



European Union Action to
Fight Environmental Crime

Articles 82 – 86 of the Treaty on the Functioning of the European Union and Environmental Crime

WORK PACKAGE 2 ON “INSTRUMENTS, ACTORS, AND INSTITUTIONS”



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Abstract

The report provides an in-depth analysis of the provisions of Articles 82-86 TFEU, which especially deal with the “Judicial cooperation in criminal matters”, set out in the framework of Title V of the TFEU, devoted to the “Area of Freedom, Security and Justice”. While Articles 82 and 83 TFEU deal with approximation of laws and regulations of the Member States (and in particular of national provisions of criminal law and criminal procedure), Articles 85 and 86 TFEU covers what can be called the institutional dimension of such a cooperation.

Article 82 TFEU brings mutual recognition in general terms within the scope of the EU’s competence, and gives in particular the European Parliament and the Council general regulatory powers on this matter.

Article 83 TFEU is the fundamental provision as far as the harmonisation of substantive criminal law is concerned; this article lists the areas in which the approximation of laws can be realised and it distinguishes between the cases of “particularly serious crime with a cross-border dimension” and the ones in which the approximation proves essential “to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures”.

Article 84 TFEU deals with the preventive side of the “security” dimension of the common area of freedom, security and justice, establishing the competence of the EU for adopting measures in the field of “crime prevention”.

Article 85 TFEU deals with the actual main EU actor in such a field, that is to say Eurojust.

Article 86 TFEU introduces the necessary legal basis for the establishment of a European Public Prosecutor’s Office as a new European actor with direct powers of investigation and prosecution.

All these provisions open very significant perspectives for an improvement of the protection of the environment, provided that the crucial role of the environment in the EU construction is fully recognised and properly taken into consideration when implementing these provisions.

Table of Contents

1	Article 82 TFEU.....	7
1.1	Preliminary remarks	7
1.2	Judicial cooperation and mutual recognition in criminal matters	8
1.3	Minimum standards for criminal procedural law: the steps forward of the EU legislation	14
1.4	The <i>emergency brake</i> and the simplified enhanced cooperation: a flexible approach to integration	17
2	Article 83 TFEU.....	19
2.1	Preliminary remarks: the Harmonisation of the criminal provisions of the Member States before the Lisbon Treaty.	19
2.2	Article 83 TFEU and the harmonisation of criminal law.	22
2.3	The content of the possible harmonisation measures.	25
2.4	The “emergency brake” mechanism.	27
2.5	The principles of criminal policy to be employed in the elaboration of the European criminal provisions.	27
2.6	The possible impact on the environmental criminal law.	30
3	Articles 84, 85, 86 TFEU	32
3.1	Preliminary remarks	32
3.2	Article 84 TFEU	33
3.2.1	EU action for preventing environmental crime	33
3.3	Article 85 TFEU	34
3.3.1	Article 85.1 – first sub-paragraph	34
3.3.2	Article 85.1 – second sub-paragraph	36
3.3.3	Article 85.1 – third sub-paragraph	38
3.3.4	Article 85.2	38
3.3.5	Eurojust and environmental crime	39
	The state of play	39
	Eurojust’s added value	41

4	Article 86.....	42
4.1	Article 86.1 – first sub-paragraph	42
4.2	Article 86.1 – second and third sub-paragraphs	43
4.3	Article 86.2	44
4.4	Article 86.3	45
4.5	Article 86.4	46
4.6	EPPO and environmental crime	46
5	Summary	47
	Bibliography	51

LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
ECJ	European Court of Justice
EPPO	European Public Prosecutor's Office
JHA	Justice and Home Affairs
OJ	Official Journal
MSs	Member States
Para.	Paragraph
TFEU	Treaty on the Functioning of the European Union
TUE	Treaty of the European Union

1 Article 82 TFEU

1.1 Preliminary remarks

Article 82, together with Article 83 TFEU, needs to be read in the light of Chapter 1 of Title V of the TFEU, which sets out the general goals to be achieved in this field. More specifically, article 67 TFEU stipulates that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States (MSs). Moreover, it reads that the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism, xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.¹ As a result, in the light of the Treaty of Lisbon, the AFSJ reflects broader trends in European integration, namely the increasing scope of European law combined with a more flexible model of integration. As it has been highlighted by some authors integration in the AFSJ can therefore be seen to be a system for organising difference, since the limited nature of its competence, the increased capacity for a “multi-speed” Europe and above all the variety of tools and techniques aim, not to construct a complete pan-European legal regime, but rather to increase cooperation and inter-operability between national legal system and thereby manage variation within a single coherent system.²

Within such a wide concept of the AFSJ, the area of criminal law is the subject of Chapter 4 of Title V of the TFEU.

¹ See Jean Claude Piris, *The Lisbon Treaty, A legal and Political Analysis* (Cambridge: University Press, 2010), 167 ff.; Stephen D. Coutts, “The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration”, <http://www.cyelp.com/index.php/cyelp/article/view/121>; Daniel Flore, “Justice pénale et sécurité européennes: l’apport du Traité de Lisbonne”, *Journal Tribunaux* (2010): 306-308; Steve Peers, “Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon”, *Common Market Law Review* (2011): 611 ff.; Ester Herlin-Karnell, “The Lisbon Treaty Evaluated: Impact and Consequences. Flexibility and Loyalty in the AFSJ”, London, 31 January-1 February 2011, www.uaces.org; Oana-Mariuca Petrescu, “The European Judicial Cooperation in Criminal Matters in the Light of the Lisbon Treaty”, http://journaldatabase.org/articles/european_judicial_cooperation_criminal.html; Helmut Satzger, “Study on Police and Justice Cooperation in the European Union”, http://www.janalbrecht.eu/fileadmin/material/Dokumente/SATZGER__Study_on_Police_and_Justice_Cooperation_n_28_11_13_final.pdf

² See Coutts, “The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration”, 107.

1.2 Judicial cooperation and mutual recognition in criminal matters

Article 82 - para. 1 – Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- a) lay down rule and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;*
- b) prevent and settle conflicts of jurisdiction between Member States;*
- c) support the training of the judiciary and judicial staff;*
- d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.*

The provision of Article 82, para. 1, brings mutual recognition in general terms within the scope of the EU's competence and paragraph 1 (a) gives in particular the European Parliament and the Council general regulatory powers on this subject. Actually, the principle of mutual recognition has been the motor of European integration in criminal matters in the recent past. Hence, it was firstly mentioned explicitly in the Tampere Presidency Conclusions (15th-16th October 1999) as the corner stone of the judicial cooperation between the MSs and further reiterated in the Hague Programme, adopted in 2004, further in the multi-annual Programme in the AFSJ for the period 2010-2014, the so-called Stockholm Programme, approved by the Council in December 2009 and ultimately in the EU Justice Agenda for 2020,³ where the Commission reiterates that the "EU justice policy has sought to develop a European area of justice based on mutual recognition and mutual trust by building bridges between the different justice systems of the Member States" and in the Conclusions of the European Council held in Bruxelles on 26/27 June 2014.⁴ Such a principle requires that judicial decisions issued by one MS (issuing State) should be executed without further formalities by any other MS (executing State), trying to establish the "free movement of judicial decisions", without or with only little harmonisation of standards and legislations. Actually, the principle of mutual recognition was firstly adopted in the internal market (within the so-called First Pillar according to the pre-Lisbon terminology), then it has been extended to a quite different policy area, the AFSJ, and in particular to judicial cooperation, where it serves different purposes, causes different problems and has to take different forms. In particular, whereas within the internal market the principle of mutual recognition means that the individual can take advantageous standards and it facilitates the exercise of individual freedoms (free trans-border movement), in the context of the AFSJ, on the contrary, the application of such a principle means that the individuals are to be subjected to disadvantageous or coercive measures of a foreign country,

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union*, 11.03.2014, COM(2014)144 final.

⁴ Conclusions of the European Council, Bruxelles, 27 June 2014, EUCO 79/14, 5, which stress that "The smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another's justice systems should be further enhanced".

which interfere with their rights and liberties, having consequently the effect of threatening the freedoms of individuals.⁵

The first piece of legislation implementing the principle of mutual recognition was the Framework Decision (FD) on the European Arrest Warrant (2002)⁶, which represented a strong development for European Union criminal law, together with the entry into force of a set of measures applying the mutual recognition primarily to the financial side of criminal law enforcement - i.e. in 2003 the FD on the execution of orders freezing property and evidence;⁷ in 2005 the FD applying mutual recognition to financial penalties;⁸ in 2006 the FD on the application of the principle of mutual recognition to confiscation orders.⁹ More recently, in 2008 the FD applying the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty,¹⁰ and the FD on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions,¹¹ in 2009 the FD on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention,¹² were also adopted.

However, the application of mutual recognition in criminal matters raises significant challenges for the constitutional and criminal justice different traditions of Member States and for the protection of fundamental rights. At the same time, the application of this principle in such field may also have important implications for the European Union, bringing to the fore issues of competence and legitimacy, and reframing the relationship between the Union and Member States in the field of criminal law.¹³

⁵ See in this respect Markus Möstl, “Preconditions and limits of mutual recognition”, *Common Market Law Review* 47 (2010): 408 ff.

⁶ Council Framework Decision 2002/584/JHA, *OJ* 2002 L 190/1, 18.07.2002.

⁷ Council Framework Decision 2003/577/JHA, *OJ* L 196, 02.08.2003, which extends the principle of mutual recognition to pre-trial orders freezing property or evidence.

⁸ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. *OJ* L 76, 22.3.2005, 16-30.

⁹ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. *OJ* L 328, 24.11.2006, 59-78.

¹⁰ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. *OJ* L 327, 5.12.2008, 27-46.

¹¹ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. *OJ* L 337, 16.12.2008, 102-122.

¹² Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. *OJ* L 294, 11.11.2009, 20-40.

¹³ See in this respect the wording of the Advocate General Juiz-Arabo Colomer in its Opinion on the case *Advocaten voor de Wereld* delivered on 12 September 2006, where he states that: “There is, therefore, a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law. The Court of Justice must participate in that debate by embracing the prominent role assigned to it, with a view to situating the interpretation of the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems” (para. 8). For a complete analysis on the problems arising from the application of the principle of mutual recognition, see among others Valsamis Mitsilegas, *EU Criminal Law* (Oxford and Portland, Oregon: 2009), 116-120; Valsamis Mitsilegas, “The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU”,

In particular, as the implementation and application of the EAW has shown,¹⁴ since the cooperation founded on the principle of mutual recognition has resulted in abolishing the requirement of double criminality test for the crime areas specifically enumerated in the above mentioned legal acts and a previous harmonisation of such offences within the MSs legal systems has lacked, many concerns have arisen regarding the compliance of this mechanism firstly with the principle *nullum crimen, nulla poena sine lege*, granted by the European Charter of Fundamental Rights (ECFR), the European Convention on Human Rights (ECHR) and the national constitutional traditions common to the MSs legal systems. In this respect, it is particularly worthwhile a brief analysis of the European Court of Justice (ECJ) case-law, concerning some questions referred for a preliminary ruling about the EAW.

In the case *Advocaten voor de Wereld*,¹⁵ the Advocate General Colomer, after stressing that the EU has a complete and effective system of human rights protection, ensured by the interaction of three different spheres – national, Council of Europe and EU,¹⁶ highlights how the principle of legality comes into play during the exercise of the States right to punish and during the application of acts which may be strictly construed as imposing a penalty, from which it follows that the Framework Decision cannot be said to contravene the principle because it does not provide for any punishments or even seek to harmonise the criminal laws of the Member States. Instead, the Framework Decision is confined to creating a mechanism for assistance between the courts of different States during the course of proceedings to establish who is guilty of committing an offence or to execute a sentence. That system of cooperation is subject to a number of conditions, in that the sentences and detention orders which may be imposed must be of a certain severity, and it is also possible to require that the acts concerned must be

Common Market Law Review (2006): 1277-1311; Geert Corstens, “Criminal Justice in the post-Lisbon era”, speech in the EU Seminar on mutual trust and mutual recognition, www.rechtspraak.nl; Matthias J. Borges, “Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters”, *Criminal Law and Criminal Justice* 18 (2010): 99-114; Möstl, “Preconditions and limits of mutual recognition”, 432 ff.; Gilles de Kerchove and Anne Weyembergh, *La reconnaissance mutuelle des décisions judiciaires pénales dans l’Union européenne* (Bruxelles: Editions de l’Université de Bruxelles, 2002); Gian Luigi Tosato, “Some remarks on the limits to mutual recognition of judicial decisions in CML and criminal matters within the European Union”, *Rivista di diritto internazionale* 4 (2002): 869 ff.; Dionysios Spinellis, “Mutual recognition and harmonisation of national criminal legislations. The example of the European Arrest Warrant”, in *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, ed. Giovanni Grasso and Rosaria Sicurella (Milano: Giuffrè, 2008): 457 ff.; Gisèle Vernimmen-Van Tiggelen and Laura Surano, “Analysis of the future of mutual recognition in criminal matters in the European Union”, http://ec.europa.eu/justice_home/index_en.htm; Floriana Bianco, “Mutuo riconoscimento e principio di legalità alla luce delle nuove competenze dell’Unione europea in materia penale”, in *L’evoluzione del diritto penale nei settori di interesse europeo alla luce del Trattato di Lisbona*, ed. Giovanni Grasso, Lorenzo Picotti and Rosaria Sicurella (Milano: Giuffrè, 2011), 171 ff.; Marta Bargis, “La cooperazione giudiziaria penale nell’Unione europea tramutuo riconoscimento e armonizzazione: analisi e prospettive”, *Rivista di diritto processuale* 4 (2012): 914 ff.; Joanna Beata Banach-Gutierrez, “Globalised Criminal Justice in the European Context – How Theory meets Practice”, *New Journal of European Criminal Law* 1-2 (2013): 154 ff.; Emily Smith, “Running before we can walk? Mutual recognition at the expense of fair trials in Europe’s area of freedom, justice and security”, *New Journal of European Criminal Law* 1-2 (2013): 82 ff.

¹⁴ Luisa Marin, “The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case”, *Maastricht Journal of European and Comparative Law* 4 (2008): 474 ff.; Joachim Vogel and John R. Spencer, “Proportionality and the European Arrest Warrant”, *Criminal Law Review* (2010): 474-482; Joanna Apap and Sergio Carrera, “Judicial Cooperation in Criminal Matters – European Arrest Warrant – A Good Testing Ground for Mutual Recognition in the Enlarged EU?”, *CEPS Policy Brief* 46 (February 2004).

¹⁵ European Court of Justice, Grand Chamber, Case C-303/05, 03.05.2007, ECR [2007] I-3633.

