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# The Evolution of European Criminal Competence in the Fight Against Transnational Crime

Summary: 1. Preliminary Considerations on Globalisation, Transnational Crimes and European Area of Freedom, Security and Justice. — 2. The Achievement of European Criminal Competence Through the Court of Justice's Case-Law. — 3. The Path to the Introduction of a Formal Legal Basis — 4. The Treaty of Lisbon and the Indirect Criminal Competence. — 5. Some Conclusive Remarks.

## *1. Preliminary Considerations on Globalisation, Transnational Crimes and European Area of Freedom, Security and Justice*

Transnational crime is now recognised as a global issue that must be addressed through collaboration among States and their judicial and law enforcement authorities.[1] In this direction, States have developed a series of regulatory responses within international organisations, both at the global and regional levels.[2] However, the

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1 See, among others, C. Steer, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, in E. Van Sliedregt, S. Vasiliev (eds.), *Pluralism and Harmonization in International Criminal Law*, Oxford, 2013; J. Haken, *Transnational Crime in the Developing World*, Washington D. C., 2011; T. Obokata, *Transnational Organised Crime in International Law*, Oxford-Portland, 2010; D. Siegel, H. Bunt, D. Zaitch (eds.), *Global Organised Crime: Trends and Developments*. Berlin, 2003; W. Schomburg, *Are We on the Road to a European Law-Enforcement Area? International cooperation in Criminal Matters: What Place for Justice?*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8, No. 1, 2000, pp. 51–60; P. Wilkitzki, *International and Regional Developments in the Field of Inter-State Cooperation in Penal Matters*, in M. C. Bassiouni (ed.), *International Criminal Law*, Vol. II, Procedural and enforcement mechanisms, New York-The Hague, 1999.

2 With respect to the United Nations' global framework, notable examples are: *UN Convention on Psychotropic Substances* (1971); *UN Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973); *UN Convention against Transnational Organised Crime* (2000), as well as its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000), its *Protocol against the Smuggling of Migrants by Land, Sea and Air* (2000), and its *Protocol against the Illicit Manufacturing of and Trafficking*

European Union (EU) has even created the European area of freedom, security, and justice, endowing itself with police and judicial cooperation tools, as well as a specific criminal law competence in the field. In light of this, a discussion with professors and lawyers of criminal law and criminal procedure, held as part of the activities of the Jean Monnet Chair EUVALWEB, revealed that, because these two disciplines are primarily within the competence of the Member States, a number of issues arise in terms of effectiveness in the fight against transnational crimes at the international and European levels. This is because, while globalisation has altered how crime can and should be dealt with,[3] traditional criminology has difficulty identifying legal definitions of common crimes. There is a lack of a broader concept of crime, which is hampered by application and procedural difficulties at the national level.[4]

There is also a terminological problem that concerns the same definition of transnational crime. The term was coined by the United Nations to describe certain criminal phenomena that cross international borders, violate the laws of several states, or have an impact on

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*in Firearms, Their Parts and Components and Ammunition* (2001); *UN Convention Against Corruption* (2003). Regarding the regional framework, the efforts of the Council of Europe in the field led to: *Criminal Law Convention on Corruption* (ETS No. 173, 1999) and its *Additional Protocol to the Criminal Law Convention on Corruption* (ETS No. 191, 2003); *Civil Law Convention on Corruption* (ETS No. 174, 1999); *Convention on Action against Trafficking in Human Beings* (CETS No. 197, 2005); *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (CETS No. 198, 2005); *Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health* (CETS No. 211, 2011); *Convention against Trafficking in Human Organs* (CETS No. 216, 2015); *Convention on Offences Relating to Cultural Property* (CETS No. 221, 2017).

3 Globalisation establishes a very complex relationship with crime: negative and positive, as well as preventative. Negative relationship because it is globalisation itself that produces negative collateral consequences by encouraging the introduction and rapid growth in the number of crimes. Positive relationship because, simplistically, globalisation is also the „cure" because it has fostered to fight crime through cooperation and coordination of efforts between states. Preventative relationship, because globalization has emphasised the importance of prevention in the fight against transnational crime and adoption of preventive measures. In this sense, see E. C. Viano, *Globalization, Transnational Crime and State Power: The Need for a New Criminology*, in *Rivista di Criminologia, Vittimologia e Sicurezza*, Vol. 3–4, No. 3–1, 2009–2010, pp. 63–85. According to J. Wilson, *Transnational Crimes*, in A. Lautensach, S. Lautensach (eds.), *Human Security in World Affairs: Problems and Opportunities*, 2023, pp. 335–349, transnational crimes may be committed by individuals working alone but more often they involve organised groups or networks of individuals working in more than one country. Criminal organisations are taking advantage of the opportunities created by globalization — easier, faster and cheaper communication technologies, deregulated financial markets, and more open borders that allow increased flows of people and money.

