harmonization, the fact that the member states were given the right to stop negotiations if affected fundamental aspects of their internal system of criminal law, makes the harmonization have difficulties in his progress.⁵ The Lisbon Treaty has not actually provided any instrument (e.g. enhanced cooperation) to make possible the creation of codes. To create a code in this field of law, it will take more than a set of European laws and on the other hand does not seem that enhanced cooperation is to be used for the adoption of a European Criminal Code. However with the Lisbon Treaty, we have entered a new era which coincides with the harmonization of material criminal law. Minimum common rules in several areas of criminal law are essential for mutual trust and support between Member States and between their criminal domestic legislations. The principle of mutual recognition of the law as a cornerstone in the criminal law cooperation field is effective only if there is mutual trust between Member States. Member States are obliged to ensure the implementation of EU policies on their own initiative. But if member states fail to realize the successful implementation of these policies, then the EU itself can establish common rules to ensure implementation, including, if necessary the implementation of penal sanctions. However, the Treaty of

⁴ Treaty of Lisbon.

⁵ Article 83.3 of TFEU.

Lisbon⁶ recognizes and respects the diversity of basic values, habits and choice of any society. For this reason, the European Criminal Law is a consistent and coherent law.⁷

A new legal framework

The legal framework under the Lisbon Treaty provides opportunities to develop the EU criminal law. The legal framework allows notably the EU institutions and Member States to work together on a clear basis towards a coherent and-consistent EU criminal law at the same time equal effectively protects the Rights of Suspected and Accused Persons and Victims and Promotes the quality of justice.⁸

Prior to the adoption of the Lisbon Treaty implementation instruments of criminal law were decisions and directives. The Treaty of Lisbon gave Parliament greater powers through the process of co-decision and full legal control of the European Court of Justice.

Criminal law measures comprise intrusive rules, which can result in deprivation of liberty. This is why the Charter of Fundamental Rights – made legally binding by the Lisbon Treaty¹⁰ – provides important limits for EU action in this field. The Charter, being the compass of all EU policies, provides for a binding core of rules that protects citizens. When legislating on substantive criminal law or criminal procedure, Member States can pull the so-called “emergency brake”, if they consider that proposed legislation touches upon fundamental aspects of their national criminal justice system: in this case the proposal is referred to the European Council.⁹

European Criminal Law and its principles

The principles of the European criminal law are:

- The principle of subsidiary. According to this principle, the EU can intervene if measures at national or regional level are not effective;
- Necessity and proportionality;
- The minimum rules concerning the definitions of offenses and sanctions.

The Treaty of Lisbon has abolished the “third pillar”. Article 31 /1/e of the TEU has been replaced by the article 83/1 of the Treaty on the Functioning of the European Union [TFEU]. The new article provides:

“The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of

⁶ Article 67/1 TFEU: "The Union should constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

⁷ On the need for more coherence in the development of EU criminal law, see, as an example, the Manifesto on the EU Criminal Policy of 2009 (<http://www.crimpol.eu>), drafted by an academic group of 14 criminal law professors from ten Member States of the European Union.

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Brussels, 20.9.2011 COM (2011) 573 final.. Pg. 3,4.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Brussels, 20.9.2011 COM (2011) 573 final.. Pg. 4.

criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament."

TFEU replaced the "intergovernmental method" with the "community method". According to the new changes that TFEU presented, the European Commission, European Council and the Parliament gained these competences:

- The European Commission has a monopoly of the right of initiative;
- The European Council decides by a qualified majority voting instead of an unanimously voted framework decision;
- The European Parliament is involved in the procedure and even has the power to bring a proposal to an end.;
- The Court of Justice ensures the uniformity in the interpretation of the Community law;
- National parliaments may be involved in the procedure.¹⁰

This change has two main features. First, it is limiting of the sovereign power of the Member States to regulate the criminal matters, e. g. to define types of crimes and to establish penalties. Under the new regulation a simple veto of a state is impossible. Moreover, after 1 January, 2014, it will not even be sufficient to reject a proposal for a directive. Criminal matters were always recognized as one of the most delicate issues regarding the sovereignty of the state.¹¹

Secondly, the power of governments was restrained and the competence of the European Parliament was extended.

The areas of crime have been extended, including: trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime.