¹⁶ Opinion of the Advocate General Juiz-Arabo Colomer on the case *Advocaten voor de Wereld*, paras. 71-82.

classified as offences in the Member State of the court providing the assistance, except in the case of the offences referred to in Article 2(2) as they are defined by the law of the issuing Member State. Thus, *the certainty required by that principle must be demanded from the substantive criminal law of the issuing Member State* and, therefore, from the legislature and the courts of that State for the purposes of commencing criminal proceedings and resolving them, where appropriate, with a sentence. The criminal law of the Member State which executes the warrant simply has to provide the assistance requested.¹⁷

Accordingly, the Court – after pointing out that “*The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.*” and as a result “*the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which [...] must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties*” – states that “*in so far it dispenses with verifications of the requirement of double criminality in respect of the offences listed in that provision, Article 2(2) of the Framework Decision is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties*”.¹⁸

Furthermore, the ECJ affirms that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions and as a result the EU law precludes the application of a conclusive presumption that the Member State which [...] is indicated by the relevant legislation as responsible observes the fundamental rights of the European Union. Therefore, in a case dealing with the transfer of an asylum seeker from one State to another, the Court states that “Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision”.¹⁹ *Mutatis mutandis* the same reasoning has to be applied to the EAW application, so that a clear and ascertained violation of human rights perpetrated by the issuing State should certainly constitute a legitimate ground for the refusal by the requested State to surrender an individual under the EAW’ system.²⁰

Focusing on the defence rights of individuals subject to the EAW, in the *Radu* case,²¹ the question brought before the ECJ refers to the right to be heard, granted by articles 47 and 48 ECFR and Article 6 ECHR. In particular, the referring court asks whether the FD on EAW, read in the light of the ECFR and the ECHR, must be interpreted as meaning that the executing judicial authorities can refuse to execute a European arrest warrant issued for the purpose of conducting a criminal prosecution on the ground that the issuing judicial authorities did not hear the requested person before that arrest warrant was issued. However, the Court considers that “an obligation for the issuing judicial authorities to hear the requested person before such a European arrest warrant is issued would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice, in so far as such an arrest warrant must have a certain element of surprise, in particular in order to stop the person concerned from taking flight”.²² However, “the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant

¹⁷ Opinion of the Advocate General Juiz-Arabo Colomer on the case *Advocaten voor de Wereld*, paras. 103-104.

¹⁸ European Court of Justice, Grand Chamber, Case C-303/05, paras. 52-54.

¹⁹ European Court of Justice, Joined cases C-411/10 and C-493/10, *N.S. and M.E.*, 21.12.2011, ECR [2011] I-13905.

²⁰ See in this respect *Apap and Carrera*, “Judicial Cooperation in Criminal Matters”, 13-14.

²¹ European Court of Justice, C-396-11, 29.01.2013, not yet reported, <http://curia.europa.eu>

²² European Court of Justice, C-396-11, para. 40.

system”,²³ without infringing at the same time the defence rights of individuals. Therefore, “the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued”.²⁴

Recently, in the *Melloni* case,²⁵ the referring court (i.e. the Spanish Constitutional Tribunal) wonders whether Article 53 ECFR, interpreted schematically in conjunction with the rights recognised under articles 47 and 48 ECFR, allows a MS to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in requesting State, thus affording those rights a greater level of protection than that deriving from the European law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the Constitution of the requested State. Actually, the interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. The Court disregards such an interpretation, which would undermine the principle of the primacy of EU law inasmuch as it would allow a MS to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by the State’s constitution.²⁶ Consequently, the Court states that allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, which was exactly intended to remedy the difficulties associated with mutual recognition of decisions rendered in the absence of the person concerned at his trial arising from the differences among the MSs in the protection of fundamental rights. However, casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that FD, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, would mean to undermine the principles of mutual trust and recognition, which the FD purported to uphold and, therefore, to compromise the efficacy of it.²⁷

Having regard to such problems, the European Parliament has recently outlined some recommendations requiring the Commission to submit on the basis of Article 82 TFEU legislative proposals providing for:²⁸

- a) a procedure whereby a mutual recognition measure can, if necessary, be validated in the issuing Member State by a judge, court, investigating magistrate or public prosecutor, in order to overcome the differing interpretations of the term ‘judicial authority’;
- b) a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure;
- c) a standardised consultation procedure whereby the competent authorities in the issuing and executing Member State can exchange information regarding the execution of judicial decisions such as on the assessment of proportionality and specifically in regard to the EAW to ascertain trial-readiness;

²³ European Court of Justice, C-396-11, para. 41.

²⁴ European Court of Justice, C-396-11, para. 43.

²⁵ European Court of Justice, C-399/11, 26.02.2013, not yet reported, <http://curia.europa.eu>.

²⁶ European Court of Justice, C-399/11, paras. 56-58.

²⁷ European Court of Justice, C-399/11, paras. 62-63.

²⁸ European Parliament Resolution with recommendations to the Commission on the review of the European Arrest Warrant, 27.02.2014, (2013/2109(INL)). See in particular the Annex to the resolution including the recommendations as to some envisaged legislative proposals by the Commission.

- d) a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality;
- e) the right to an effective legal remedy in compliance with Article 47(1) of the Charter and Article 13 of the ECHR, such as the right to appeal in the executing Member State against the requested execution of a mutual recognition instrument and the right for the requested person to challenge before a tribunal any failure by the issuing Member State to comply with assurances given to the executing Member State;
- f) a better definition of the crimes where the EAW should apply in order to facilitate the application of the proportionality test.

Besides these concerns dealing with the respect of fundamental rights, the interaction between national criminal justice systems in the border-less AFSJ has had a significant impact in recent years on issues regarding the maintenance of State sovereignty in assuming jurisdiction and initiating prosecutions for alleged criminal offences. EU criminal law may affect the claim and exercise of sovereignty in criminal matters in a twofold manner: in not allowing a Member State to initiate prosecutions for behaviour covered by the *ne bis in idem* principle; and, at an earlier stage of the criminal process, in requesting a Member State to exercise or limit its capacity to prosecute a certain behaviour, i.e. positive or negative conflicts of jurisdiction.

The crucial role of the principle of mutual recognition within the judicial cooperation in criminal matters is therefore confirmed by this article, which subordinates to the realisation of the mutual recognition the attribution to the EU (in particular, to the European Parliament and the Council) of the competence concerning the adoption of specific measures in criminal procedure matter. At the same time, para. 1 mentions the approximation of national laws on substantive criminal law and criminal procedure within the scope of the provision, since logically the more closely the relevant national legislations resemble one another the easier mutual recognition becomes. In fact, the existence of approximation is intended to generate sufficient trust between legal systems to allow mutual recognition to take place between legal orders.

In order to overcome some of the above mentioned problems, which had arisen within the judicial cooperation in criminal matters in the past, and enhance the mutual trust between the MSs legal and judicial systems, Article 82, para. 1 (lett. a-d) provides specifically for some mutual recognition measures, to be adopted through the co-decision procedure by the Parliament and the Council. In particular, they include measures:

- a) on the recognition of *all forms of judgements and judicial decisions* (lett. a) and generally such measures lead to a framework for rules embracing all stages of the criminal justice process: from arrest to execution of sentences;
- b) for the prevention and settlement of conflicts of jurisdiction between Member States. Actually the multitude of available forum states may lead to forum shopping by prosecuting authorities and this does not comply with the right to be judged by a “court established by law”. Moreover, the conflict of jurisdiction lead to parallel proceedings, which are inefficient from the MSs’ perspective and burdensome for the suspect. Actually, such problems have not been tackled yet, since the FD on the prevention and settlement of conflicts of jurisdiction²⁹ does not require a binding determination of the forum State and provides for an informal consultation procedure, which is not effective in preventing forum shopping (in this respect, see Article 85 for the role of Eurojust in coordinating conflicts of jurisdiction and Article 86 for the new perspectives opened by the future setting up of an European Public Prosecutor’s Office);
- c-d) for supporting the training of the judiciary and judicial staff and facilitating cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions. Such measures aim at improving the knowledge of the judiciary and the judicial staff and simplifying and clarifying the cooperation procedures, in order to enhance the mutual trust in one another’s justice systems.³⁰

²⁹ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. *OJ L 328/42, 15.12.2009, 42-47.*

³⁰ See in this respect, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *The*

1.3 Minimum standards for criminal procedural law: the steps forward of the EU legislation

Article 82 - Para. 2 - To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- a) mutual admissibility of evidence between Member States;*
 - b) the rights of individuals in criminal procedure;*
 - c) the rights of victims of crime;*
 - d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision;*
- for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.*

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Article 82, para. 2, TFEU shows the awareness of the EU legislator about the circumstance that the construction of an AFSJ based on the mutual trust between the different judicial systems – necessary also in order to ensure the best functioning of the principle of mutual recognition of judicial decisions and orders– requires above all the specification of common standards ruling both the most important issues of the criminal procedural law and the defence rights and guarantees of suspected or accused in criminal proceedings. Nevertheless, in the light of the “flexible harmonisation”, which characterises the AFSJ, such *minimum rules* have to take into account the differences between the legal traditions and systems of the MSs, in order to draft a EU legislation largely acceptable – and consequently easily implementable - by all MSs.

Generally speaking, it is particularly significant that, according to Article 82, para. 2, such minimum rules apply only to *criminal matters having a cross border dimension*. Therefore, it seems that such limitation should also be included in national legislation implementing them. However, this constraint is balanced by the specific provision, which enables the Council, by unanimity and with the consent of the Parliament, to extend such a list of issues, thus leaving an open perspective for the future,³¹ as provided for also in Article 83 TFEU.

In particular, the approximation of national laws should deal at the moment with three main fields:

- a) mutual admissibility of evidence (consequently, the EU has competence to adopt rules governing the admissibility of evidences collected in another country or the testimony of witnesses questioned in another country);

2014 EU Justice Scoreboard, 17.03.2014, COM(2014) 155 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union*, 2-3; Conclusions of the European Council, Bruxelles, 27 June 2014, 5-6.

³¹ See Piris, *The Lisbon Treaty*, 183.

b) the rights of individuals involved in a criminal procedure and the rights of victims of crime. The rights of individuals involved in the criminal procedure deal with defendants, witnesses and experts. Actually, such provision widens the EU competence to procedural criminal law almost in its entirety, subordinating it however to a unanimous decision by the Council and the approval of the Parliament, when it refers to subjects different of those already listed in article 82, para. 2.³²

According to the provisions of Article 82, the EU legislator firstly adopted in 2009 a EU's Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings.³³ It is a set of procedural safeguards for accused persons intended to ensure that fair trial rights are protected across the EU. Once fully implemented, the Roadmap will help ensure that the rights enshrined by the ECHR are respected in practice and in a consistent manner across all MSs.

Some Directives have been adopted as a follow-up to such a Roadmap.

The Directive on the right to interpretation and translation in criminal proceedings,³⁴ which allow the suspected or accused person to understand what is happening during the criminal proceeding. Furthermore, a suspected or accused person who does not speak or understand the language used in the proceedings has the right to ask for an interpreter or a translation of essential procedural documents.

The Directive on the right to information in criminal proceedings,³⁵ which enshrines to the persons suspected or accused of a crime the right to be informed on their basic rights orally or, where appropriate, in writing (e.g. by way of a Letter of Rights), to receive also information promptly about the nature and the cause of the accusation against them, in order to prepare their defence.

The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty,³⁶ which grants the right to legal advice for the suspected or accused person in criminal proceedings at the earliest stage of such proceedings and the right for person who is deprived of the liberty to be promptly informed of the right to have at least one person, such as a relative or employer, or competent consular authorities informed of the deprivation of liberty.

Moreover, on 27 November 2013, the European Commission has presented a package of proposals to further strengthen procedural safeguards for citizens in criminal proceedings, aiming to guarantee fair trial rights for all citizens, wherever they are in the European Union. In particular, a proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings,³⁷ a proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings³⁸ and a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings have been adopted.³⁹

³² See Mitsilegas, *EU Criminal Law*, 109-110.

³³ Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings, 30.11.2009, (2009/C 295/01).

³⁴ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. *OJ L 280/1*, 26.10.2010, 1-7.

³⁵ Directive 2012/13/EU on the right to information in criminal proceedings. *OJ L 142/1*, 01.06.2012, 1-10.

³⁶ Directive 2013/48/EU. *OJ L 294*, 6.11.2013.

³⁷ Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM/2013/0821 final.

³⁸ Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM/2013/0822 final.

³⁹ Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM/2013/0824 final.

Under the above mentioned Roadmap, the European Commission also published a Green Paper on pre-trial detention in June 2011,⁴⁰ since the pre-trial detention periods can considerably vary between MSs and furthermore inappropriate and excessive pre-trial detention has detrimental effect on the right to be presumed innocent and on the right of the suspect's family members. Lengthy pre-trial detention can also undermine the trust needed for mutual recognition instruments to work effectively.

According to Article 82, para. 2(c), in order to establish minimum standards on the protection of victims of crime, in 2012 a Directive establishing minimum standards on the rights, support and protection of victims of crime has been adopted.⁴¹ Article 1 of the Directive clarifies that the purpose is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. Therefore, in order to achieve such a goal, MSs have to ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings.

Special guarantees are provided for where the victim is a child. Actually, the child's best interests has to be a primary consideration and be assessed on an individual basis. A child-sensitive approach, taking due account of the child's age, maturity, views, needs and concerns, has to prevail. The child and the holder of parental responsibility or other legal representative, if any, have to be informed of any measures or rights specifically focused on the child.

Ultimately, in the context of the mutual assistance in gathering and exchanging evidences between the judicial systems of MSs, the Directive 2014/41/EU has introduced a new mechanism within the judicial cooperation in criminal matters: the European Investigation Order (EIO).⁴² It represents a judicial decision issued or validated by a judicial authority of a Member State (the issuing State) to have one or several specific investigative measure(s) carried out in another Member State (the executing State), in order to obtain evidence, even when it is already in the possession of the competent authorities of the executing State. According to the Directive, the EIO works on the basis of the principle of mutual recognition and the issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure. The application of such a mechanism must not be detrimental for the respect of the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

This new instrument replaces most of the existing laws in the transfer of evidence between Member States in criminal cases,⁴³ making the judicial cooperation in cross-border investigations easier and faster. Unlike the

⁴⁰ Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327, Bruxelles, 14.06.2011.

⁴¹ Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. *OJ L 315*, 14.11.2012, 57–73.

⁴² Directive 2014/41/EU regarding the European Investigation Order in criminal matters. *OJ L 130*, 1.5.2014, 1–36. For the first comments on this new tool see Emilio De Capitani and Steve Peers, “The European Investigation Order: A new approach to mutual recognition in criminal matters”, <http://eulawanalysis.blogspot.it/2014/05/the-european-investigation-order-new.html>; Lucio Camaldo, “La Direttiva sull’ordine europeo di indagine penale (OEI): un congegno di acquisizione della prova dotato di molteplici potenzialità, ma non di facile attuazione”, www.penalecontemporaneo.it; De Amicis, “Limiti e prospettive del mandato europeo di ricerca della prova”, 505 ff., who wrote when the final Directive had not been adopted yet.

⁴³ Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (and its two additional protocols); parts of the Schengen Convention; the 2000 EU Convention on Mutual assistance in criminal matters (and its Protocol); the 2008 Framework Decision on the European evidence warrant; and the 2003 Framework Decision on the execution in the European Union of orders freezing property or evidence (as regards freezing of evidence).

European Evidence Warrant,⁴⁴ the EIO covers almost all investigative measures such as interviewing witnesses, obtaining of information or evidence already in the possession of the executing authority, and (with some additional safeguards) interception of telecommunications, and information on and monitoring of bank accounts, whereas it does not apply to Schengen cross-border surveillance by police officers under the Schengen Convention, or to the setting up of a joint investigation team and the gathering of evidence within such a team, since these issues “require specific rules which are better dealt with separately”.

As the protection of fundamental rights and in particular the defence rights, the Directive provides for a general ground of refusal to execute the order based on the protection of human rights (Article 11(f)), it also recalls the above mentioned recent Directives on the protection of the most important defence rights and finally Recital 39 of the Preamble states that “*The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused.*”, reiterating the principles expressed in the ECJ case-law issued in the context of the protection of asylum seekers (*N.S.* case, cited in para. 1.2).