4 See again the considerations of E. C. Viano, *op. cit*., p. 79.

another country.[5] It was a criminological term, with no claim to providing a juridical concept.[6] Furthermore, it has been considered primarily a functional rather than normative descriptor with definitional problems: a generic concept covering a multiplicity of different kinds of criminal activity, including organised, corporate, professional, and political crime. The use of the adjective „transnational" is also discussed, because in fact not all transnational crime crosses State boundaries. What is relevant is the ripple effect these crimes can have on other States, thus generating the legitimate concern of international society to combat them on a common basis.[7] Therefore, transnational crime has been deemed to describe conduct that has actual or potential cross-border effects of national and international concern. Such crimes must be differentiated from international crimes,[8] which are recognised by and can therefore be prosecuted under international law and domestic crimes that fall under one national jurisdiction. This is true to the extent that, prior to the adoption of the Convention on Transnational Organised Crime, the UN had, without obtaining satisfactory and unequivocal answers, asked member states to list cases of transnational organised crime in their jurisdictions. Even in the drafting of the Convention, then, the perspective had prevailed to focus on the characteristics of the actors rather than those of the acts.[9]

With the adoption of the 2000 United Nations Convention against Transnational Organised Crime (UNTOC), as stated in the Foreword, „*the international community demonstrated the political will to answer a global challenge with a global response*".[10] The

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5 In the 2002 Report of the UNODC, *Results of a pilot survey of forty selected organised criminal groups in sixteen countries*, www.unodc.org/pdf/crime/publications/Pilot_survey.pdf, it is possible to read that: „*The concept of transnational crime — essentially criminal activity that crossed national borders — was introduced in the 1990s. In 1995, the United Nations identified eighteen categories of transnational offences, whose inception, perpetration and/or direct or indirect effects involve more than one country*". The offences listed included money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit arms trafficking, aircraft hijacking, sea piracy, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illicit drug, trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public or party officials.

6 G. O. W. Mueller, *Transnational crime: Definitions and Concepts*, in P. Williams, D. Vlassis (eds.), *Combating Transnational Crime. Concepts, Activities and Responses*, 2001, p. 13.

7 In this sense, see N. Boister, *Transnational Criminal Law?*, in *European Journal of International Law*, Vol. 14, No. 5, 2003, pp. 953–976.

8 See for all, M. C. Bassiouni (ed.), *International Criminal Law*, Vol. 1: Sources, Subjects and Contents, Ed. 3, 2008.

9 For a reconstruction of the drafting process, see D. Vlassis, *Drafting the United Nations Convention against Transnational Organised Crime*, in P. Williams, D. Vlassis (eds.), *Combating Transnational Organised Crime: Concepts, Activities and Responses*, London, 2001.

10 Insightful comments on the convention can be found, *ex multis*, in V. Musacchio, A. Di Tullio D'Elisiis, *Commentario breve alla Convenzione di Palermo*

Convention served as a novel instrument to tackle the worldwide issue of crime: the first attempt to compile all the ideas and strategies required to combat organised crime globally into a single, legally binding text. Transnational crime is becoming more widely acknowledged as a serious threat to human security in addition to posing a threat to state security. Both the concept of transnational offences and the reference to serious crimes are contained in this convention. The crimes to which the UN Convention is applicable are listed in its art. 3, para. 1. There is no closed list. Apart from the four distinct offences (affiliation with an organised criminal group, money laundering, corruption, and obstruction of justice) that State Parties must include in their national legislation, any other offences that meet the definition of „*serious crimes*" are encompassed under this regulation. Serious crimes are defined by art. 2, lett. b as those that carry a minimum sentence of four years in prison. Nonetheless, serious crimes covered by the UN Convention will only be considered if two requirements are met: they must be transnational in nature and involve the actions of an organised criminal group. Art. 3, para. 2 lists a number of situations in which the crime in question must be considered transnational; while this is the most evident instance of „transnationality", it is not required for the crime to have been committed in more than one State. If the offence was primarily planned, directed, or controlled in another State, then all situations in which it is fully committed in one State are also covered. Even though all of the events leading up to a crime, including its commission, may have taken place in the same State, the crime may still be classified as transnational if it meets one of two criteria: either the organised crime group involved operates internationally, or the crime has a significant impact on another State.