The European Criminal Code

The need for unification of European criminal law and therefore the creation of a European criminal code should be seen not only in the legal spectrum and its effectiveness in the fight against cross-border crime, but we must also analyze the political spectrum. It is known that the European Union is a political union first of all and this means that every measure taken including the creation of a European criminal code will be related to political developments in Europe.

From this arises the idea of creating a completely unified Europe and this idea leads

¹⁰ Daniela Pisou, *Reactive Integration: Police and Judicial Cooperation in Criminal Matters: Cooperation Or Communitisation?*, Nordestedt, 2005, p. 7-8.

¹¹ Christopher Harding, *Exploring The Intersection of European Law and National Criminal Law*, *European Law Review* 2000, 25(4), p. 380; Steeve Peers, *EU criminal law and the Treaty of Lisbon*, *European Law Review* 2008, 33(4), p. 507.

to the term "federation".

At this point the question raised is: Is the creation of a European criminal code followed by the establishment of implementation and control institutions enough or in order to have effectiveness in criminal common issues the work should start in the political level?

So in other words, it is necessary that in applying criminal law, there should be a European political union at a higher level, like a Confederation?

Is it possible to create a Confederation under already existing examples: USA, Switzerland?

This means further transfer of sovereignty by member states to the EU. How ready are these countries?

The fact that Europe faces the two systems of law (civil law and common law), does it constitutes an obstacle to the common criminal code?

So in conclusion, is a political unification needed before unification of criminal law? Effectiveness of European criminal law is unquestionable given that many crimes that violate domestic laws as well as those harmonized which have cross-border nature. And no, I do not think that to have a European Criminal Code there should be a reorganizing politics.

As mentioned above, there is thus an incentive and possibility for criminals to choose the Member State with the most lenient sanctioning system in certain crime areas unless a degree of approximation of the national laws prevents the existence of such "safe havens".¹²

Common rules strengthen mutual trust among the judiciaries and law enforcement authorities of the Member States. This facilitates the mutual recognition of judicial measures as national authorities feel more comfortable recognizing decisions taken in another Member State if the definitions of the underlying criminal offences are compatible and there is a minimum approximation of sanction level. Common rules also facilitate cooperation with regard to the use of special investigative measures in cross-border cases.¹³

Furthermore, Article 83/2 of the TFEU allows Parliament and the Council on the basis of the Commission proposal to establish the minimum rules in order to define crimes and sanctions if the approximation of criminal laws of the Member States is essential to ensure the effective implementation of a EU policy in an area which is subject of harmonization.

Because of their serious nature and their cross border dimension, it is needed an approach of this kind in European law.

European Criminal Law serves to ensure the implementation of EU policies in such areas ranging from customs union and the internal market to the environment protection. Member States are obliged to ensure the implementation of compulsory EU policies in such areas. They can choose the right tool to implement these policies,

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Brussels, 20.9.2011 COM (2011) 573 final., pg.5.

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Brussels, 20.9.2011 COM (2011) 573 final., pg.5.

by criminal or administrative sanctions.

Conclusions

As a conclusion to this study, the international criminality requires international measures, but due to the different national legislations, there is a necessity to harmonize them. European Union expectations go beyond simply harmonizing the law. There is a purpose towards the unification of the law and the creation of a common criminal law like a European Criminal Code. The Lisbon Treaty creates a favorable ground for such a thing. Harmonization of specific elements of the criminal procedure law and the definitions and sanctions for a limited number of serious crimes, is foreseen in the Lisbon Treaty, respectively in Article 82.2 for criminal procedural law and Article 83.1 for criminal material law. European Criminal Law serves to ensure the implementation of EU policies in such areas ranging from customs union and the internal market to the environment protection. Member States are obliged to ensure the implementation of compulsory EU policies in such areas. They can choose the right tool to implement these policies, by criminal or administrative sanctions. The Lisbon Treaty has not actually provided any instrument (e.g. enhanced cooperation) to make possible the creation of codes. To create a code in this field of law, it will take more than a set of European laws and on the other hand does not seem that enhanced cooperation is to be used for the adoption of a European Criminal Code. However with the Lisbon Treaty, we have entered a new era which coincides with the harmonization of material criminal law. It is not necessary a European political union at a higher level, like a Confederation in order to have a criminal law applicable and/or to move towards a European Criminal Code.

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