Although this new tool certainly represents a step forward in the field of judicial cooperation in order to ensure a better circulation of evidence in the cross-border investigations, some perplexities still remain especially concerning the concrete possibility to use the evidences gathered through the EIO in the criminal proceedings, since many MSs have legal provisions, which provide for different rules about the procedure necessary to make an evidence – gathered in another legal system - legitimate and usable in the criminal proceedings. In fact, it would be useless to gather and transfer an evidence through the EIO, if the legal system of the issuing MS did not allow then to use it in the proceedings. Probably, as it has been already stressed in relation to the EAW, a previous harmonisation of the national legislation dealing with the gathering and the using of evidence in the proceedings would have been necessary.

1.4 The emergency brake and the simplified enhanced cooperation: a flexible approach to integration

Article 82 - Para. 3– Where a member of the Council considers that a draft directive as referred in paragraph 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 suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

⁴⁴ On the debate concerning the European Evidence Warrant and more in general the approximation of legislations dealing with evidence, see Gaetano De Amicis, *Cooperazione giudiziaria e corruzione internazionale* (Milano: Giuffrè, 2007), 156 ff.; Spencer, “The problems of trans-border evidence and European initiatives to resolve them”, in *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, ed. Giovanni Grasso and Rosaria Sicurella (Milano: Giuffrè, 2008): 471; Silvia Allegrezza, “L’armonizzazione della prova penale alla luce del Trattato di Lisbona”, *Cassazione Penale* 10 (2008): 3882 ff.; Stefano Marcolini, “La circolazione della prova nello spazio giudiziario europeo tra vecchi e nuovi modelli: la difficile convivenza tra efficienza e tutela”, in *L’evoluzione del diritto penale nei settori di interesse europeo alla luce del Trattato di Lisbona*, ed. Giovanni Grasso, Lorenzo Picotti and Rosaria Sicurella (Milano: Giuffrè, 2011), 535 ff.

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 authorization to proceed with enhanced cooperation referred to in article 20(2) of the Treaty on European Union and article 329 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

In order to make the provisions of articles 82 (see also the report on Article 83), which refer to the very sensitive area of criminal matters, more acceptable for the majority of Member States, some new mechanisms are provided for: i.e. the so-called “emergency brake” system and, as a counterbalance, the possibility to carry out an enhanced cooperation, through a procedure easier and faster than the ordinary one.

The former (emergency brake) allows a Member State, which considers that a draft legislative act would affect fundamental aspects of its criminal justice system, to suspend the legislative procedure and bring the matter to the European Council, that must, after discussion and in case of consensus, within four months refer the draft back to the Council, which must terminate the suspension.

The latter (enhanced cooperation) represents a kind of solution for those Member States, which wish to carry on the draft legislative act, despite the activation of the emergency brake. Actually, if disagreement in the European Council remains and at least nine Member States wish to establish an enhanced cooperation on the basis of the draft act in question, they will notify the European Parliament, the Council and the Commission accordingly and the enhanced cooperation will automatically apply between them, thus bypassing some of the preliminary steps which are normally required under the enhanced cooperation procedure (as set out in article 329 TFEU, which requires a request to the Commission, specifying the scope and the objectives of the cooperation, and in article 20(2) TFEU, which obliges the Council to adopt the decision at issue only as a last resort) and hence making it easier and faster to carry out.⁴⁵

Such a provision testifies how tension exists at the heart of the system of integration in the AFSJ between the creation of a single system and at the same time providing for mechanisms allowing differentiations. Actually, the institutional arrangements, the exclusionary nature of competences, the binding nature of norms and mechanisms of enforcement are certainly supranational in character, whereas the specificity of competences and the tools and techniques employed in fostering integration – such as the emergency brake and the enhanced cooperation - in the area represent a strong form of differentiated integration⁴⁶ and pay particular attention to the particularism of national systems, instead to the common objectives and legislation.

Probably the task of striking a fair balance between integration and differentiation will be undertaken by the ECJ, which will establish the limits of the autonomy reserved for MSs, in order to fulfil the common general principles and the needs of European integration, as the Court has already done in the context of the EAW in the *Melloni* case.

⁴⁵ See Piris, *The Lisbon Treaty*, 185 and 187; Corstens, “Criminal Justice”, para. 3.2.1.

⁴⁶ See Coutts, “The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration”, 106-107.

2 Article 83 TFEU

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.

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.*

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.

2.1 Preliminary remarks: the Harmonisation of the criminal provisions of the Member States before the Lisbon Treaty.

2.1. Article 83 TFEU is the fundamental provision as far as the harmonisation of *substantive criminal law* is concerned.

In order to understand this provision, a brief introductory remark is necessary.

It seems appropriate to underline that the issue of the harmonisation of criminal law of the Member States through the European Union regulation was laid down long before the Lisbon Treaty.⁴⁷

Two different aspects have to be taken into account.

⁴⁷ See Daniel Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne* (Brussels: Larcier, 2009).

2.1.1. First of all, the third pillar of the European Union Treaty, after the amendments introduced by the Amsterdam Treaty, provided that the police and judicial cooperation in criminal matters had the aim to realize an area of freedom, security and justice.

Such an objective, according to Article 29 TEU, should have been achieved through different instruments, among which there was also the «*approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e)*».

Article 31(e), in that respect, prescribed the adoption of «*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*».

The list of the areas subject to the approximation measures was not exhaustive; indeed, the broad interpretation of the notion of «organised crime» and the suggestions emerging from the conclusions of the European Council of Tampere permitted the realisation of several interventions of harmonisation of criminal law of the Member States in different areas of crime.⁴⁸

In particular, the Council has approved several framework decisions in which it establishes coordinated provisions for the punishment of certain types of conduct. In the sphere of financial crime, there is the Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against euro (OJ, L 140, 29/5/2000, p. 1), as amended by Framework Decision 2001/888/JHA (OJ, L 329, 6/12/2001, p. 3); and Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ, L 182, 26/6/2001, p. 1). The combating of terrorism by means of criminal law is the subject-matter of Framework Decision 2002/475/JHA (OJ, L 164, 13/6/2002, p. 3), and the trafficking in human beings that of Framework Decision 2002/629/JHA (OJ, L 203, 19/7/2002, p. 1). The protection of the victims of illegal immigration is addressed in Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ, L 328, 28/11/2002, p. 1). Framework Decision 2003/568/JHA harmonises national legal provisions for combating corruption in the private sector (OJ, L 192, 22/7/2003, p. 54). Concerning the protection of environment, there is the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 5.2.2003, pp. 55–58) and the Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ L 255, 30.9.2005, pp. 164–167).

It is necessary to underline that the mentioned framework decisions do not target only cases of transnational crimes; furthermore the areas of crime concerned are not all included in the list provided for in Article 31(e).

Under the Maastricht Treaty (before the amendments introduced by the Amsterdam Treaty) there was the Convention of 29 July 1995 concerning the protection of the financial interests of the European Communities (and its three Protocols), which represented a very important instrument of harmonisation of criminal law of the Member States.

2.1.2. Secondly, the academic legal thinking, in its majority, expressed the view that, under the first pillar, the Community bodies had the power to impose the harmonisation of criminal provisions of the Member States or the introduction of uniform offences, provided that it was necessary for the purpose of achieving the Community objectives, in an area where the Treaties granted those bodies specific powers.⁴⁹

⁴⁸ See Lorenzo Salazar, “Comment to Article 83”, in *Codice dell’Unione Europea*, ed. Carlo Curti Gialdino, (Naples: Simone, 2012), 916.

⁴⁹ See, among others, Johannes Hartmut, “Das Strafrecht im Bereich der Europäischen Gemeinschaften”, *Europarecht* (1968): 107f.; Giovanni Grasso, *Comunità europee e diritto penale* (Milan: Giuffrè, 1989), 192 ff. (also translated in Spanish: *Cominidades Europeas y Derecho Penal. Las relaciones entre el ordenamiento comunitario y los sistemas penales de los Estados miembros*, (Ediciones de la Universidad de Castilla-La Mancha, 1993); Giovanni Grasso, “Harmonisation of the national penal systems: a possible

Following this point of view, the European Commission has introduced in several proposals of directives the obligation for the Member States to adopt criminal provisions to sanction illegal conducts.⁵⁰

According to the view of the Commission, such obligations found their legal basis in the provisions which permitted the intervention of the Community regulation in a specific area.⁵¹

Those proposals were never accepted in this form by the Council (before the judgment of the Court of Justice of 13 September 2005). The adopted directives identified the illegal conducts to be sanctioned, but they have not imposed any obligation concerning the nature of the offence or the type of the sanction;⁵² as for the sanction, the directives imposed the obligation to introduce sanctions which should be «appropriate», «efficient» and «dissuasive», in the sense that it has a very limited impact on the criminal systems of Member States.⁵³

Before the entry into force of the Treaty of Lisbon, the issue found a solution in two fundamental judgments of the Court of Justice.

With the already mentioned judgment of 13 September 2005, the Court of Justice recognised the power for the Community bodies to harmonise the criminal provisions of the Member States «*where it is necessary in order to ensure the effectiveness of Community law*». According to the Court of Justice, the condition for such an intervention is that the measure adopted should be «*necessary in order to ensure that the rules which it lays down on environmental protection are fully effective*» (in the case at stake the measure was «*essential ... for combating serious environmental offences*»).

The following judgment of the Court of Justice of 23 October 2007, in case C-440/05 concerning ship-source pollution, reaffirmed the conclusions of the previous decision; the Community legislature may have the power to require Member States «*to apply criminal penalties to certain forms of conduct*». However, the ECJ decided that «*the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence*».⁵⁴

objective for the European Union?”, in *The European Union and the challenge of transnational organised crime. Towards a common police and judicial approach*, ed. Francesca Longo (Milan: Giuffrè, 2002), 97 ff.; Enrique Bacigalupo, “Möglichkeiten einer Rechtsangleichung im Strafrecht zum Schutz der Finanzinteressen der Europäischen Gemeinschaften”, in *Die Bekämpfung des Subventionsbetrugs im EG-Bereich*, ed. Gerhard Dannecker (Köln: 1993), 146 ff.; Stefano Manacorda, “L’efficacia espansiva del diritto comunitario sul diritto penale”, *Foro italiano* IV (1995): 66 ff.

⁵⁰ Proposal for a Council Directive on prevention of the financial system for the purpose of money laundering, COM/90/106FINAL. *OJ C 106*, 28.4.1990, 6–8. Proposal for a Council Directive on coordinating regulations on insider dealing. *OJ C 153*, 11.6.1987, 8.

⁵¹ On the position taken and the proposals presented by the Commission, see Rosaria Sicurella, *Diritto penale e competenze dell’Unione europea; linee guida di un sistema integrato di tutela deibeni giuridici sopranazionali e dei beni giuridici di interesse comune* (Milan: Giuffrè, 2005), 204 ff.

⁵² Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. *OJ L 166*, 28.6.1991, 77 – 82; Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing. *OJ L 334*, 18.11.1989, 30-32. *OJ L 166*, 28.6.1991, 77 – 82.

⁵³ Alessandro Bernardi, “Strategie per l’armonizzazione dei sistemi penali europei”, in *Il diritto penale nella prospettiva europea. Quali politiche criminali per quale Europa*, in eds. Stefano Canestrari and Luigi Foffani (Milan: Giuffrè, 2005), 420-421.

⁵⁴ It has to be underlined that, according to this judgment of the Court of Justice, the criminal law provisions should have been adopted on the basis of art 80(2) TEC, devoted to the common transport policy (and consequently not on the basis of the provisions, such as 175 TEC, concerning the protection of the environment).

As a consequence, the ECJ declared void the two Framework Decisions (FD 2003/80/JHA of 27 January 2003 and FD 2005/667/JHA of 12 July 2005) that had imposed on Member States an obligation to prescribe criminal penalties, under the third pillar.⁵⁵

Following the point of view of the Court of Justice, the Council adopted a directive «on the protection of the environment through criminal law» (directive 2008/99/EC of 19 November 2008).

In this directive Member States are required to introduce criminal penalties for specific forms of conduct, but the type and the measure of the penalty is left to the discretion of the Member States. The only provision concerning this issue is that the offences, referred to in Articles 3 and 4 of the directive, should be «punishable by effective, proportionate and dissuasive criminal penalties». For more details on the directive 2008/99/EC of 19 November 2008, see the report on European level on the directive at stake.

Further directives, which include the obligation to introduce criminal penalties, have been subsequently adopted.⁵⁶

Through the judgments of the Court of Justice and the subsequent adoption of these directives, a competence of the European Community in criminal matters has been recognised. But it is an indirect criminal competence, which limits the discretion of the national legislator, but requires its intervention in order to introduce the criminal offences in the national criminal system.⁵⁷

2.2 Article 83 TFEU and the harmonisation of criminal law.

2.2. As far as Article 83 is concerned, it must be underlined that the provided approximation of laws is an **autonomous** and fundamental instrument to establish the area of freedom, security and justice, although the wording of the first paragraph of Article 82 seems to link also such an approximation in the field of criminal law to judicial cooperation and to the mutual recognition of criminal judgments.

Different harmonisation initiatives, which were totally independent of the needs of the judicial cooperation, had been previously taken within the third pillar:⁵⁸ therefore, it is clear that such a result should not be lost. The approximation of laws, in fact, has significant purposes that go beyond a mere auxiliary function in the service of the judicial cooperation.⁵⁹

⁵⁵ On the two ECJ' decisions, see Mitsilegas, *EU Criminal Law*, 70 ff.

⁵⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. *OJ L 168*, 30.6.2009, 24–32. See also Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements. *OJ L 280*, 27.10.2009, 52–55. For a detailed analysis on the Directive 2009/123/EC, see the report on European level on the directive at stake.

⁵⁷ See Giovanni Grasso, “Relazione introduttiva”, *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, eds. Giovanni Grasso and Rosaria Sicurella (Milan: Giuffrè, 2008), 25; Francesco Viganò, “Il diritto penale sostanziale”, *Diritto penale e processo* (2011), 27.

⁵⁸ See Lorenzo Salazar, “La lotta alla criminalità nell’Unione: passi in avanti verso uno spazio giudiziario comune prima e dopo la Costituzione per l’Europa e il programma dell’Aia”, *Cassazione penale* (2004), 3522–3523. See “Preliminary remarks”, para. 2.1.

⁵⁹ See Giovanni Grasso, “Il Trattato di Lisbona e le nuove competenze penali dell’Unione Europea”, in *Studi in onore di Mario Romano* (Naples: Jovene, 2011), 2326.

Article 83 lists the areas in which the approximation of laws can be realized and it distinguishes between the cases of “*particularly serious crime with a cross-border dimension*” and the ones in which the approximation proves essential “*to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures*”.

Therefore, thanks to these provisions, the legitimacy of obligations of criminal harmonisation (descending from the EU law) has been recognized and a *criminal competence of the EU* has been introduced.

However, it is not a *direct power of incrimination of the European institutions*: indeed, they can only adopt directives, which have to be subsequently implemented by national legislators. But the discretion of national Parliaments is obviously restricted in the choice of the legal interests to protect, the techniques of such protection and the definition of criminal offences, and in the choice of sanctions, too. For these features of the EU competence in this field, the definition of an *indirect criminal competence* has been considered more appropriate, insofar such a competence limits the national legislator but requires its involvement.⁶⁰ Rosaria Sicurella has used the expression “*integrated criminal competence*”.⁶¹

Therefore, Article 83 TFEU provides a context in which all the adopted harmonisation measures of national criminal laws can be referred to: both those ones which were adopted within the first pillar (related to the properly supranational interests, on the basis of the hints of the decision of the ECJ delivered on 13 September 2005) and those ones adopted within the third pillar (especially devoted to the cross-border crime).