In accordance with art. 36 of the UNTOC Convention, the European Community (EC) at the time was the first international

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*sulla criminalità organizzata*, Padua, 2021; C. Rose, *The Creation of a Review Mechanism for the UN Convention Against Transnational Organised Crime and Its Protocols*, in *American Journal of International Law*, Vol. 114, No. 1, 2020, pp. 51–67; G. Polimeni, *The Notion of Organised Crime in the United Nations Convention against Transnational Organised Crime*, in S. Carnevale, S. Forlati, O. Giolo (eds.), *Redefining Organised Crime. A Challenge for the European Union?*, Oxford-Portland, 2017, pp. 59–63; F. Balsamo, M. A. Accili, *Verso un nuovo ruolo della Convenzione di Palermo nel contrasto alla criminalità transnazionale. Dopo l'approvazione del Meccanismo di Riesame ad opera della Conferenza delle Parti*, in *Diritto penale contemporaneo*, No. 12, 2018, pp. 113–128; N. Boister, *The Cooperation Provisions of the UN Convention Against Transnational Organised Crime: A „Toolbox" Rarely Used?*, in *International Crime Law Review*, Vol. 16, No. 1, 2016, pp. 39–70; S. Redo, *The United Nations Criminal Justice System in the Suppression of Transnational Crime*, in N. Boister R. J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, 2015; D. McClean, *Transnational Organised Crime: A Commentary on the UN Convention and its Protocols*, Oxford, 2007.

organisation to sign it.[11] Combating organised crime was, in fact, one of the EU's top priorities in its endeavour to establish an area of freedom, security, and justice. This idea, which was introduced in the Amsterdam Treaty, is an attempt to address the growing belief that organised crime is proliferating throughout the EU with never-before-seen virulence. Nearly everywhere in the world, the rapid advancement of communication technologies and the globalisation of economies have resulted in a rise in activities linked to highly organised criminal groups. However, in the European Union, this phenomenon was posing a particularly serious problem due to the Single Market and the Schengen system, which had established a nearly borderless region. Despite the general understanding of the urgent need to address these new challenges of crime, only the Treaty of Lisbon's implementation signalled a turning point. After a protracted and laborious process, this Treaty on the reform of the European Union provided significant, albeit incomplete, answers for the formalisation of the Union's criminal competence in the areas of particularly serious crime with a cross-border dimension, raising a number of concerns that will be addressed in the conclusions of the current work.

## *2. The Achievement of European Criminal Competence Through the Court of Justice's Case-Law*

It would be incorrect to view the EU's criminal competence as a Lisbon Treaty-era accomplishment. Quite the contrary; it started to take shape at the close of the 20th century when the Court of Justice acknowledged that community obligations to incriminate date back to broad principles of Union law, both written and unwritten.[12] In

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[11] See the Working Paper, *The European Union and the United Nations Convention against Transnational Organised Crime*, Civil Liberties Series, of September 2001, LIBE 116.

[12] See Court of Justice of the European Communities, Judgment of 21 September 1989, Case C-68/88, *Commission v. Greece (Greek Maize)*. In particular, Court of Justice of the European Union, Judgment of 8 July 1999, Case C-186/98 *Nunes and de Matos*, paras. 12–14 and Court of Justice of the European Communities, Judgment of 2 February 1977, Case 50/76, *Amsterdam Bulb*, paras. 32–33, where the Court first stated that that Member States have an obligation to cooperate loyally in criminal matters according to principles of efficient and equal cooperation. Subsequently, the Court of Justice of the European Union, Judgment of 13 September 2005, Case C-176/03, *Commission v. Council*, paras. 47–48, it admitted that criminal law and criminal procedure are not within the scope of Community competence. But, however, this does not prevent the then EC legislature from taking measures in relation to the criminal law of the Member States, if the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities are essential measures to combat serious crimes (with respect to the case at issue serious „environmental" crimes), when it is required that the rules which it lays down on protection are fully effective. Hence, „*The Court conferred express criminal competence upon the Community with this judgment. Striking points within this*

