



## Seminar 8: Substantive EU criminal law

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Improving Judicial Cooperation in Criminal Matters in the area of Freedom, Security and Justice, institutional processes and topical areas



### **Fragments of the general part of criminal law: Legality, jurisdiction, objective and subjective element of crime**

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# Fragments of the general part of criminal law

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## Course content and objective

- **Description:** ... the last decade EU has adopted a number of legislative instruments on substantive criminal law. The course will tackle the **horizontal regulatory** issues closely related to these instruments such as defining EU competence, legality, jurisdiction, objective and subjective element of crime.
- **Method:** Presentations complimented by discussions
- **Objectives:** ... two-fold: firstly, to provide participants with **information** and **critical assessment** of the EU body of laws on substantive criminal law. Secondly to understand how EU law **penetrates** into domestic criminal laws and criminal justice systems.

## Part I – Programme

- EU instruments on substantive criminal law.
- Horizontal regulatory issues (competence, legality, elements of crime etc.)

## The instruments

- *PIF Convention (financial interests of EU)(proposed directive)*
- *Framework decision on Counterfeiting (proposed directive)*
- *Framework decision on Non-Cash Means of Payment*
- *Framework decision on Money Laundering*
- *Framework decision on Terrorism*
- *Framework decision on Unauthorised Entry (smuggling of people)*
- *Framework decision on Corruption*
- *Framework decision on Drug Trafficking*
- *Framework decision on Information*
- *Framework decision on Ship-Source Pollution*
- *Framework decision on Environment*
- *Framework decision on Organised Crime*
- *Framework decision on Racism*
- *Directive on Trafficking in Human Beings*
- *Directive on Sexual Exploitation of Children*

## Instruments – common features?

- Approximation of elements of criminal offence (Minimum harmonisation)
- Penalties (minimum maximum regulation)
- Legal persons (sanctions – not criminal sanctions)
- Some times also...
  - Confiscation
  - Jurisdiction
  - Replacement of FRA (art. 21 DIR on human trafficking):
    - “Framework Decision ... on combating trafficking in human beings is hereby replaced in relation to Member States participating in the adoption of this Directive...”.

## Instruments – common features (II)?

- No approximation of...
  - Participation, aiding, abetting, attempt
  - Mens rea (intent, negligence – but standards of “due diligence” may be described in EU law)
  - Except from the requirement of criminalisation
- Conclusion
  - Approx of objective elements of an offence
  - But no approx of the general part of the criminal code
  - And no approx on subjective elements of crime
  - => still largely depended on national criminal law
  - => diversity on EU level, coherence on national level

## Instruments – which kind?

- Framework decisions + directives. Difference?
- Implementation necessary
  - What does that mean, generally? For the definition of crimes?
  - Good or bad?
    - Legality problem?
      - 1) depends on the MS
      - 2) no disadvantage of the individual
      - 3) Difficult legislative process in EU – compromise – national level work on lex certa (foreseeability)
    - Good for coherence of national criminal law systems

## Fragments of the general part

- EU criminal law = interaction between 1) national criminal law + 2) EU features
- 1) Depended on national criminal law
  - National implementation
  - National Criminal Code (general part)

## Fragments of the general part – EU requirements

- Neutralizing effect
  - The supremacy of EU law => neutralization of national laws, if incompatible with Acquis
  - Conflict with elements of a criminal offence (Jet ski judgments Denmark/Sweden)
  - Conflict with legal consequences
    - Exceeds an upper limit (discrimination or proportionality)
    - Nature of the sanction (Donatella Calfa – expelled from Greece for life for drug offences)
- Interpretation of national law
  - National law must be interpreted in the light of EU law
  - Principle of legality sets limits
    - Interpretation may “expand” criminal liability (Satzger 2012, s. 101), but
    - A judge may not develop the law by interpretation, if it would transcend the ordinary meaning of the statutory wording (detriment of the accused) (EU Charter art. 49).
  - Sentencing
    - *“... IT IS THE TASK FOR THE NATIONAL COURT TO USE ITS JUDICIAL DISCRETION TO IMPOSE A PUNISHMENT APPROPRIATE TO THE CHARACTER AND OBJECTIVE OF THE PROVISIONS OF COMMUNITY LAW THE OBSERVANCE OF WHICH THE PENALTY IS INTENDED TO SAFEGUARD “.* Case 8/77 Sagulo
    - *“ whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive ”* Case 68/88 Greek Maize.