In that respect, the Italian academic legal thinking has distinguished two categories of legal interests which are affected by the EU legislation.⁶²

Indeed, the properly supranational legal interests (i.e. the “institutional” ones and the legal interests linked to the EU activity, as for example the protection of the environment and the repression of illegal immigration) have been differentiated from those ones of “common interest”; the last ones are mostly national but at the same time they contribute to the implementation of some EU purposes (especially the establishment of an area of freedom, security and justice): this is the case, above all, of the need to tackle cross-border crime.

The difference between the two above-mentioned categories of legal interests is embodied in two different paragraphs of Article 83: the first one is devoted to the repression of serious crime with a cross-border dimension, the second one to the protection of properly supranational interests. However, all the cases in which the obligation to criminalize will be introduced on the basis of the EU law should be found within Article 83 TFEU.⁶³

2.2.1. Considering the two paragraphs of Article 83, the first one refers to «*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*».⁶⁴

The wording is quite generic; moreover, the second and third subparagraphs list the concerned areas (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

⁶⁰ See Viganò, “Diritto penale sostanziale”, 27; Grasso, “Il Trattato di Lisbona”, 2327.

⁶¹ Rosaria Sicurella, “«*Prove tecniche*» per una metodologia dell’esercizio delle nuove competenze concorrenti dell’Unione Europea in materia penale”, in *L’evoluzione del diritto penale nei settori d’interesse del diritto europeo alla luce del Trattato di Lisbona*, eds. Giovanni Grasso, Lorenzo Picotti and Rosaria Sicurella (Milan: Giuffrè, 2011), 32-33.

⁶² See, *ex multis*, Grasso, “Il Trattato di Lisbona”, 2326; Sicurella, *Diritto penale*, 227 ff. and 463 ff.

⁶³ With the exception of cases provided for in Article 325 TFEU, concerning the protection of the financial interest of the European Union, which constitutes an autonomous legal basis for harmonisation measures in this particular area.

⁶⁴ On this issue, see Corstens, “Criminal justice in the post-Lisbon era”, 23-46.

crime) and allow its extension through a decision adopted unanimously by the Council, with the previous consent of the European Parliament. The fact that such an important decision (as well as that one of extending the powers of the European Public Prosecutor's Office) can be adopted with a procedure in which the role played by the EP is so limited (insofar it has only to consent to the text prepared by the Council) is blameworthy.⁶⁵ It is just with reference to this very important issue that the "democratic deficit" –which has been finally overcome in the ordinary legislative procedure – continues to exist.

2.2.2. As said before, the second paragraph of Article 83 TFEU is devoted to the cases of harmonisation descending from the need to protect the supranational legal interests which are linked with the activity of the European institutions.

But this interpretation is not fully accepted, in the light of the wording of this paragraph which allows the adoption of the approximation measures of criminal law only when this is «*essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures*».

Such a harmonisation in connection with the criminal matters - which is based on the absolute necessity of these measures for the implementation of an EU policy - seems then to be conceived as an instrumental power in respect to harmonisation measures which have been yet adopted in a field different from the criminal one. In that respect, Alessandro Bernardi uses the expression "*criminal accessory competence*".⁶⁶

But the consequences of such a literal and restrictive interpretation of this provision would be paradoxical and, in practice, incomprehensible.

For example, it could be argued that a harmonisation measure in criminal matters is not possible in the areas of exclusive competence of the EU (in the light of Article 3 TFEU), in which the EU never adopts such measures.⁶⁷

Even in the areas of shared competence, a harmonisation measure should be excluded when the EU has adopted unification (and not simply harmonisation) measures.

Therefore, the most correct solution seems to be that one of admitting that in these cases the harmonisation competence exists *a fortiori*.⁶⁸

Therefore, the provision should be interpreted in the meaning resulting from the proposals of the *Praesidium* of the European Convention (which elaborated the Draft Treaty establishing a Constitution for Europe), on the basis of the text which has been prepared by the working group on the area of freedom, security and justice: in fact, it

⁶⁵ Giovanni Grasso, "La «competenza penale» dell'Unione europea nel quadro del Trattato di Lisbona", in *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, ed. Giovanni Grasso, Lorenzo Picotti and Rosaria Sicurella (Milano: Giuffrè, 2011), 697; Carlo Sotis, "Le novità in tema di diritto penale europeo", in *La nuova Europa dopo il Trattato di Lisbona*, ed. Paola Bilancia and Marilisa D'Amico (Milan: Giuffrè, 2009), 159.

⁶⁶ Alessandro Bernardi, "Ombre e luci nel processo di armonizzazione dei sistemi penali europei", in *Le sfide dell'attuazione di una Procura europea: definizione di regole e loro impatto sugli ordinamenti interni*, ed. Giovanni Grasso, Giulio Illuminati, Rosaria Sicurella and Silvia Allegrezza (Milan: Giuffrè, 2013).

⁶⁷ For several interesting remarks, see Eliette Rubi-Cavagna, "Réflexions sur l'harmonisation des incriminations et des sanctions pénales par le traité de Lisbonne", *Revue de science criminelle et de droit pénal comparé* (2009): 506 ff.

⁶⁸ So, correctly, Eliette Rubi-Cavagna, "Réflexions sur l'harmonisation", 506 ff.

allowed the approximation of criminal laws in regard to crimes which affected a «*common interest which is the subject of a Union policy*». ⁶⁹

2.2.3. The protection of the environment is undoubtedly one of the areas in which a harmonisation measure can be adopted on the basis of Article 83 (2) (even in the most restrictive interpretation of this rule).

On the one hand, indeed, the environment is a legal interest of supranational importance, as it has been underlined, in particular, by the Conclusions of the Advocate General Ruiz Jarabo-Colomer in the case C-176/03.

On the other hand, the environmental matter has been subject to several interventions of harmonisation. With regards to this aspect, it can be underlined that the protection of the environment (which is referred to in the judgement of the European Court of Justice of 13 September 2005) has even been the object of the first harmonisation measure realised by the EU legislation in the field of criminal law with the directive 2008/99/EC of 19 November 2008 (see *retro*, 2.1.2).

Therefore, a harmonisation measure is possible on the basis of Article 83 § 2 and it can have a significant added value, as it will be shown in the following paragraphs (see *infra*, 2.6).

2.3 The content of the possible harmonisation measures.

2.3. As far as the content of the harmonisation measures is concerned, it must be highlighted that Article 83 refers to the adoption of «*minimum rules concerning the definition of criminal offences and sanctions*».

This expression is the same of that one comprised in Article 31 TEU (in the previous version) and hints to a limited competence of the EU. ⁷⁰

In the past, Rosaria Sicurella has exactly underlined that «*the adopted expression is technically unsuitable to give clear standards and binding guidelines concerning the level of incisiveness of the European legislation*». ⁷¹

Therefore, it should be argued that such an intervention, first of all, must concern the structure of the type of offence which is dealt with in a given directive. In that respect, it should be possible also to propose legislative models in order to obtain a substantial unification of the type of offence in different Member States.

Article 83 TFEU, moreover, solves one of the problems which emerged in the case-law of the ECJ, because it allows the legislative intervention of the EU to deal with the sanctions (such an intervention had been excluded also in the decision of the Court of Justice of 23 October 2007, in the case C-440/05). Indeed, it has been underlined that the fact of deciding which behaviour had to be punished, without paying attention to the nature or the gravity of the sanctions themselves (as for example it happened in the directive concerning insider trading) ⁷²

⁶⁹See, with regard to the corresponding provision of the Treaty establishing a Constitution for Europe, Giovanni Grasso, “La Costituzione per l’Europa e la formazione di un diritto penale dell’Unione Europea”, *Lezioni di diritto penale europeo*, ed. Giovanni Grasso and Rosaria Sicurella (Milan: Giuffrè, 2007), 695.

⁷⁰ For more details, see Rosaria Sicurella, “Some Reflections on the Need for a General Theory of the Competence of the European Union in Criminal Law”, in *Substantive Criminal Law of the European Union*, ed. André Klip (Antwerpen-Apeldoorn-Portland: Maklu, 2011), 233 ff.

⁷¹ Rosaria Sicurella, “La tutela “mediata” degli interessi della costruzione europea: l’armonizzazione dei sistemi penali nazionali tra diritto comunitario e diritto dell’Unione europea”, in *Lezioni di diritto penale europeo*, ed. Giovanni Grasso and Rosaria Sicurella (Milan: Giuffrè, 2007), 385.

⁷² Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). *OJ L 96, 12.4.2003*, 16–25.

turned out to be too reductive: the pursued aim (as the implementation of an internal European market of capital) can be hindered by an excessive difference of sanctions, even if all legal systems criminalize some behaviours.⁷³

On the other hand, the expression used in Article 83, “minimum rules”, does not imply that the harmonisation of issues of the general part of criminal law is prohibited.

In fact, in a conference recently held at the University of Catania, Francesco Viganò has underlined that *«the uniform application of the provisions which criminalize given behaviours (the so called provisions of the “special part” of criminal law) can be actually reached only if there is uniformity in the provisions of the general part, insofar the latter ones regulate the conditions of applicability of the former in each case»*.⁷⁴

Indeed, a harmonisation which totally excludes the general part of criminal law will be unable to achieve the prefixed goals, because the proper range of the personal responsibility is also linked to the application of rules of the general part.

Nevertheless, it has been underlined that the implementation of a directive regarding principles of general part could be hindered by the hostility of national scholars, insofar each legal system is based on seminal choices of criminal policy which express the substance of each juridical tradition.⁷⁵

Precisely for these difficulties, in some recently adopted harmonisation directives,⁷⁶ the obligation to criminalize behaviours of attempt and participation in the offence has been included, without an in-depth definition of such concepts.

However, a certain degree of harmonisation could be triggered by the interpretative decisions of the ECJ, that could be requested to interpret the concepts of the general part of criminal law which are dealt with in the harmonisation directive (for example, attempt/participation) and to evaluate their correct implementation in the domestic legal systems.

2.3.1. The areas of the general part of criminal law in which harmonisation measures seem more likely to be adopted are those ones related to the statute of limitation and to the liability of legal persons.

In that respect, the provisions of the proposal for a directive on the fight against fraud to the Union’s financial interests by means of criminal law are highly meaningful:⁷⁷ indeed, on the one hand, it is requested to criminalize both the attempt and the participation in the offence, without defining these concepts.

On the other hand, relevant binding guidelines concern two issues of the general part of criminal law for which the needs of harmonisation appeared to be more relevant.

Article 6 of the proposal refers to the liability of legal persons, pointing the subjective and the objective criteria for such liability (which is referred to as “criminal”), whereas Article 9 refers to the sanctions for legal persons.

⁷³ This opinion was expressed repeatedly by Grasso; see, for example, “Introduzione: Diritto penale ed integrazione europea”, in *Lezioni di diritto penale europeo*, ed. Giovanni Grasso and Rosaria Sicurella (Milan: Giuffrè, 2007), 75-76.

⁷⁴ Francesco Viganò, “Verso una ‘Parte generale europea’?”, in *Le sfide dell’attuazione di una Procura europea: definizione di regole e loro impatto sugli ordinamenti interni*, ed. Giovanni Grasso, Giulio Illuminati, Rosaria Sicurella and Silvia Allegrezza (Milan: Giuffrè, 2013), 123 ff.

⁷⁵ Viganò, “Verso una ‘Parte generale europea’?”, 123 ff.

⁷⁶ Article 8 of the Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. *OJ L 218, 14.8.2013, 8-14*.

⁷⁷ 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.

Moreover, Article 12 takes into account the statute of prescription, providing a minimum period and the necessity of regulating its interruption.⁷⁸

As far as the intervention on the general part of criminal law is concerned, the adoption of a “horizontal” directive which regards all the areas which have been object of harmonisation measures can be envisaged. Another option could be that one of introducing more precise rules of the general part of criminal law in each harmonisation directive.

On the other hand, an intervention on the general part of criminal law, which is independent of the abovementioned harmonisation measures provided in Article 83 TFEU (a sort of **European criminal code of general part**), does not seem likely to be allowed.

2.4 The “emergency brake” mechanism.

2.4. According to the third paragraph of Article 83, «*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 this case the ordinary legislative procedure is suspended.⁷⁹

If the European Council does not reach a consensus in the timeframe of four months (then referring the draft back to the Council), at least nine Member States could ask to establish enhanced cooperation on the basis of the draft directive concerned; in such a case it is not necessary to obtain the authorization to proceed with enhanced cooperation, provided in Article 20(2) TEU and Article 329(1) TFEU, because the authorization is deemed to be automatically granted.

This provision establishes a very complex mechanism which allows every Member State to interrupt every legislative intervention aimed at the harmonisation of the national criminal law on the basis of the first and second paragraph of Article 83, when such an intervention is perceived as affecting the fundamental principles of its criminal justice system.

The mechanism is woolly and cumbersome and it distorts the legislation procedure in the areas in which it can be adopted.

The possible compensation is the possibility to establish a form of enhanced cooperation, but it is not effective: if a process of harmonisation is essential «*in order to ensure the effective implementation of a Union policy*», it should necessarily concern all the Member States and not only a group of them.⁸⁰

2.5 The principles of criminal policy to be employed in the elaboration of the European criminal provisions.

2.5. The problem of which principles of criminal policy should inspire the EU intervention in the field of criminal law is lively debated both in the legal academic thinking and in the European institutions.

⁷⁸ The general approach of the Council on the Proposal at stake decreases the extent of the harmonization measure regarding the statute of prescription (Council Document No. 10729/13).

⁷⁹ Piris, *The Lisbon Treaty*, 185.

⁸⁰ Grasso, “Il Trattato di Lisbona”, 2326.

Indeed, Article 83, § 1 does not deal with such a problem. Moreover, the second paragraph of the same Article requires only that «*the approximation of criminal laws and regulation of the Member States proves essential to ensure the effective implementation of a Union policy*».

This last requirement can be linked with the judgment of the ECJ delivered on 13 September 2005, which referred to the need «*to ensure that the rules which it lays down in environmental protection are fully effective*». In other words, as it has been underlined by the Advocate General Mazák in his Opinion in the case C-440/05, the ruling of the Court of Justice is «*fundamentally motivated by and born out of the concern to ensure the full effectiveness of Community law*»: the power to impose criminal sanctions is conceived as an «*instrumental power in the service of the effectiveness of Community law*».⁸¹

However, it is clear that this only requirement cannot safeguard the nature of criminal law as a «*subsidiary instrument for the protection of legal interests*».⁸²

As a consequence, it has been feared that the EU indirect criminal competence can broaden the accessory criminal law in an unacceptable way.⁸³

Although such fears are legitimate, they have been contradicted (or at least reduced) by the first EU legal documents adopted in this field – as for example the directive on the protection of the environment through criminal law – but they have however led to the establishment of a core of an European criminal policy, in which both the scholars and the supranational institutions have taken part. In that respect, the “Council Conclusions on model provisions, guiding the Council’s criminal law deliberations”, issued by the Justice and Home Affairs Council of 30 November 2009, the Communication from the Commission “towards an EU Criminal Policy” issued in 2011 and the Resolution of the European Parliament of 9 February 2012 need to be recalled.

One conclusion – which actually emerges from the documents of the European institutions – has to be clearly pointed out: the EU indirect criminal competence must rely on the same criteria which inspire the power of criminalization in a democracy founded on the rule of law.⁸⁴

Bearing this in mind, the requirement for which the approximation proves “essential” to ensure the effective implementation of a Union policy is totally consistent with the proper needs of the supranational system (especially in the light of the principle of subsidiarity), on the one hand, but on the other hand, it does not exhaust the prerequisites of criminal policy for the power of criminalization.