fact, it is possible to distinguish different stages of this competence in the EU integration process. During the first phase of negative integration, the Court of Justice frequently ordered national judges to disregard substantive criminal law rules that were deemed incompatible with Union law. This is done to prevent the single market's fundamental freedoms or other European policies' goals from being hampered, which has resulted in the legislatures of Member States repealing the offending rules, for example on gaming and betting.[13] Even on migration, the Court has occasionally evaluated whether the scope or type of an afflictive measure imposed by State law was consistent with the principles of equality and proportionality.[14]

The second stage of integration was positive since states must take all necessary measures, some of which may even be criminal in nature, to guarantee the efficacy of EU law. From a reverse „positive" standpoint, the Court of Justice confirmed that Member States must take all necessary steps to ensure the effective implementation of European rules, such as imposing penalties that are „*effective, appropriate to the gravity of the offence and dissuasive*", as a peculiar declination of the principle of loyal cooperation. This competence was reaffirmed in 2005 when case law once again recognised the legitimacy of criminal harmonisation directives in specific cases pertaining to matters falling under the purview of the Union's first pillar, even before the Lisbon Treaty came into effect. Specifically, Directive 2008/99/EC[15]

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*judgment are the effectiveness of Community law and the achievement of Community aim*'s" from the standpoint of B. Yakut, *Post-Lisbon Criminal Law Competency of the European Union*, in *Marmara Journal of European Studies*, Vol. 17, Nos. 1–2, 2009, p. 15. Cfr. N. Neagu, *Entrapment Between Two Pillars: The European Court of justice Rulings in Criminal Law*, in *European Law Journal*, Vol. 15, No. 4, 2009, pp. 536–551. See for discussions, M. J. Borgers, T. Kooijmans, *The Scope of the Community's Competence in the Field of Criminal Law*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 16, No. 4, 2008, pp. 379–397; S. Peers, *EU Justice and Home Affairs Law*, Oxford, 2007, pp. 389–427; F. Angelini, *Ordine pubblico e integrazione costituzionale europea. I principi fondamentali nelle relazioni interordinamentali*, Padua, 2007; V. Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law*, in *European Journal of Law Reform*, Vol. 8, Nos. 2–3, 2006, pp. 301–324.

13 Court of Justice of the European Union, Judgment of 6 March 2007, Joined Cases C-338/04, C-359/04 and C-360/04, *Placanica and Others*, in which it was found that the imposition of a prior police authorisation, whose absence would entail the materialisation of the offence of abusive exercise of gaming or betting activities, was considered incompatible with the rules of the single market as it was liable to unduly restrict the freedom of establishment.

14 Court of Justice of the European Union, Judgment of 19 January 1999, Case C-348/96, *Calfa*; Court of Justice of the European Union, Judgment of 30 April 1998, Case C-24/97, *Commission v. Germany*; Court of Justice of the European Communities, Judgment of 3 July 1980, Case 157/79, *Pieck*.

15 Directive 2008/99/EC of the European Parliament and of the Council, *on the protection of the environment through criminal law*, of 19 November 2008, in OJ L 328, of 6 December 2008. See, R. M. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden, 2015.

requires Member States to include criminal sanctions in their national legislation for serious violations of Community law's environmental protection provisions, or Directive 2009/52/EC[16] of the European Parliament and of the Council, which sets minimum standards for sanctions and measures against employers of third-country nationals staying illegally.

Although the Union did not yet have criminal competence, in these phases the possibility that the European Community could bind States to the introduction of criminal sanctions or norms that implicate them gave rise to a debate. The same Court stated that, while the *ius puniendi* falls under the exclusive jurisdiction of national authorities, it was also possible that obligations originating from the European Community could activate this sovereign power.[17] In addition, the famous landmark Court ruling in the *Greek Maize* Case from the late 1980s formulated Member States' obligations to protect the Community's financial interests, including using criminal law. The principle of effective and equivalent protection for the protection of the Union budget was established by this ruling, and the Directive on the fight against fraud to the Union's financial interests by means of criminal law (also known as the „PIF Directive")[18] still uses language from that judgement, such as that on „*effective, proportionate and dissuasive*" sanctions. Therefore, as frequently occurs in the development of EU law, the European Court of Justice's jurisprudence may have provided the true catalyst for changes to EU competences even earlier.