## Two cases

- Kolpinghuis
- Grøngaard/Bang

## Kolpinghuis 80/86

- Selling tap-water under the label of "mineral water".
- Directive 80/777/EEC – only water recognised as mineral water should be sold as mineral water.
- DIR not implemented in NL at the time.
- NL law "prohibits the stocking for sale and delivery of goods intended for trade and human consumption which are of unsound composition"
- ECJ judgment: "A national authority may not rely, as against an individual, upon a provision of a directive whose necessary implementation in national law has not yet taken place.
- (2) In applying its national legislation, a court of a Member State is required to interpret that legislation in the light of the wording and the purpose of the directive in order to achieve the result [...] of the Treaty, but a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive."

## "Bang and Grøngaard" case ECJ (C-384/02)

- RealDanmark (major Danish financial institution), 7000 employees
- Mr. Grøngaard member of the directors board
- Representing the staff of RealDanmark
- Board meeting: Discussing merging of RealDanmark and the biggest Danish Bank
- Stocks = rise... and staff = decline

## ”Bang and Grøngaard” case ECJ (C-384/02)

- Grøngaard contacts Mr. Bang (head of trade union)
- Danish ”Law on dealings in transferable securities”, Section 36(1):
- 'Any person in possession of inside information may not disclose such information to any other person unless such disclosure is made in the **normal course of the exercise of his employment**, profession or duties.'
- Grøngaard and Bang: normal course of their jobs
- Interpretation of “**normal course of the exercise of his employment**”
- Wording from directive 89/592

## ”Bang and Grøngaard” case ECJ (C-384/02)

- City Court
  - Asks ECJ (Luxemburg) how to interpret directive 89/592
  - Defense lawyer: Principle of legality
- ECJ
  - **Normal course of the exercise of his employment**
  - **The disclosure must be strictly necessary for the exercise of that employment**
  - **Probably not strictly necessary for Bang+Grøngaard**
  - **Doesn't matter, if it is a criminal law case**
  - **Must be equally interpreted in all EU Member States**
  - **Principle of legality is not our concern**
  - **Coherent application of EU law is our concern**

## "Bang and Grøngaard" case CJEU (C-384/02)

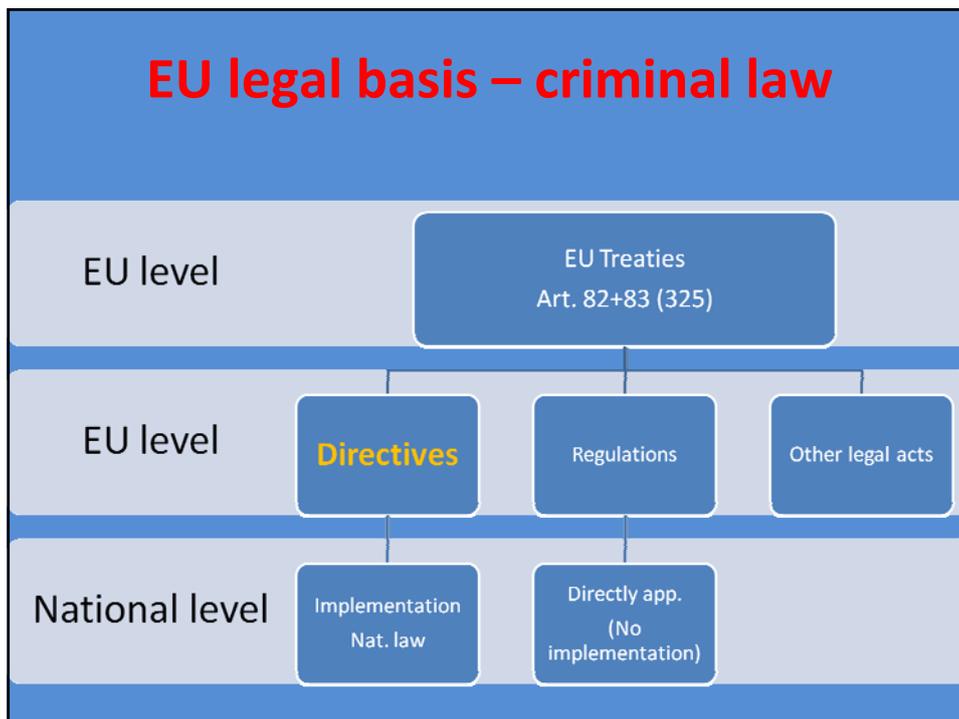
- City court
  - Not "strictly necessary", Bang + Grøngaard fined
- High court
  - Not "strictly necessary", do
- Supreme court
  - Principle of legality our (national) problem
  - This is said by ECJ:
  - C-384/02 (Section 29): The national court must "ensure compliance with the principle of legal certainty in the interpretation" of national law and a directive's wording and purpose.
  - Danish law Section 36(1) = unclear wording
  - Acquittal – even though B+G had violated the rules set out in the directive