Then, it means that the requirement referred to in Article 83, § 2 shall be evaluated before taking into account these other requirements, insofar the latter ones will be dealt with by the EU legislator only after it has been proved that the given intervention is essential to ensure the abovementioned implementation.⁸⁵

⁸¹ Advocate General Ruiz-Jarabo Colomer, Conclusions in the case C-176/03, delivered on 26 May 2005, para. 84.

⁸² Sotis, “Le novità in tema di diritto penale europeo”, 148.

⁸³ See Helmut Satzger, “Der Mangel an Europäischer Kriminalpolitik. Anlass für das Manifest der internationalen Wissenschaftlergruppe «European Criminal Policy Initiative»”, in *ZIS* (2009), 693. See also Marco Pelissero, Competenza della Procura europea e scelte di incriminazione: oltre la tutela degli interessi finanziari, in *Le sfide dell’attuazione di una Procura europea: definizione di regole e loro impatto sugli ordinamenti interni*, ed. Giovanni Grasso, Giulio Illuminati, Rosaria Sicurella and Silvia Allegrezza (Milan: Giuffrè, 2013), 109 ff. The ambiguity of the concept of ‘effectiveness’ is underlined by Ester Herlin-Karnell, “What Principles Drive (or Should Drive) European Criminal Law?”, *German Law Journal* (2010), 1122 ff.

⁸⁴ In general terms, see “A Manifesto on European Criminal Policy. European Criminal Policy Initiative”, elaborated by a group of European criminal law experts and published in *Zeitschrift für Internationale Strafrechtsdogmatik* (2009), 737ff.

⁸⁵ Grasso, “Il Trattato di Lisbona”.

Once briefly explained (and somehow reduced) the meaning of the wording of Article 83, § 2 and of the rulings of the ECJ - which have been useful to outline the EU indirect criminal competence - now the attention can be focused on the general principles which should underpin the EU criminal policy, in the light of the hints emerging both from the scholars and from the EU institutions.

2.5.1. The first requirement to be fulfilled is that the behavior to criminalize harms (or endangers) a legal interest.

The abovementioned Council Conclusions underline that the criminal provisions have to be adopted in order to grant a necessary protection of legal interests, too.

Also in their Opinions, the Advocates General Ruiz Jarabo-Colomer (in the case C-176/03) and Mazák (in the case C-440/05) have highlighted that criminal law is an instrument which is devoted to the protection of interests and fundamental values in a given society. The same path has to be followed by the EU institutions.

2.5.2. The basic principle of *extrema ratio* is equally essential and it has been recalled both in the abovementioned Council Conclusions and in the Stockholm Programme, where it is stated that «*criminal law provisions should [...] be used only as a last resort*».⁸⁶

In that respect, two aspects seem to be relevant in the EU decisions of criminalization.

First of all, it should be wondered which is the added value of the criminal intervention in comparison with other measures;⁸⁷ the question involves especially the relations with the existing administrative sanctions, which can be divided into different categories and could even become more diffused.⁸⁸

Secondly, the other fundamental aspect to be taken into account in the light of the principle of *extrema ratio* is that one of the equivalence in the protection of a given interest in different Member States. The importance of such concept has been specifically recalled by Article 325 TFEU (previous Article 280 TEC), in connection with the protection of the EU financial interests.

It is clear, indeed, that the diversity in the degree of protection of the same interest in the Member States can hinder the achievement of the goal pursued by a given provision or can even cause a distortion in the field of the competition.⁸⁹

Then, the equivalence in the protection of a legal interest in different Member States has to be evaluated in the consideration whether the principle of *extrema ratio* has been respected.

2.5.3. Finally, the focus shifts on the principle of proportionality, which firmly underpins the EU legal order, thanks also to the steady ECJ case-law.⁹⁰ Nowadays, it is also enshrined in Article 49 of the Charter of fundamental rights of the European Union, precisely in connection with its criminal aspects.

⁸⁶ “The Stockholm Programme. An open and secure Europe serving and protecting citizens”. *O.J. C115/01*, 4.5.2010, 1-38, para. 3.3.1); see also the Council Conclusions on model provisions, mentioned in the text, 9.

⁸⁷ Council Conclusions on model provisions, 2.

⁸⁸ See Anna Maria Maugeri, “I principi fondamentali del sistema punitivo comunitario, la giurisprudenza della Corte di Giustizia e della Corte europea dei diritti dell’uomo”, in *Per un rilancio del progetto europeo*, ed. Giovanni Grasso and Rosaria Sicurella (Milano: Giuffrè, 2008), 83ff.

⁸⁹ Grasso, “Il Trattato di Lisbona”, 234 ff.

⁹⁰ Herlin-Karnell, “What Principles Drive”, 1125.

The abovementioned Council Conclusions conveniently underline the need to be cautious with the category of the “abstract danger”, which should be justified only if the endangered interest is particularly important.

2.5.4. The first EU interventions in which the new indirect criminal competence has been exercised allow to retain that a careful evaluation of the relevant criteria of criminal policy has been undertaken. In spite of the abovementioned fears, the EU institutions have not used the power of criminalization in a broad or blameworthy way.

Therefore, as far as the environment is concerned, the directive 2008/99 is not only linked with the protection of a supranational legal interest, but also shares the abovementioned point of view for which the obligations to criminalize are acceptable when the legal interests at stake are violated or endangered. Indeed, it requests that the illegal conduct considered in the directive not only has to violate the administrative regulations but also «*cause[s] or [are] is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*», as we can read in Article 3(a).⁹¹

2.6 The possible impact on the environmental criminal law.

2.6. Article 83 could have an important impact on the protection of the environment.

It is necessary to underline that, on the one hand, the directive 2008/99 imposes on Member States an obligation to introduce criminal penalties in order to sanction several conducts, such as, for example, the discharge, emission or introduction of materials into air, soil or water, which causes death or is likely to cause death or serious injury to any person or substantial damage to different environment constituent elements; but on the other hand, as far as the sanctions are concerned, the directive provides only that Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable «*by effective, proportionate and dissuasive criminal penalties*». Following the conclusions of the judgment of the Court of Justice of 23 October 2007, in the directive there is not any binding indication concerning the type and the measure of the sanctions to be introduced. If we share the opinion that serious differences in the area of sanctions introduced for the offences provided in the directive could compromise the achievement of the aims of the directive, it is clear that the harmonisation of the sanctions – which is permitted on the basis of the second paragraph of Article 83 TFEU – could have a real added value.

It has been highlighted that such a difference could trigger conducts of forum shopping which could reduce the deterrent effect of the criminal provisions introduced on the basis of the directive, when they concern criminal offences committed in the exercise of an economic enterprise or having a transnational nature.⁹²

In general terms, an intervention of harmonization which is limited to point out the behaviours to be punished (and also the criminal nature of the rules to introduce), without giving binding indications on the kind and the amount of the sanctions, has been regarded as unsatisfactory. Although some behaviours are considered illicit in all the Member States, the aim pursued case by case (e.g. the creation of an European market of capital) can be hindered by an excessive difference in the provided sanctions. Practical reasons can suggest to adopt a regulation with a certain degree of flexibility, insofar it can be difficult to find an exact equivalence among the penalties

⁹¹ This aspect was underlined in particular by Grazia Maria Vagliasindi, “Obblighi di penalizzazione di fonte europea e principi di politica criminale: le indicazioni promananti dalla materia ambientale”, in *L'evoluzione del diritto penale nei settori di interesse europeo*, ed. Giovanni Grasso, Lorenzo Picotti and Rosaria Sicurella (Milano: Giuffrè, 2011), 140 ff.

⁹² See Grazia Maria Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona: verso un nuovo volto del diritto penale ambientale italiano”, *Diritto del Commercio internazionale* (2010), 466 ff.

provided in each legal system for the significant differences in the general part of criminal law. It can be suggested to adopt a regulation which points out the behaviours to be punished, the types of crimes and the sanctions, without an exact determination of their amount: however, although the absence of such an exact determination, the adoption of a “grid” in which the penalties (at their minimum or maximum) should be included can be fostered.⁹³ This is the solution which can be suggested in the environmental matter.

2.6.1. Furthermore, Article 83, § 1 could permit to introduce specific criminal provisions in order to target environmental crimes committed by criminal organizations (or in which a criminal organization is involved).

In that respect, the academic legal thinking has expressed the need to introduce an incrimination in order to sanction the organized crime in the environmental sphere with criminal penalties.⁹⁴

Therefore, Article 83, § 1 allows such an intervention, which was not possible under the previous rules of the Community law.

In the environmental field, indeed, a peculiar criminal phenomenon (in Italy known as “ecomafia”) has progressively grown through the years: the organized criminality, for example, operates in the illicit trafficking in waste, in the illicit waste disposal and in the illicit trafficking in endangered species, usually with the support of companies (or company-like entities).⁹⁵

Therefore, it could be envisaged either to propose some aggravating circumstances linked with the involvement of the organised criminality in the commission of environmental crimes⁹⁶ or to introduce a rule which criminalizes the «organized trafficking in waste».

Such a rule – whose model can be represented by Article 260 of the Italian law n. 152/2006 – should be then implemented in all the national legal systems by the competent legislative authorities.

2.6.2. The harmonisation can involve also the statute of the prescription.

The difficulty of the harmonisation measures involving the general part of criminal law has been already underlined; however, such a difficulty can be overcome when some specific rules (as the statute of prescription indeed) – and not the core of the general part – are touched upon.⁹⁷

With regard to this aspect, it has been already pointed out that the proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law includes some rules related to the statute of prescription.⁹⁸

⁹³ Grasso, “Relazione introduttiva”, 22-23.

⁹⁴ Vagliasindi, “La direttiva 2008/99/CE”, 474 ff.

⁹⁵ See Grazia Maria Vagliasindi, “Istituzione di una Procura europea e diritto penale sostanziale: l’eventuale estensione della competenza materiale della futura Procura alla criminalità ambientale”, in *Le sfide dell’attuazione di una Procura europea*, ed. Giovanni Grasso, Giulio Illuminati, Rosaria Sicurella and Silvia Allegranza (Milan: Giuffrè, 2013), 202-203.

⁹⁶ Vagliasindi, “La direttiva 2008/99/CE”, 474ff.

⁹⁷ See 2.3.1.

⁹⁸ See footnote n. 38.

2.6.3. This intervention of harmonisation could find its legal basis in Article 83, § 1 (devoted to the fight against transnational criminality), in connection with § 2 which regards the protection of the supranational interests.

3 Articles 84, 85, 86 TFEU

3.1 Preliminary remarks

In the framework of Title V of the TFEU, devoted to the Area of Freedom, Security and Justice, Chapter 4 (articles 82-86 TFEU) contains all provisions especially dealing with the “Judicial cooperation in criminal matters”.

As already pointed out by almost all the scholars with respect to the same ‘label’ employed in the Amsterdam Treaty (but with an even stronger criticism when referring to the expression used in the Lisbon Treaty)⁹⁹, provisions placed in the framework of Title V go much beyond the meaning of *judicial cooperation in criminal matters* in the strict sense, covering the whole sector of the “security” dimension of the common area of freedom, security and justice, except for what falls under the *police cooperation*.

So, while articles 82 and 83 deal with *approximation of laws and regulations* of the Member States (and in particular of national provisions of criminal law and criminal procedure) – which is expressly mentioned as an essential component of the “judicial cooperation in criminal matters”, even after the (first) formalisation of the principle of mutual recognition of judgments and judicial decisions as the “base” of such a cooperation (Article 82.1 TFEU) –, articles 85 and 86 TFEU covers what can be called the *institutional dimension* of such a cooperation.

On the one side, Article 85 TFEU deals with the actual main EU actor in such a field, that is to say Eurojust; on the other, Article 86 TFEU introduces the necessary legal basis for the establishment of a European Public Prosecutor’s Office. This last provision is especially far from the traditional meaning of the concept of “judicial cooperation” since it provides for the possibility to establish a new European actor with direct powers of investigation and prosecution (and because of that representing much more than an organ of cooperation but a mean of integration).

Article 84 TFEU deals with the *preventive side* of the “security” dimension of the common area of freedom, security and justice, establishing the competence of the EU for adopting measures in the field of “crime prevention”. Something – again – which it is not covered by the strict meaning of the expression “judicial cooperation”, even if the exact meaning of the expression “crime prevention” in the framework of Article 84 TFEU is far from being unambiguous.

The above mentioned provisions – and precisely the competences of EU institutions and organs that are to be considered as enshrined in them – open very significant perspectives for an improvement of the protection of environment, provided that the crucial role of the environment in the EU construction is fully recognized and

⁹⁹ See the various contributions published in some collective volumes: *Criminal Justice Co-operation in the European Union after Tampere*, ed. Peter Cullen and Sarah Jund (Köln: Academy of European Law, 2002); *European Cooperation in Penal Matters: issues and perspectives*, ed. M. Cherif Bassiouni et al (Padova: Cedam, 2008). See also Rosaria Sicurella, “La tutela “mediata” degli interessi della costruzione europea: l’armonizzazione dei sistemi penali nazionali tra diritto comunitario e diritto dell’Unione europea”, in *Lezioni di diritto penale europeo*, ed. Giovanni Grasso and Rosaria Sicurella (Milano: Giuffrè, 2007), 383.

properly taken into consideration when implementing these provisions. In order to put in evidence the specific function that can be played by these provisions with respect to environmental protection, a separated paragraph in each commentary is specifically devoted to the initiatives that could be taken in this sector.

3.2 Article 84 TFEU

“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of Member States”

This provision, which appears as not having any direct correspondent in the previous treaties, was first introduced in Article III-272 of the Treaty establishing a Constitution for Europe. It establishes the competence of the European Union – and in particular of the European Parliament and the Council acting in accordance with the ordinary legislative procedure – for adopting “measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States”.

As for all the provisions in Chapter 5 (and also in Chapter 6), it has to be interpreted as to be a development of the general provision of Article 67. 3 TFEU – covering the “security dimension” of the area of freedom, security and justice – which explicitly refers to the objective of the Union of ensuring a “high level of security through measures to prevent and combat crime [...]”.

No definition can be found of what has to be considered as being covered by the wording “crime prevention”, in order to indicate which kind of measures can be adopted. The sole indication is a ‘negative’ one, that is to say the exclusion of any measure of harmonization of laws and regulations of Member States in this field. Such an exclusion stresses and confirms what appears to be already clearly established by this provision when stating that measures can be adopted at EU level “to promote and support *the action of Member States*”: crime prevention remains a competence of the Member States, and measures can be taken by EU legislator only aiming at improving cooperation between them (in the strict meaning of the word). According to most of the scholars, this means that EU measures could be adopted (exclusively) in order to stimulate and (possibly) facilitate – eventually by providing a financial support – the development of shared principles of preventive strategies and evaluation of crime, together with the exchange of best practices.¹⁰⁰

3.2.1 EU action for preventing environmental crime

EU initiatives based on this provision for preventing environmental crime – even within the limits indicated above – should be strongly encouraged since they appear to be necessary to counteract environmental crime in many respects.

First, a serious engagement by EU legislator seems to be necessary aiming at sensibilise Governments, legal practitioners and in general all those involved in various form with environment protection. Raising full awareness of the real dimension and the negative impact on European economies (of each Member State and of the EU) of environmental crime is to be considered the logical pre-requisite of any effective national policy in this area, and also the pre-requisite for any effective cooperation among competent authorities in Member States. So, a EU legislative initiative could be envisaged in order to establish a general framework for more specific measures aimed at raising awareness, covering (possible by financing) comparative studies (on national legislations and remedies), experts meetings aiming at presenting the actual dimension of the phenomenon

¹⁰⁰ Jürgen Schwarze et al., *EU-Kommentar* (Baden Baden: Nomos, 2012), 1084-1087.