## *3. The Path to the Introduction of a Formal Legal Basis*

However, establishing a legal basis explicitly dedicated to the Union's criminal competence required a lengthy and laborious process.[19]

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[16] Directive 2009/52/EC of the European Parliament and of the Council, *providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, of 18 June 2009, in OJ L 168, of 30 June 2009. See K. Ambos, P. Rackow (eds.), *The Cambridge Companion to European Criminal Law,* Cambridge, 2023.

[17] Court of Justice of the European Union, Judgment of 28 January 1999, Case C-77/97, *Unilever*; Court of Justice, *Amsterdam Bulb*, cit.; Court of Justice, *Commission v. Greece (Greek Maize)*, cit.

[18] Directive (EU) 2017/1371 of the European Parliament and of the Council, *on the fight against fraud to the Union's financial interests by means of criminal law*, of 5 July 2017, in OJ L 198, of 28 July 2017.

[19] As discussed by many scholars, among them J. Oberg, *Union Regulatory Criminal Law Competence after Lisbon*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 19, No. 3, 2011, pp. 289–318; E. Baker, *Governing through Crime: The Case of the European Union*, in *European Journal of Criminology*, Vol. 7, No. 3, 2010, pp. 187–213; F. Calderoni, *Organised Crime Legislation in the European Union. Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organised Crime*, Heidelberg, 2010, p. 27 ff.; A. Weyembergh, V.

The Treaty establishing the European Economic Community of 1957, did not include any rules in the area of judicial cooperation. The development of the Union's competences in the field of criminal law dates to the 1990 Convention implementing the 1985 Schengen Agreement[20] which was outside the community system. Then, because the terms „*political cooperation*" and „*European Union*" were employed for the first time, the Single European Act represented the first embryo of political unity between the twelve Member States at the time. A „*Political Declaration of the Governments of the Member States*" concerning the free movement of persons[21] contained an early (though very vague) indication of potential police and criminal cooperation. They also cooperated in the fight against terrorism, crime, drugs, and the trafficking of antiques and works of art. To avoid any misunderstanding about the „non-existent" cession of sovereignty, it was specifically stated in the subsequent Declaration „*on Articles 13 to 19 of the Single European Act*" that „*Nothing in these provisions shall affect the right of Member States to take such measures as they deem necessary to control immigration from third countries and to combat terrorism, crime, drug trafficking, and trafficking in works of art and antiquities*". Furthermore, these mechanisms were devoid of any implementing instruments.

Then, legal cooperation in criminal matters obtained a new institutional place within the formal framework of the EU with the implementation of the Treaty of Maastricht, which established the European Union, in the so-called „third pillar". The EU Member States formally recognised judicial cooperation in criminal matters as a matter of common interest (art. K, para. 1, sub-para. 7). This did not, however, change the fundamental aspect of the intergovernmental nature of decision-making concerning cooperation in criminal matters. Both the requirement of unanimity and the Member States' sole authority to take the lead in creating third-pillar legal instruments

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Santamaria (eds.), *The Evaluation of European Criminal Law*, Brussels, 2009; V. Mitsilegas, *The Competence Question: The European Community and Criminal Law*, in E. Guild, F. Geyer (eds.), *Security Versus Justice? Police and Judicial Cooperation in the European Union*, Aldershot, 2008, p. 153 ff.; S. White, *Harmonization of Criminal Law under the First Pillar*, in *European Law Review*, Vol. 31, No. 1, 2006, pp. 81–92; V. Mitsilegas, *Defining Organised Crime in the European Union: The Limits of European Criminal Law in an Area of „Freedom, Security and Justice",* in *European Law Review*, Vol. 26, 2001, pp. 565–581; J. W. Bridge, *The European Communities and the Criminal Law*, *in Criminal Law Review*, 1976, pp. 88–97.

