

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



Legislative competence of the EU in the field of substantive criminal law

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Introduction

- **early (failed) attempts to agree on the specific issue of fraud against the EC budget**
- **United Nations**
- **Council of Europe**
- **i.e. Conventions on corruption, cybercrime**

- **why EU substantive criminal law?**



Institutional framework and overview - Maastricht

- **Treaty on the European Union**
 - judicial cooperation in criminal matters Article K.1.(7)
 - no explicit competence to harmonize substantive criminal law
- **but! combination acts**
- **+ K1.(4) 'combating drug addiction'**
- **+ K1.(5) 'combating fraud on an international scale)**
 - Conventions, Joint Actions
- **former Article 209a TEC on fraud against EC financial interests**
- **Schengen Convention**



Institutional framework and overview - Amsterdam

Treaty of Amsterdam, amending the Treaty on the European Union

Article 29

Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.



Institutional framework and overview - Amsterdam

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,
- closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ('Eurojust'), in accordance with the provisions of Articles 31 and 32,
- **approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).objective 'preventing and combating racism and xenophobia'**

Article 31 [...]

(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.



Institutional framework and overview - Amsterdam

Treaty of Amsterdam, amending the Treaty establishing the European Community

▪ Article 135

Within the scope of application of this Treaty, the Council, acting in accordance with the procedure referred to in Article 251, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission. **These measures shall not concern the application of national criminal law or the national administration of justice.**

▪ Article 280 (former 209a)

[...]

4. The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of Auditors, **shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice.**



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Institutional framework and overview - Lisbon

Treaty of Lisbon, creating the Treaty on the Functioning of the European Union

▪ 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.



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Institutional framework and overview - Lisbon

Treaty of Lisbon, creating the Treaty on the Functioning of the European Union

▪ Article 83 (cont.)

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



Institutional framework and overview - Lisbon

Treaty of Lisbon, creating the Treaty on the Functioning of the European Union

▪ Article 83

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

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



Competence issues – general

- **‘historic’ dispute between 1st pillar or 3rd pillar**
- **scope and intensity of EU action**
 - exhaustive list of crimes in Article 83(1)
 - minimum rules Article 83(1) and (2)
 - relationship between Article 83(1) and (2)
 - relationship between Article 83(1) and other treaty articles on policing and criminal law
 - relationship between Article 83(1) and other treaty articles
- **territorial scope**



Competence issues – Community criminal law competence

- **before the Treaty of Lisbon**
- **issue whether the EC has criminal law competence**
 - 68/88 Commission v Greece (Greek maize case)**

‘For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.’
 - **C-176/03 Commission v Council**

‘As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.’



Competence issues – Community criminal law competence

- **after the Treaty of Lisbon**
 - **clarified in Article 83(2)**
 - **relation with Article 83(1)**
 - **conditions for applying Article 83(2)**
 - criminal law measure has to be essential for the implementation of an EU policy
 - area must have been subject to harmonisation measures
 - criminal law measures must not precede
- + Commission Communication COM(2011) 573 final



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Offences

- **EU law offences (Article 83(1) TFEU)**
 - terrorism
 - trafficking in human beings
 - sexual exploitation of women and children
 - drug trafficking
 - arms trafficking
 - money laundering
 - corruption,
 - counterfeiting of means of payment,
 - computer crime
 - organised crime
- + arms trafficking



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Offences

- **former EC criminal law measures**
 - racism and xenophobia
 - facilitation of illegal entry and stay
 - employment of irregular migrants
 - environmental crime, ship source pollution
 - protection of EU financial interests

- **prohibitions through former EC law**
 - white collar and economic crime (insider dealing, money laundering, possession of firearms, lorry driving hours)

Limitations of national law

- **fundamental freedoms of EU law limit national criminal law**
- **national criminal law may be set aside**
 - 186/87 *Cowan*
- **proportionate use of criminal law**
 - 178/78 *Michalengelo Riviora and others*
- **EU law imposes obligations to legislate**
 - minimum criminalisation
 - dissuasive, effective and proportionate criminal measures

Limitations of EU law

- principles of conferral, subsidiarity and proportionality
- fundamental rights
- last resort: emergency break Article 83(3)



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**Do You Have
Any Questions?**
We would be happy to help.
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