(making clear the very different areas that have to be considered as to be environmental crime, the links between environmental crime and organised crime, the circulation and investment of illicit profits, including money laundering, the transnational dimension of the greatest part of environmental criminality, etc.), improvement of circulation of assessments of the phenomenon (such as the EU Serious and Organised Crime Threat Assessment – SOCTA) Such an action could lead to a progressive movement towards a common definition of environmental crime, which is to be considered essential in the perspective of an effective response to the phenomenon at a European level. This could also lead to the achievement of a genuine political will to ensure an improvement of environment protection – first of all by ensuring application of existing legislation –, so overcoming the actual perception of protection of environment as hampering economic progress, and supporting the idea that, on the contrary, environmental protection is, in the long term, beneficial to the economy and the society as a whole.

Second, a EU initiative could be envisaged based on this provision concerning training and exchange of best practice, eventually supporting and enhancing the action of networks already acting in this field, such as the European Network of Prosecutors of the Environment (ENPE), or the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL). The importance of professional networks has been specifically recognised in the 7th Environment Action Programme. An initiative at EU level could address the need denounced by these networks of an improvement in the exchange of experiences, knowledge, material means and data regarding case law.

Third, a EU initiative based on this provision could have as an objective the enhancement of the role of NGOs which are often more prepared – and more willing – to monitor the application of environmental law and that can significantly contribute to stimulate public administrations and to raise the level of awareness of the seriousness of the phenomenon.

3.3 Article 85 TFEU

3.3.1 Article 85.1 – first sub-paragraph

“Eurojust’s mission shall be to support and strengthen coordination and cooperation between national investigating and prosecution authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by Member States’ authorities and by Europol”.

This provision establishes the mandate of Eurojust, in particular concerning its objectives – and because of that its nature – and conditions and requirements for its action

Concerning the objectives of Eurojust, the Treaty of Lisbon, essentially confirms the *supporting and facilitating role* (with respect to the activities of the national competent authorities) of Eurojust, and then also its original ‘horizontal’ nature; and so despite some changes of terminology: Article 85.1 in fact refers to “support and strengthen coordination and cooperation”, whereas Article 31.2 TEU employed the terms “facilitate proper coordination”, and in the Eurojust decision (Article 3) it is a matter of “stimulating and improving coordination”, “improving cooperation” and “supporting otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective”. Indeed, following the political commitment at the European Council in Tampere in 2009, the Treaty of Nice introduced such a new body designed to co-ordinate the activities of public prosecutors in the different Member States; so joining and completing the two previous initiatives at EU level in this direction: the introduction, in 1996, of the “liaison magistrates” (a scheme according

to which prosecutors from one Member State are seconded to another, in order to provide help and advice);¹⁰¹ and the (more ambitious) establishment in 1998 of the “European Judicial Network” (a network of public prosecutors who, as “national contact points”, are available to advise one another, and who meet all together at least once a year).¹⁰²

Such an horizontal nature of Eurojust appears to be clearly implemented by the actual regulation of Eurojust’s activities, established by the 2002 Council Decision,¹⁰³ as then amended by Council Decision 2009/492/JHA.¹⁰⁴ Despite the 2009 Decision introduces important amendments, aimed at strengthening the effectiveness of Eurojust – essentially by ‘attempting’ to reduce the very much criticised ‘asymmetry’ of Eurojust with regard to differences between national members, and strengthen the exchange of information together with an extension of justification obligations with respect to requests issued by Eurojust (as a College and by its national members)¹⁰⁵ –, Eurojust remains a “simple mediator” and facilitator, without any decision-making powers or binding powers with regard to national authorities.¹⁰⁶ According to Article 6 of the Decision, Eurojust has the (sole) power to “ask” a Member State to take a series of initiatives, such as to investigate a case or institute a prosecution, to set up a joint investigation team together with another Member State or (in cases where two Member States are both engaged in investigating or prosecuting the same person) it may also invite one of them to leave the prosecution of the case to the other. Eurojust, then, has no power, as such, to require a Member State (and so to bind such a Member State) to investigate a case or institute a prosecution (though a Member State which refuses to accede a request from Eurojust must give its reasons, unless to do so would “harm essential security interests or would jeopardise the safety of individuals”).

Concerning conditions and requirements for its action, the wording of Article 85.1 appears to introduce some important enhancements with respect to the actual situation.

a) By fixing the scope of Eurojust’s action “in relation to serious crimes affecting two or more Member States or requiring a prosecution on common bases [...]” (which is able to potentially cover also environmental crime, see commentary in para. 1.2.5), Article 85 TFEU leads to believe that Eurojust’s action is not limited to situations where the matter concerns at least two Member States (and so presents a trans-national nature, as previously required by article 31 TUE), but also in any case it requires a common strategy and a European approach to that crime. As pointed out by some scholars, “this gives rise to the question of ascertain who is going to decide whether a prosecution on common bases is needed [...] And hence the question further upstream of determining a framework for doing this and therefore determining a European Criminal Policy”.¹⁰⁷

b) By saying that Eurojust is aimed to act (when conditions referred above are met) “on the basis of operation conducted and information supplied by the Member States authorities and by Europol” (while Article 31 TUE only referred to the fact that Eurojust should act “taking account, in particular, of

¹⁰¹ Joint Action of 22 April 1996, *OJ L 105*, 27.4.1996, 1-2.

¹⁰² Joint Action of 29 June 1998, *OJ L 191*, 7.7.1998, 4-7.

¹⁰³ Council Decision No 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. *OJ L 063*, 06/03/2002, 1-13.

¹⁰⁴ Council Decision 2009/492/JHA of 16 December 2008 on strengthening Eurojust and amending Decision 2002/187/JHA. *OJ L 138/14*, 4.6.2009.

¹⁰⁵ For a general overview of the changes introduced, see Serge de Biolley, “Eurojust”, *Jurisclasseur, Europe Traitée*, section 2710, 2nd ed.

¹⁰⁶ See Daniel Flore, *Droit pénal européen. Les enjeux d’une justice pénale européenne* (Bruxelles, 2009), 581 ff.

¹⁰⁷ See Anne Weyembergh, “The development of Eurojust: potential and limitations of article 85 of the TFEU”, *New Journal of European Criminal Law* (vol. 2, issue 1, 2011), 85.

analyses carried out by Europol), article 85.1 clearly points out the link between the supply of information to Eurojust and its effectiveness. This should lead to a further improvement of cooperation between Eurojust and Europol, and above all to an improvement of provisions regulating transmission of information by national authorities (actually essentially regulated according to Article 13 of Eurojust Decision, as amended in 2008), in particular concerning evaluation on the correct fulfilment by Member States of the obligation to provide Eurojust with all relevant information. Even more than that, as pointed out by some scholars, “this evaluation should also provide an opportunity [...] for evaluating what Eurojust effectively produces, or is able for producing, in terms of the information transmitted in this way, whether there is any duplication of the work provided by Europol”; and, in conclusion the question arises: “Is Eurojust really able to assume responsibility for processing data? Is this not principally the duty of Europol?”¹⁰⁸

Astonishingly enough, no mention is done to information to be provided by Olaf, since a special importance is recognised by Article 85.1 (second sub-paragraph) to crimes affecting EU financial interests.

3.3.2 Article 85.1 – second sub-paragraph

“In this context, the European Parliament and the Council, by means of regulations, in accordance with ordinary legislative procedure, shall determine Eurojust’s structure, operation, field of action and tasks. These tasks may include:

- a) the initiation of criminal investigations as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;*
- b) the coordination of investigations and prosecutions referred to in point a);*
- c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network”.*

This provision establishes the nature and contents of the legal act aimed at regulating Eurojust.

Concerning the *nature of the act*, the change envisaged is evident: future legislation on Eurojust will lay on *regulations adopted in accordance with ordinary legislative procedure*. This means that future legislation on Eurojust will follow the model of EU ordinary legislation: it will be adopted, then, following the co-decision procedure (which should guarantee a deeper democratic control) and be taken by qualified majority; and above all it will fall in the scope of the control of the Court of Justice (that can result to be very relevant especially concerning infringement proceedings that might be taken against recalcitrant States). Something that represents a radical change – and especially an improvement – with respect to the actual situation (except for the risk inevitably connected to the re-opening negotiations regarding existing provisions, and so the risk of a possible step backwards, taking also into consideration the complexity rising from the use of British, Danish and Irish opt-outs).

Concerning *contents of the act*, article 85.1 TFEU does not provide any further indication concerning provisions to be adopted aimed at regulating Eurojust’s “structure, operation, field of action [...]”, while some indications are provided for concerning the “tasks” of Eurojust (points a) to c)).

Although nobody can deny a certain weakness of these indications – deriving from the wording of the treaty that states that “these tasks *may include*”, implying their non binding character (and so the fact they are not aimed to establish the “necessary content” of future legislation concerning Eurojust), the list of tasks which might be

¹⁰⁸ See Weyembergh, “The development of Eurojust”, 86.

covered by Eurojust clearly envisages a step forward with respect to the existing framework, since it allows for granting Eurojust certain binding powers, and so a possible evolution of Eurojust “from a player at horizontal cooperation level to a player at vertical integration level”.¹⁰⁹ Finally, by listing Eurojust’s future possible tasks, article 85.1 establishes the ‘maximal’ framework, allowing any improvement of the existing legislation so far that it stays under the ‘ceiling’ provided for article 85.1 TFEU.

Going through indications given in article 85.1, a clear improvement with respect to the existing framework results from the indications in letters a) and b) (which are strictly linked, because of the explicit referral to “investigations and prosecutions referred to in a)” contained in b) to Eurojust’s competence concerning “initiation of investigations” and “coordination of investigations and prosecutions referred to in a)”. While concerning *prosecutions* article 85.1. shows to be very prudent – since it establishes that Eurojust can only *propose the initiation of prosecutions* –, concerning *investigations* the competence of Eurojust to *initiate* them is clearly envisaged, which implies a decision making power, as well as for the competence (established in b)) to *coordinate investigations and prosecutions* referred in a). Both competences, then, could be interpreted as they imply that Eurojust can take binding decisions to be respected by national competent authorities.

Concerning letter a), a question arises on what does “*initiate an investigation*” mean.

As pointed out by most of the scholars, there is no doubt on the fact that the wording of article 85.1. allows Eurojust “to set in motion, to launch an initiative regarding criminal investigations”,¹¹⁰ and more precisely it allows Eurojust to “order the commencement of an investigation by the national authorities in the Member States”.¹¹¹ But the very question is whether it allows Eurojust to carry out itself investigations. The answer depends on the interpretation of the expression in a) “conducted by competent authorities” as referred only to prosecutions or also to investigations. Wording of article 85.1, indeed, appears to legitimate a broader interpretation of the term “initiate” (so establishing a sharper differences of Eurojust’s competences related to investigations and prosecutions; that could also be considered confirmed by the wording of Article 85.2 only referring to prosecutions). Nevertheless, according to some scholars, this could result to be “merely an oversight, since the first version of what has become Article 85 only mentioned prosecutions, not investigations”.¹¹²

Finally, the phrase “particularly those relating to offences against the financial interests in the Union”, introduced by the *Praesidium* of the Convention on the Future of the European Union, is to be interpreted in strict connection with provision in article 86 TFEU establishing the competence of the Council “in order to combat crimes affecting the financial interests of the Union”, to set up a European Public Prosecutor “from Eurojust”. It should then be understood as the indication of the ‘starting point’ towards the implementation of article 86 TFEU.

Concerning indications in letter c) – referring to Eurojust’s role in strengthening cooperation –, a very significant improvement seems to be made possible with respect to its powers in cases of conflicts of jurisdiction, since the use of the word “resolution” appears to recognize decision-making powers to Eurojust; something that would realize a quality change with respect to the situation actually regulated by Framework decision of 30.11.2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

Finally, this provision explicitly mention cooperation with EJP but it remains silent regarding two other essential players, that is to say Europol (that is previously mentioned in article 85) and Olaf (not mentioned anywhere in article 85 TFEU), whose contribution is nevertheless crucial for achieving the objective of strengthening judicial cooperation.

¹⁰⁹ See Weyembergh, “The development of Eurojust”, 91.

¹¹⁰ See Weyembergh, “The development of Eurojust”, 92.

¹¹¹ See Flore, *Droit pénal européen*, 591.

¹¹² See Weyembergh, “The development of Eurojust”, 92.

Actually, cooperation between Eurojust and these two bodies is supported by specific agreements: the one with Europol established in 2004 and then revised in 2009; and the “Practical Agreement on arrangements of cooperation” with Olaf, agreed in 2008.

3.3.3 Article 85.1 – third sub-paragraph

“These regulations shall also determine arrangements for involving European Parliament and national Parliaments in the evaluation of Eurojust’s activities”.

This sub-paragraph of article 85.1 expressly requires that future regulation on Eurojust regulates involvement of European Parliament and National Parliaments in the evaluation of Eurojust’s activities.

The fact itself that evaluation is explicitly mentioned shows the importance attached to it, in the perspective of a greater transparency and democratic legitimacy of Eurojust, and because of that also an improvement of its force of persuasion and authority.

While some control of Eurojust by the European Parliament already exists (especially according to 2008 Decision), the direct involvement of National Parliaments is innovative, since up until now National Parliaments have only exercised control via their governments or had to adopt ad hoc measures in order to be informed of and control the activities of Eurojust.

3.3.4 Article 85.2

“In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials”.

This paragraph of article 85 is far from leading to an easy interpretation.

The fact that it only mentions prosecutions – and not also investigations – when explicitly stating the exclusive competence of national officials to accomplish “formal acts of judicial procedures”, could lead to the conclusion that Eurojust can itself carry out investigations (and so, acts of investigations could be accomplished by Eurojust, realistically via the national member of the interested Member State, provided that he/she is empowered to do so according to national legislation on the status and competences of Eurojust’s national member). According to the opinion of some commentators, nevertheless, a look to the first version of the provision in the Constitutional treaty (Article III-174) – where investigations were not mentioned – should lead to the opposite conclusion: once added by the Convention on the future of the European Union in the first sub-paragraph, the reference to investigations is to be considered as to be implicit also in the third sub-paragraph.¹¹³ Following this last position, Eurojust’s binding powers cease once the investigation is initiated and both investigations and prosecutions should be directed by national officials.

¹¹³ See Weyembergh, “The development of Eurojust”, 98.

3.3.5 Eurojust and environmental crime

The state of play

Looking at Eurojust' mandate referring to "serious crime affecting two or more Member States or requiring a prosecution on common bases" no doubts should be expressed on the 'natural' inclusion of environmental crime, unanimously recognized – at least in official speeches – as to be one among the "serious crime" requiring the putting in place of a common strategy at EU level, and very often as having also a cross-border and organised nature (that is to say the 'typical' characters required by the treaty to define Eurojust scope of competence). Nevertheless, environmental crime was only modestly addressed in Eurojust's casework so far. As showed by the last annual report (2013), although the number of cases increased considerably over 2012, it remains low. Only 3 registered cases in 2012; 8 in 2013.

Such figures actual reflect the very critical situation of environmental crime prevention and repression at national and supranational levels. Two main reasons – clearly interconnected – can be identified.