[20] The abolition of internal border controls required greater cooperation between national police, customs and judicial authorities concerned with the Union's external borders, on issues such as terrorism, organised crime, immigration and asylum, as set out in the „Schengen *acquis*".

[21] The Declaration reads as follows: „*In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of third-country nationals*".

in this area were preserved. Although Title VI of the Treaty on European Union contained provisions on cooperation in the fields of justice and home affairs (JHA), the Treaty did not specifically address the competence of harmonising criminal law. However, this did not stop the Union from enacting a number of international legal conventions (most notably, on the protection of the Union's financial interests), whose obvious goal was to specify the elements of specific criminal offences and the appropriate penalties for them.[22]

Subsequently, JHA components were included in the Community legal framework proper (i. e., the first pillar) by the 1997 Treaty of Amsterdam. This gave the European Commission the authority to suggest laws and policies regarding borders, immigration, asylum, visas, and civil court cooperation. The EC Treaty's Title IV, concerning „*Visas, asylum, immigration, and other policies related to free movement of persons*", was then invoked to address those issues. Conversely, cooperation between the police and courts in criminal cases was still governed by intergovernmental decision-making and fell under the third pillar. Nonetheless, the Amsterdam Treaty established a new goal for the EU: „*an Area of Freedom, Security, and Justice*" through the adoption of a new legal tool known as a „Framework Decision" that reflected the paradigm shift to bring Member States' laws and regulations closer together. While leaving the choice of form and methodology to the national authorities, framework decisions would bind Member States with regard to the intended outcome. They had no immediate effect, but were acts of Union law, even though criminal law remained restricted to intergovernmental cooperation under what was then the third pillar of the Union (rather than the Community method).[23] Nevertheless, the Amsterdam Treaty clearly recognised the Union's authority to harmonise criminal law for the first time by adding new provisions specifically addressing the matter (art. K. 6, para. 2, lett. b).[24]

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[22] See for example, Council Act, *drawing up the Convention on the protection of the European Communities' financial interests*, of 26 July 1995, in OJ C 316, of 27 November 1995, broadly known as the „PIF Convention". The Convention is assisted by two protocols: the Council Act, *drawing up a Protocol to the Convention on the protection of the European Communities' financial interests*, of 27 September 1996, in OJ C 313, of 23 October 1996; Council Act, *drawing up, on the basis of Article K. 3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests*, of 29 November 1996, in OJ C 151, of 20 May 1997.

[23] In the following years, the Council adopted a large number of framework decisions in the area of criminal law and cooperation, see *infra* note 36.

[24] See, among others, M. Zbinden, *Les institutions et les procédures de prise de décision de l'Union européenne après Amsterdam*, Bern, 2002; S. Peers, *Justice and Home Affairs: Decision-Making after Amsterdam*, in *European Law Review*, No. 2, 2000, pp. 183–191; P. Magrini, *L'evoluzione delle politiche europee nel settore della giustizia e degli affari interni: da Schengen a Tampere via Amsterdam*, in *Diritto pubblico comparato ed europeo*, No. 4, 2000, pp. 1817–1828; D. O'Keefe,

Later, „*closer cooperation between judicial and other competent authorities of the Member States*" was emphasised in the Treaty of Nice. The changes include „*enhanced cooperation*" in areas referred to in Title VI of the Treaty on European Union (art. 40–40b TEU), extension of the co-decision procedure to areas such as illegal immigration and short-term visa policy as well as immigration and asylum, and cooperation through Eurojust (art. 31 TEU).[25] The changes aimed to enable the European Union to develop into an area of freedom, security, and justice more quickly. In addition, the Nice European Council officially „proclaimed" the Charter of Fundamental Rights in December 2000. The right to liberty and security (art. 6), the right to asylum (art. 18), protection from removal, expulsion, or extradition (art. 19), non-discrimination (art. 21), and Title VI on justice are just a few of the topics that are covered by the 54-article Charter and are pertinent to justice and home affairs. As is well known, the Treaty of Lisbon, which came into effect on December 1, 2009, gave the Charter the same legal standing as the Treaties (see art. 6 TEU). As one of the elements of a space of freedom, security, and justice, the Lisbon Treaty also established the European Criminal competence, which is finally covered in Chapter 4 regarding the „*Judicial Cooperation in Criminal Matters*".