## Part II

### Eurocrimes

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## EU legal basis – criminal law



## Instruments – competence

- Competence for instruments on substantial criminal law (not procedural, for example EAW).
- No supranational criminal law provisions – yet
  - No regulations with directly applicable criminal provision – national implementing measures necessary
  - However, art. 325 TFEU (financial interest of the EU) and art. 33 TFEU (customs).
- Directives
  - Art. 83(1) TFEU
    - Limited to certain kinds of crimes (but extension possible)
  - Art. 83(2) TFEU
    - Annex competence (every field of EU regulation)
    - Proposal for DIR on criminal sanctions for insider dealing and market manipulation (COM 654 (2011) Final).

## Eurocrimes. What is that?

- Provisions on EU fraud + TFEU art. 83
- Article 83(1)
- The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of **particularly serious crime with a cross-border dimension** resulting from the nature or impact of such offences or from a special need to combat them on a common basis.
- These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.
- On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

## DIR sexual abuse of children

### *Article 2*

#### **Definitions**

For the purposes of this Directive, the following definitions apply:

- (a) 'child' means any person below the age of 18 years;
- (b) 'age of sexual consent' means the age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child;

### *Article 3*

#### **Offences concerning sexual abuse**

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 6 is punishable.
2. Causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual activities, even without having to participate, shall be punishable by a maximum term of imprisonment of at least 1 year.

## Competence (NB! Art. 83(2)) – Special character of criminal law

- German Federal Constitutional Court, judgment of the Second Senate of 30 June 2009
- 253 (1) As regards the preconditions of criminal liability as well as the concepts of a fair and appropriate trial, the administration of criminal law depends on **cultural processes** of previous understanding that are **historically grown** and also determined by language, and on the alternatives which emerge in the process of deliberation and which move the respective **public opinion** ...
- The penalisation of social behaviour can, however, only to a limited extent be normatively derived from **values and moral premises** that are shared Europe-wide. Instead, the decision on punishable behaviour, on the rank of legal interests and the sense and the measure of the threat of punishment, is to a particular extent left to the democratic decision-making process...”

## Incarceration rates

	1979/80	2007/08
<b>U.S.A.</b>	230	756
<b>U.S.S.R./Rusland</b>	660	629
<b>Baltic countries</b>		200-300
<b>Polen</b>	300	221
<b>Spain</b>	37	160
<b>England and Wales</b>	85	153
<b>Canada</b>	100	116
<b>Netherland</b>	23	100
<b>Germany</b>	82	89
<b>Sweden</b>	55	74
<b>Norway</b>	44	69
<b>Finland</b>	106	64
<b>Danmark</b>	63	63 (2010:71)
<b>India</b>		33

## DIR Proposal financial interests (COM(2012)363/2)

### Article 8

#### Imprisonment thresholds

1. Member States shall take the necessary measures to ensure that criminal offences as referred to in Articles 3 and 4, paragraphs 1 and 4, involving an advantage or damage of at least EUR 100,000 shall be punishable by

- (a) a minimum penalty of at least 6 months imprisonment ;
- (b) a maximum penalty of at least 5 years of imprisonment.

Member States shall take the necessary measures to ensure that criminal offences as referred to in Article 4, paragraphs 2 and 3, involving an advantage or damage of at least EUR 30,000 shall be punishable by:

- (a) a minimum penalty of at least 6 months imprisonment;
- (b) a maximum penalty of at least 5 years of imprisonment.



Thank you  
for your  
attention!