The first reason is without any doubt the lack of an un-ambiguous definition of environmental crime at European and International level, and in particular of what kind of offences have to be considered as to fall in this category. At European level, the definition in the 2008/99/EC directive (and in particular the very articulated provision in Article3) can be considered as to be the primary reference, requiring a breach of environmental legislation which typically causes or is likely to cause substantial damage to the air, including the stratosphere, to soil, water animals or plants, including to the conservation of species. Nevertheless, looking at the European Union's webpage on environment, whereas the need for both requirements is confirmed, the list of areas covered by the definition partially differs: an explicit reference can be found to illegal trade in wildlife, illegal trade in ozone-depleting substances and the illegal shipment or dumping of waste. Definitions contained in legal documents adopted at International level (UN and Interpol, for example) mostly consider as a (further) fundamental character of environmental crime also its trans-national nature (and so focusing the definition on illegal trafficking), often mentioning, by consequence, also the fact that these behaviors are mostly carried out by organized criminal networks (as it is the case in the Interpol's Environmental Crime Programme). Such a situation makes not only statistics un-able to properly set the situation, but above all it affects very much judicial cooperation. One of the reasons of the very low number of cases registered by Eurojust is then the very limited ability of national law enforcement authorities to recognize what constitutes environmental crime and to report it as such, and also to properly address and deal with initiatives/requests for judicial cooperation in this field.

The second reason to be mentioned (that is far from being nevertheless of a lesser importance than the first listed here) is the overall underestimation of the phenomenon not only by National Governments but somehow also by European Institutions. The financial crisis together with the need to counteract other phenomena – first of all illegal immigration and human trafficking – which appear to be of a very great concern for the public opinion are obviously at the origin of such a situation.

Concerning the EU side, it is striking to note the 'involution' of the EU policies when related to the protection of environment. It is very well known the growing importance attached to the protection of the environment from the middle of the Seventies to the very beginning of the XXI century.¹¹⁴ After being mentioned for the first time in the European Single Act (where a separated title, the title VII, was entirely devoted to it), the environment became the object of a EU policy in the Maastrich Treaty and then, in the Amsterdam Treaty, the achievement of "a high level of protection of the environment and the improvement of its quality" was established as an autonomous objective of the EU. In addition to that, it is remarkable that article 37 of the Charter of Fundamental

¹¹⁴ The first directives in this area date back to the Seventy's. See, for example, Directive 75/442/EEC of 15 July 1975 on waste. *OJ L 194, 25.7.1975, 39-41.*

Rights established the principle of sustainable development in the implementation of the policies of the Union as a fundamental interest of the EU. Such a legal framework allowed the EU to establish a significant bulk of legislation and to develop policies which are considered as to cover, with some exceptions, all the main issues of environmental protection. Moreover, the legislation adopted made possible to achieve a greater awareness by the public opinion and a greater prudence by economic operators – whose rights and obligations were more clearly established – and by national administrations, whose discretion was reduced, making more and more difficult for them to somehow ‘contribute’ to environmental crimes by turning a blind eye to environmental impairment, pollution, etc., by not suing polluters, by not collecting data that would reveal environmental crimes, by granting permits contrary to existing legislation. The Treaty of Lisbon appears to confirm such a trend, especially stressing the objective of the achievement of a high level of protection and improvement of the quality of the environment when dealing with the establishment of the internal market. As expressly stated in article 3 (3) TUE, the latter engages the EU to “*work for the sustainable development of Europe based on balanced economy growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment [...]*” In such a situation, the challenge for EU institutions would have to be to seriously check on implementation by Member States of existing legislation (and, in addition to that, to adopt new legislation when needed), and make this to be one of the main task for the near future. Nevertheless, looking at the Europe 2020 strategy adopted in 2011, the policy approach taken by the Commission – in line with the trend among Member States -, seems to completely put aside the objective of a “balance” between the various interests mentioned in article 3 TUE, to establish, on the contrary, a hierarchy where “growth and jobs” are the priorities, implying by that that any environmental measure, in order to be approved by the Commission, must show that it contributes to growth and jobs. While economic damages of the failure to implement environmental legislation (health costs and direct costs to the environment) are widely recognized, and also the impact that in the medium and long term will have such an ‘unwillingness’ to seriously tackle environmental challenges on the internal market and on EU integration in general (energy, transport, agriculture, competition, etc.), a direct link between measures on environmental protection and growth and jobs can reveal to be pretty hard to demonstrate. Something that seems to completely disregard obligations established in article 191 of the Treaty on the Functioning of the EU requiring to seriously “preserve, protect and improve the quality of the environment”. Moreover, the absence of environmental crime among EU priorities in the implementation of the Freedom, Security and Justice area is to be mentioned, and more recently the absence of environmental crime among EU priorities between 2014 and 2017 for the fight against serious and organized crime set up by the Council of the Justice and Home Affairs in its meeting in Luxembourg on 6 and 7 June 2013.¹¹⁵ Here, although environmental crime was mentioned in the introduction to the conclusions of the Council, it was not set as a Council priority for the 2014 to 2017 policy cycle. According to the opinion of some experts,¹¹⁶ the Commission’s “*Proposal for a Decision on a general Union environment action programme to 2020*” is not conceived as to make a significant change and seriously address environmental crime.

This shows the actual lack of political will not only at Member States level but also (probably as a consequence of that) at the EU institutions level. As mentioned before, one of the reasons probably lies on the dramatic economic crisis affecting Europe, when competent authorities’ choices on allocation of resources are very much restricted by the limited budget at their disposal, so that they tend to use them in areas where they know such decisions will be more effective in terms of social/electoral consensus. As affirmed by Catherine Alfonsi, Head of EnviCrimeNet Secretariat at Europol, in the actual situation “environmental crime is not really ‘sexy’”,¹¹⁷ meaning that tackling environmental crime does not really attract the attention of the media (as it happens, on the contrary, when fight against human or drug trafficking is at stake, for example), and cannot be considered as to be an interesting cost/effective area in terms of consensus of the public opinion, since the consequences of criminal activities in this area (such as the pollution of the soil, water and air) not only take time to manifest, but above all

¹¹⁵ *Council Conclusions on setting the EU’s priorities for the fight against serious and organized crime between 2014 and 2017*, Justice and Home Affairs Council meeting, Luxembourg 6 and 7 June 2013.

¹¹⁶ See the interview with Professor Dr Ludwig Kramer in *Eurojust News*, Issue n°10 – December 2013, 10.

¹¹⁷ See the interview published in *Eurojust News*, issue No. 10, cit., 11.

they are hardly to be clearly identify as causing destruction of the environment, environmental disasters often being imputed to casualties.

Such a situation does not overcome the fact that protection of environment is established as one of the main EU objectives in the Treaty of Lisbon, requiring a substantial change of attitude, first of all from EU actors and then from Member States authorities. Since competences in environmental matters are clearly attributed to the EU, including the integration of environmental requirements into its other policies, as required by the Lisbon Treaty, then EU has to engage all its means to seriously tackle the environmental challenges. This clearly implies a stronger involvement of all EU institutions, and above all, concerning the repressive side, of Eurojust.

Eurojust's added value

As mentioned above, the typical cross-border and organized nature of environmental crime (including all activities related to the illegal trafficking of endangered species, be it animals or plants and their products) immediately indicates most of environmental crimes as naturally falling within the remit of Eurojust, and then suggests the possibility for Eurojust to play a significant role in the strategy to tackle them. This is true not only looking at the evolution of Eurojust's powers provided for in the Treaty of Lisbon but also in the existing legal framework.

In order to move from the actual situation described above, a stronger engagement of Eurojust should be encouraged not only in its function of facilitation, support and enhancement of the cooperation among the competent national authorities (by facilitating and coordinating mutual legal assistance requests, gathering and sharing best practice, coordinating national specialized units and the putting in place of joint investigation teams), but before that, in supporting the best use of the legal framework in place, identifying obstacles and best practices, and suggesting possible 'evolutive' interpretation or improvements of existing legal instruments.

All professionals involved in various form in the environmental protection – prosecutors, international organizations, networks and academics – highlighted the links between environmental crime and organized crime, as well as the fact that transnational environmental crimes often involve corruption and financial crime, loss of tax revenue, parallel trading with other forms of criminal activity, and distortion of the licit market. The need for a European overview of the different criminal activities linked to environmental crime is also unanimously recognized. The full engagement of Eurojust could lead to an easier identification of criminal networks and a better comprehension of circuit of criminal profits. This remark confirms that Eurojust should play a crucial role in counteracting environmental crime and, what is more important, it can do this by properly using existing legal texts concerning organized crime or financial crime and establishing its competence in these areas. By doing this, Eurojust can contribute to a substantial change in the way environmental crime is perceived, that is to say as a "gentleman's crime", and to a more serious engagement in counteracting environmental crime, by that eliminating the beneficial situation for environmental criminals, relying on the actual lack of investigation and attention (and because of that acting in the perspective of 'low risk' of penalty).

4 Article 86

4.1 Article 86.1 – first sub-paragraph

“In order to combat crimes affecting the financial interests of the Union, the Council by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament”

This provision establishes the competence of the Council to create a common authority responsible for all activities falling in the stage preliminary to the trial. More precisely, it does not itself establish such a European Public Prosecutor’s Office (EPPO) but empowers the Council to do so, by adopting regulations following a special legislative procedure asking for unanimity of Member States.

According to Article 86.1 TFEU, such an authority can be established *“in order to combat crimes affecting the financial interests of the Union”* (whereas, according to Article 86.4 TFEU, other sectors could be covered following an unanimous decision of the Council, and so also environmental crimes could fall in the scope of the European Prosecutor)¹¹⁸. No definition is nevertheless provided of which offences constitutes a “crime affecting the financial interests of the Union”. Following a restrictive notion (relying on a strict interpretation of the wording of this provision), the material scope of the EPPO should be limited to those offences that have as a consequence an actual or (at least) a potential harm for financial interests of the Union (to be proven in trial by the EPPO). According to an extensive notion, the wording “crimes affecting European financial interests” can be interpreted as covering not only criminal behaviours producing an actual or potential harm, but also offences which are statistically connected or generally considered as to be some way ‘functional’ to the realisation of behaviours directly affecting financial interests. Following this last reading, corruption, misappropriation of funds, abuse of power, when realised by EU or national officials managing EU funds, would fall in the EPPO’s material scope, while, according to the restrictive notion, they could be considered as falling within the EPPO’s material scope only when it can be assumed that they had as a result an actual or potential harm for the European budget.

In its proposal for a regulation “on the establishment of the Public Prosecutor’s Office”,¹¹⁹ the Commission establishes the competence of the new organ by referring to the “Directive 2013/xx/EU” – that has to be read as a reference to the Directive on the fight against fraud to the Union’s financial interests by means of criminal law”, which is still pending before the Council¹²⁰ – “as implemented by national law”. Leaving aside criticisms that can be expressed on the choice made by the Commission to establish the competence of a supranational inquiring organ, logically requiring some basic common provisions, on a (merely) harmonizing legal text (as it is the directive)¹²¹, attention has to be turned to provisions in articles 3 and 4 of the proposal. Looking at the definitions

¹¹⁸ See the commentary of Article 86.4 TFEU.

¹¹⁹ COM(2013)534.

¹²⁰ COM(2012)363/2.

¹²¹ See R. Sicurella, “Il diritto penale applicabile dalla Procura europea: diritto penale sovranazionale o diritto nazionale ‘armonizzato’? Le questioni in gioco”, in *Le sfide dell’attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, ed. Giovanni Grasso, Giulio Illuminati, Rosaria Sicurella and Silvia Allegrèzza (Milan: Giuffrè, 2013), 27 ff.

of fraud, corruption and money laundering, essentially reproducing definitions in previous legal texts,¹²² requiring the actual or at least potential harm of the financial interests, it would be logical to say that the Commission supports the restrictive notion. Nevertheless, this conclusion results not to be fully correct when we look at the other paragraphs of article 4 introducing two new offences related to fraudulent behaviors in procurement and misappropriation where an actual or potential harm to the financial interests of the Union is not required for the offence to be integrated.

Such a choice can be interpreted as to express the position of the Commission as not being stuck on a restrictive interpretation of the expression “crimes affecting the financial interests of the Union” and, on the contrary, as an opening to an extensive one.

Concerning in particular the perspectives of the establishment of the EPPO with respect to environmental crime, it is clear that it cannot be envisaged as to fall, in itself, in the ‘core offences’ indicated by the above mentioned expression “crimes affecting the financial interests of the Union” even in the case that an extensive notion is adopted. Nevertheless, looking at the provision in article 13 of the proposal, establishing the “ancillary competence” of the EPPO, environmental crime (as any other offences not covered by the definition in article 12) could be dealt by the EPPO in some concrete cases where specific conditions are met, and more precisely when an environmental crime results to be “inextricably linked” with criminal offences referred to in Article 12 (that is to say offences directly affecting financial interests of the European Union), and “their joint investigation and prosecution” by European Public Prosecutor’s Office are “in the interest of a good administration of justice”, provided moreover that “the offences referred to in Article 12 are preponderant and the other criminal offences are based on identical facts”.

According to article 86.1, the EPPO has to be established “*from Eurojust*”. This expression is one of the most controversial points of the whole provision, since it only establishes a physiological and structural connection between the new body and Eurojust but it does not make clear how exactly such connection should be put in practice. It is obviously a very sensitive question, and it will be a matter of a political choice, since, because of the limited EPPO’s material scope (at least concerning its hard core represented by “crimes affecting financial interests of the Union”), the situation to be considered as the most realistic one is a coexistence of the two bodies (at least until the moment when, after an extension of EPPO competences, this new body would attract all competences now attributed to Eurojust, which will then disappear).

Such an ambiguous wording appears nevertheless to clearly establish the legal nature of the new body as a judicial body (and not an administrative one), as well as its subordination to the judicial control of the ECJ.

4.2 Article 86.1 – second and third sub-paragraphs

“In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council 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 for adoption.

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 regulation concerned, they shall

¹²² First Protocol to the PIF Convention, “Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities’ financial interests - Statements made by Member States on the adoption of the Act drawing up the Protocol”, *OJ C 313*, 23/10/1996, 0002 - 0010; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. *OJ L 309*, 25.11.2005, 15 -36.

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”

These two sub-paragraphs regulate the situation where unanimity required in the first sub-paragraph is not met, establishing the opening of a ‘diplomatic’ procedure before the European Council – together with the suspension of the legislative procedure – aimed at exploring room for a consensus on the proposed text (and eventually on possible amendments which could lead to such a consensus). The second sub-paragraph, then, deal with the situation where a consensus is finally achieved in the European Council – and in this case the text agreed is sent back to the Council for adoption –, while the third sub-paragraph regulates the situation where discussion in the European Council was not successful, so that any text appears to be able to reach the required consensus and the legislative procedure cannot be reopened. In this case, the possibility is nevertheless envisaged that enhanced cooperation on the basis of the draft regulation concerned is established among a group of at least nine Member States that wish to do so. Such a solution appears to be somewhat facilitated since this sub-paragraph establishes a derogation with respect to the ordinary procedure provided for enhanced cooperation, by providing that interested Member States are only bound to notify their decision to the European Parliament, the Council and the Commission, while the authorisation to proceed (required according to the ordinary regulation of enhanced cooperation) is deemed to be granted.

4.3 Article 86.2

“The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgement, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union’s financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.”

This provision establishes the main tasks of the new authority, and by doing so it also reveals a specific model of inquiring authority which appears to have inspired the drafters.

The expression adopted to generally indicate the scope of competence of the EPPO – “investigating, prosecuting and bringing to judgment” and then “[...] exercise the functions of prosecutor in the competent courts of the Member States” – conveys the idea of an EPPO as the unique competent authority for investigating as well as for prosecuting, in so far tending to a model where the role of the police is subordinated to decisions of the EPPO while, at the same time, the role of the judge is logically conceived as being functional and related to the main activity of the EPPO (to guarantee the necessary judicial control over measures decided by the EPPO and that can affect individual liberties). Article 86 TFEU appears to refuse models where the distinction between ‘investigation’ and ‘prosecution’ reflects a distribution of competences between the prosecutor and the police (in some systems such as that of the United Kingdom)¹²³ or between the prosecutor and the judge competent to prepare the case (such as the *juge d’instruction* in the French system)¹²⁴.