## *4. The Treaty of Lisbon and the Indirect Criminal Competence*

As a result, the Lisbon Treaty is a watershed moment because it abolishes the division of the pillars and unites the entire area of freedom, security, and justice in Title V of the Treaty on the Functioning of the European Union (TFEU). Furthermore, it enshrines the core of EU criminal competence in art. 83, para. 1 TFEU, on the basis of which the European Parliament and Council may establish „*minimum rules*" concerning criminal offences and penalties in the field of serious cross-border crime, with the directive replacing the instrument of the framework decision. While this European criminal competence remains indirect, it now obligates Member States to implement the provisions in which it is expressed, with the threat of

P. Twomey (eds.), *Legal Issues after the Treaty of Amsterdam*, London, 1999; J. Monar, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, in *European Law Review*, Vol. 23, No. 4, 1998, pp. 320–335; G. Soulier, *Le Traité d'Amsterdam et la coopération policière et judiciaire en matière pénale*, in *Revue de science criminelle et de droit pénal comparé*, No. 2, 1998, pp. 237–254.

[25] The European Judicial Co-operation Unit, or Eurojust, was established in accordance with Council Decision 2002/187/JHA, *setting up Eurojust with a view to reinforcing the fight against serious crime*, of 28 February 2002, in OJ L 63, of 6 March 2002, which followed the Nice amendments to Title VI of the EU Treaty.

an action for failure to fulfil obligations and a Court of Justice sentence. The majority of substantive criminal law framework decisions have now been repealed by directives based on art. 83, para. 1 TFEU.[26]

The recognition of the absolute necessity of combating transnational crime in the European sphere, first and foremost through substantive law texts capable of ensuring sufficiently homogeneous areas of criminal unlawfulness and punitive treatment in the various Member States, has resulted in the conferral of an autonomous character on the Union's criminal competence under consideration here. A competence that legitimises itself by combating the most insidious manifestations of the crime at hand. The aforementioned EU criminal competence has acquired a marked functionalist autonomy, in that it no longer primarily serves the needs of coordination between the authorities responsible for combating crime (whereas, on the contrary, such needs were the basis of third-pillar criminal competence under arts. 29 and 31 TEU until 2009).[27] Of course, this autonomous development of European criminal competence does not deny the long-known virtuous synergies between criminal harmonisation and judicial cooperation; rather, it expresses the desire to give

[26] Under art. 83, para. 1 TFEU, by repealing previously existent framework decisions, the following legislative acts have been adopted at the EU level: Directive 2019/713 of the European Parliament and the Council, *on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA*, of 17 April 2019, in OJ L 123, of 10 May 2019; Directive (EU) 2017/2103 of the European Parliament and of the Council, *amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of „drug" and repealing Council Decision 2005/387/JHA*, of 15 November 2017, in OJ L 305, of 21 November 2017; Directive (EU) 2017/541 of the European Parliament and of the Council, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, of 15 March 2017, in OJ L 88, of 31 March 2017; Directive 2014/62/EU of the European Parliament and of the Council, *on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA*, of 15 May 2014, in OJ L 151, of 21 May 2014; Directive 2013/40/EU of the European Parliament and of the Council, *on attacks against information systems and replacing Council Framework Decision 2005/222/JHA*, of 12 August 2013, in OJ L 218, of 14 August 2013; Directive 2011/92/EU of the European Parliament and of the Council, *on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*, of 13 December 2011, in OJ L 335, of 17 December 2011; Directive 2011/36/EU of the European Parliament and of the Council, *on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, of 5 April 2011, OJ L 101, of 15 April 2011.

[27] In this sense, see A. Bernardi, *La competenza penale accessoria dell'Unione Europea: problemi e prospettive*, in *Diritto Penale Contemporaneo*, No. 1, 2012, p. 44. See also R. Sicurella, *Il diritto penale europeo dopo Lisbona. Dall' „ossimoro polisenso" al diritto penale di un sistema di ordinamenti integrati. Ancora a metà del guado*, in *Archivio Penale*, 2021, No. 1, https://archiviopenale.it/File/DownloadArticolo?codice=6ccd8889-ad15–40e4–8f29–6f3f1d0dbc60&idarticolo=27098.