¹²³ For a more detailed analysis, see the Country report on UK.

¹²⁴ For a more detailed analysis, see the Country report on France.

The reference to national Courts as the ‘competent’ judicial authority before which the EPPO has to exercise its functions clearly indicates the choice of the drafters not to create a European judge but to integrate the EPPO in the structure of national competent authorities. No indication can be found, nevertheless, on the model to be followed when regulating relationship and distribution of tasks with the competent national authorities. More generally, no indication can be found – neither in this provision, nor in other paragraphs of Article 86 – concerning crucial issues related to the status of the EPPO, designation of its members and their powers, its accountability. This implies that most of the basic choices concerning the new body are to be made by the Council when adopting regulations establishing the EPPO.

The interpretation of the phrase “*as determined by the regulation provided for in paragraph 1*” is a very controversial one, and so also because of some divergences in the different linguistic versions. In particular, according to some linguistic versions – as the Italian one – where the expression “as determined” appears to be clearly referred to the word “offences”, such provision could appear to introduce the necessary legal basis for a EU competence to establish common offences directly applicable (by national judges) to individuals; and so going much further what is established in article 83 TFEU especially dealing with EU competence in criminal law. Such an interpretation results to be somewhat weakened by the provision of article 86.3 where no reference is made to offences constituting EPPO material scope when indicating aspects to be dealt with by the regulation establishing the EPPO.

4.4 Article 86.3

“The regulation referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions”.

This provision deals with contents of future regulation establishing the EPPO. More specifically, it deals with what can be considered as to be the ‘necessary’ content of such a regulation. As announced above, the drafters of the treaty clearly decided to leave up to the Council, when adopting such a regulation, any decision concerning regulation of all essential characters of the new body.

Although the expression “*general rules applicable to the European Public Prosecutor’s Office*” is able to cover a wide range of rules concerning very different aspects – such as its status and internal structure, together with status and powers of its member, and also aspects related the definition of the scope of its powers – it has to be stressed the absence of any reference to offences falling into EPPO’s material scope (not even a ‘simple’ list of criminal behaviours to be considered as to fall into EPPO’s material scope, according to the model adopted in article 2 of the FD on the European Arrest Warrant); something that can appear even more astonishing when following the interpretation of Article 86.2 proposed by some scholars according to which the regulation establishing the EPPO should also establish a first nucleus of EU offences.

4.5 Article 86.4

“The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission”

This provision establishes the competence of the European Council (acting unanimously, after consulting the Commission, and with the consent of the European Parliament) to extend the EPPO’s material scope to cover any ‘serious crime having a cross-border dimension’. This can be read as a confirmation to the conception of the EPPO as an evolution from Eurojust, and because of that any extension of its competence should be justified on the two requirements of ‘seriousness’ and ‘cross-border dimension’ (in the extended meaning that Article 83 TFEU attributes to this expression). What can be inferred from that provision is mainly that, if it will be established, the EPPO will be competent (at least) for crimes affecting the financial interests of the Union; but such a situation finally represents only the ‘starting point’, because of the fact that its competences could cover any other serious crime having a cross-border dimension. Such a solution, together with the much-discussed expression ‘from Eurojust’, seems in fact to embrace the idea of an EPPO which is not conceived as being in its very substance a specialised authority whose competences and functions would evolve always within the ‘borders’ of the protection of financial interests, but it is clearly conceived as an authority which is structurally and functionally ‘prepared’ for having a general inquiring competence covering (potentially) any serious crime having a cross-border dimension.

4.6 EPPO and environmental crime

The provision in article 86.4 seems to be of a special interest for the subject matter of environmental crimes. As mentioned in the commentary of article 86.1, even if the widest scope is attributed to the expression “crimes affecting financial interests of the Union”, environmental crime is undoubtedly excluded in itself. Nevertheless, environmental crime is reasonably to be considered among the ‘favourites’ sectors to be interested by a future extension of the material scope of the European Prosecutor, as a consequence of its very nature and above all the relevance of environment protection in EU policies.¹²⁵ It is moreover worthy to mention the special relevance that results to be attached to the environment by the Court of the Justice, since the Eighties, when the Luxembourg jurisdiction has first stated that the protection of environment represents “an essential goal of the Community”,¹²⁶ and a “goal of general interest of the Community”.¹²⁷ Significantly, the protection of the environment was the sector where the Court of Justice recognized for the first time the competence of the European legislator to establish obligations for Member States to provide criminal sanctions¹²⁸ (so legitimizing the adoption of the

¹²⁵ On this point, see Grazia Maria Vagliasindi, “Istituzione di una Procura europea e diritto penale sostanziale: l’eventuale estensione della competenza materiale della futura Procura alla criminalità ambientale”, in *Le sfide dell’attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, ed. Giovanni Grasso, Giulio Illuminati, Rosaria Sicurella, Silvia Allegrezza, 189. Milano: Giuffrè, 2013.

¹²⁶ ECJ 7.2.1985, *Prosecutor v. ADBHU*, case 240/83, 549, para.13

¹²⁷ ECJ 20.9.1988, *Commission v. Denmark*, case 302/86, 4630, para. 11

¹²⁸ ECJ 13.9.2005, *European Commission v. Council of European Union*, case C-176/03

2008/99/CE directive on the protection of the environment, and also directive 2009/123/CE on ship pollution, directly following another decision of the Court especially dealing with this question)¹²⁹. Both the Advocates General, in their conclusions presented in the framework of the procedure before the Court of Justice, funded their position (supporting the idea of the existence of a competence of the European legislator to establish obligations to criminalise in this sector) on the special relevance of the environment protection in the European legal order, considered as to be “an essential goal of the European order”.¹³⁰

The arguments above should logically lead to consider the environment as a proper “supranational” legal interest (although the ECJ refused so far to take a clear position on this point, and in general on the fact that EU competence in criminal matters should be limited to initiatives aimed at protecting supranational legal interests)¹³¹, and because of that environmental crime as to be one of the area to be primarily interested by a future extension of the scope of competence of the EPPO; at least where one follows the logic that, as a consequence of the supranational nature of the EPPO (as conceived in the treaty), further extension of its material scope should first involve offences affecting legal interests of the same (supranational) nature.¹³²

5 Summary

Article 82

The provision of Article 82 TFEU brings mutual recognition in general terms within the scope of the EU’s competence, and gives in particular the European Parliament and the Council general regulatory powers on this matter. Actually, the principle of mutual recognition has been the motor of European integration in criminal matters in the recent past. Such a principle requires that judicial decisions issued by one MS (issuing State) should be executed without further formalities by any other MS (executing State), trying to establish the “free movement of judicial decisions”, without or with only little harmonisation of standards and legislations.

The crucial role of the principle of mutual recognition within the judicial cooperation in criminal matters is therefore confirmed by Article 82 TFEU, which subordinates to the implementation of mutual recognition the attribution to the EU of the competence concerning the adoption of specific measures in criminal procedure matters.

Article 82, para. 1 TFEU states that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to: lay down rule and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; prevent and settle conflicts of jurisdiction between Member States; support the training of the judiciary and judicial staff; facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

¹²⁹ ECJ 23.10.2007, *European Commission v. Council of European Union*, case C-440/05.

¹³⁰ See in particular the conclusions of Advocate General Ruiz-Jarabo Colomer, presented the 26.5.2005, in the case C-176/03, p. I-7895, para. 59.

¹³¹ See Rosaria Sicurella, *Diritto penale e competenze dell’Unione europea. Linee guida di un sistema integrato di tutela dei beni giuridici sovranazionali e dei beni giuridici di interesse comune* (Milano: Giuffrè, 2005), 346 ff.

¹³² See Rosaria Sicurella, “Setting up a European Criminal Policy for the Protection of EU Financial Interests: Guidelines for a Coherent Definition of the Material Scope of the European Public Prosecutor’s Office”, in *Toward a Prosecutor for the European Union*, ed. Katalin Ligeti, vol. I (Oxford and Portland, Oregon: Hart Publishing, 2013), 888 ff.

Article 82, para. 2 TFEU establishes that the approximation of national laws should deal with: mutual admissibility of evidence; the rights of individuals involved in a criminal procedure and the rights of victims of crime; any other specific aspects of criminal procedure which the Council has identified in advance by a decision.

It is worth to mention that, according to the provisions of Article 82, the EU legislator adopted in 2009 a EU's Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. It is a set of procedural safeguards for accused persons intended to ensure that fair trial rights are protected across the EU. Once fully implemented, the Roadmap will help ensure that the rights enshrined by the ECHR are respected in practice and in a consistent manner across all MSs. Some Directives have been already adopted as a follow-up to such a Roadmap.

Article 83

Article 83 TFEU is the fundamental provision as far as the harmonisation of substantive criminal law is concerned. This article lists the areas in which the approximation of laws can be realized and it distinguishes between the cases of “particularly serious crime with a cross-border dimension” (para. 1) and the ones in which the approximation proves essential “to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures” (para. 2).

Therefore, thanks to these provisions, the legitimacy of obligations of criminal harmonisation (descending from the EU law) has been recognized and a criminal competence of the EU has been introduced. However, it is not a direct power of incrimination of the European institutions: indeed, they can only adopt directives, which have to be subsequently implemented by national legislators. The discretion of national Parliaments is obviously restricted in the choice of the legal interests to protect, the techniques of such protection and the definition of criminal offences, and in the choice of sanctions, too. For these features of the EU competence in this field, the definition of an indirect criminal competence has been considered more appropriate, insofar such a competence limits the national legislator but requires its involvement.

The protection of the environment is undoubtedly one of the areas in which an harmonisation measure can be adopted on the basis of Article 83, para. 2. On the one hand, indeed, the environment is a legal interest of supranational importance, as it has been underlined, in particular, by the Conclusions of the Advocate General Ruiz Jarabo-Colomer in the case C-176/03. On the other hand, the environmental matter has been subject to several interventions of harmonization.

Article 83 TFEU could have an important impact on the protection of the environment. In this perspective, it is necessary to underline that as far as the sanctions are concerned, the directive 2008/99/EC provides only that Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable «by effective, proportionate and dissuasive criminal penalties». If we share the opinion that serious differences in the area of sanctions introduced for the offences provided in the directive could compromise the achievement of the aims of the directive, it is clear that the harmonisation of the sanctions – which is permitted on the basis of Article 83, para. 1 TFEU – could have a real added value.

Furthermore, Article 83, para. 1 TFEU could permit to introduce specific criminal provisions in order to target environmental crimes committed by criminal organizations (or in which a criminal organization is involved). In that respect, the academic legal thinking has expressed the need to introduce an incrimination in order to sanction the organized crime in the environmental sphere with criminal penalties. Therefore, Article 83, para. 1 allows such an intervention, which was not possible under the previous rules of the Community law.

Article 84

Article 84 TFEU deals with the preventive side of the “security” dimension of the common area of freedom, security and justice.

EU initiatives based on this provision for preventing environmental crime should be strongly encouraged since they appear to be necessary to counteract environmental crime in many respects. First, a serious engagement by EU legislator seems to be necessary aiming at sensibilise Governments, legal practitioners and in general all those involved in various form with environment protection. Second, a EU initiative could be envisaged based on this provision concerning training and exchange of best practice, eventually supporting and enhancing the action of networks already acting in this field. Third, a EU initiative based on this provision could have as an objective the enhancement of the role of NGOs which are often more prepared – and more willing – to monitor the application of environmental law and that can significantly contribute to stimulate public administrations and to raise the level of awareness of the seriousness of the phenomenon.

Article 85

Article 85 TFEU establishes the mandate of Eurojust, in particular concerning its objectives – and because of that its nature – and conditions and requirements for its action.

Concerning the objectives of Eurojust, the Treaty of Lisbon, essentially confirms the supporting and facilitating role (with respect to the activities of the national competent authorities) of Eurojust, and then also its original ‘horizontal’ nature. Such an horizontal nature of Eurojust appears to be clearly implemented by the actual regulation of Eurojust’s activities, established by the 2002 Council Decision, as then amended by Council Decision 2009/492/JHA.

Article 85, para. 1 TFEU establishes the nature and contents of the legal act aimed at regulating Eurojust. Concerning the nature of the act, future legislation on Eurojust will lay on regulations adopted in accordance with ordinary legislative procedure. Concerning contents of the act, article 85, para. 1 TFEU does not provide any further indication concerning provisions to be adopted aimed at regulating Eurojust’s “structure, operation, field of action [...]”, while some indications are provided for concerning the “tasks” of Eurojust.

Furthermore, Article 85, para. 1 TFEU expressly requires that future regulation on Eurojust regulates involvement of European Parliament and National Parliaments in the evaluation of Eurojust’s activities.

Looking at Eurojust’s mandate referring to “serious crime affecting two or more Member States or requiring a prosecution on common bases” no doubts should be expressed on the ‘natural’ inclusion of environmental crime, unanimously recognized – at least in official speeches – as to be one among the “serious crime” requiring the putting in place of a common strategy at EU level, and very often as having also a cross-border and organised nature (that is to say the ‘typical’ characters required by the treaty to define Eurojust scope of competence). Nevertheless, environmental crime was only modestly addressed in Eurojust’s casework so far. It reflects the very critical situation of environmental crime prevention and repression at national and supranational levels. Two main reasons – clearly interconnected – can be identified. The first reason is without any doubt the lack of an unambiguous definition of environmental crime at European and International level, and in particular of what kind of offences have to be considered as to fall in this category. The second reason to be mentioned (that is far from being nevertheless of a lesser importance than the first one) is the overall underestimation of the phenomenon not only by National Governments but someway also by European Institutions.

Such a situation does not overcome the fact that protection of environment is established as one of the main EU objectives in the Treaty of Lisbon, requiring a substantial change of attitude, first of all from EU actors and then from Member States authorities.

Article 86

Article 86 TFEU establishes the competence of the Council to create a common authority responsible for all investigative activities falling in the stage preliminary to the trial. More precisely, it does not itself establish such a European Public Prosecutor's Office (EPPO) but empowers the Council to do so, by adopting regulations following a special legislative procedure asking for unanimity of Member States. According to Article 86, para. 1 TFEU, such an authority can be established "in order to combat crimes affecting the financial interests of the Union".

Concerning in particular the perspectives of the establishment of the EPPO with respect to environmental crime, it is clear that it cannot be envisaged as to fall, in itself, in the 'core offences' indicated by the above mentioned expression "crimes affecting the financial interests of the Union" even in the case that an extensive notion is adopted. Nevertheless, looking at the provision in article 13 of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office of 17 July 2013, environmental crime (as any other offences not covered by the definition in article 12) could be dealt by the EPPO in some concrete cases where specific conditions are met, and more precisely when an environmental crime results to be "inextricably linked" with criminal offences referred to in Article 12 (that is to say offences directly affecting financial interests of the European Union), and "their joint investigation and prosecution" by European Public Prosecutor's Office are "in the interest of a good administration of justice", provided moreover that "the offences referred to in Article 12 are preponderant and the other criminal offences are based on identical facts".

The provision in article 86, para. 4 seems to be of a special interest for the subject matter of environmental crimes. In fact, environmental crime is reasonably to be considered among the 'favourites' sectors to be interested by a future extension of the material scope of the European Prosecutor, as a consequence of its very nature and above all the relevance of environment protection in EU policies.

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