the new European rules aimed at combating the most serious forms of cross-border crime additional purposes, sometimes with symbolic implications. In fact, it is primarily through these rules that a common sense of justice is established, an ideal of retributive fairness aimed at affirming the substantial equality of Union citizens in their dual capacities as perpetrators and passive subjects. Furthermore, it is through the criminal laws under consideration that a „feeling of belonging to Europe as a political, legal, and cultural whole" is affirmed, expressive of homogeneous values and aimed at firmly striking at those behaviours that, by their inherent seriousness, overshadow its image as an „entity of law".[28]

While Art. 29 of the Treaty of Maastricht established a core set of offences (which were not always clearly defined), Art. 83 TFEU addresses minimum standards for serious cross-border crime known as „Euro-crimes", which include terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of payment instruments, computer crime, and organised crime. „*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*", it stated. Furthermore, in para. 2 of art. 83 TFEU, the so-called „accessory indirect criminal law competence" was introduced, which states that where the approximation of criminal laws and regulations of the Member States proves essential to ensuring the effective implementation of a Union policy in an area that has been subject to harmonisation measures, minimum rules concerning the definition of criminal offences and sanctions in the area concerned may be laid down by means of directives.[29] This rule is more complicated because the competencies are not identified for specific sectors but must be exercised in areas that have already been subject to harmonisation measures, a condition that does not appear to adequately fulfil the Union's delimiting function of criminal law intervention. The requirement of „essential" becomes important at this point: the latter, by subordinating the judgement of necessity of criminal intervention to the „*effective implementation of a Union policy*", as variously interpreted, opens the way for some to „*possible extensive attitudes to the detriment of subsidiarity and extreme ratio of criminal intervention*".[30]

Furthermore, under art. 83, para. 1, sub-para. 3 TFEU, based on criminal trends, the Council may issue a decision identifying additional areas of serious crimes, acting unanimously after receiving approval from the European Parliament, as it has done recently in

[28] *Ibidem*.

[29] This ancillary or annex competence developed by the case law in the area of environmental crime and ship-source pollution has been now expressly codified in art. 83, para. 2 TFEU.

[30] In this sense, see A. Bernardi, *op. cit*.

the case of violations of EU sanctions. The European Union has imposed sanctions on third-country, entities, and legal and natural persons, such as arms embargoes, import and export bans, the freezing of funds and economic resources, and travel bans. While the adoption of EU sanctions is centralised at the EU level, Member States are responsible for their implementation and enforcement. Significant differences between national systems, particularly in terms of offences and penalties for violations of EU sanctions, are thought to undermine their efficacy and the credibility of the EU. As a result, the Council decided to classify violations of Union restrictive measures as a type of crime that meets the requirements of art. 83, para. 1 TFEU.[31] Following the Council's decision to include violations of EU sanctions among the areas of „*particularly serious crime with a cross-border dimension*", the European Commission issued a proposal for a directive in December 2022, aiming to approximate the definition of criminal offences and sanctions for violating Union restrictive measures.[32] To summarise, „European criminal policy" now necessitates not only the expansion of domestic incriminatory offences or the introduction of new ones, but also, as anticipated in the 2011 Commission Communication,[33] the effective implementation of EU policies through criminal law.

## *5. Some Conclusive Remarks*

The evolution of the Union's criminal competence in the fight against transnational crime allows for some critical reflections in the conclusions. While the advancement of European integration has created new opportunities for illegal activities of various kinds, there has also been a push in the opposite direction in terms of accelerating the integration process in the specific area of crime fighting. As a result, the role of criminal law within European institutions has changed dramatically over the years, becoming a topic of widespread interest. The EU's ambition to create an integrated common judicial area is predicated on the cooperation of law-enforcement authorities and a high degree of convergence in criminal law and procedure. The Lisbon Treaty has broadened the legal basis because the criminal justice cooperation is an important component of

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[31] Council Decision (EU) 2022/2332, *on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in art. 83, para. 1 TFEU*, of 28 November 2022, in OJ L 308, of 29 November 2022.

[32] Proposal for a directive of the European Parliament and of the Council, *on the definition of criminal offences and penalties for the violation of Union restrictive measures*, of 2 December 2022, COM/2022/684 final, 2022/0398(COD).

[33] Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, COM/2011/0573 Final.

European integration and serves to promote respect for fundamental rights, based on the principle of mutual recognition of judgements and judicial decisions, including, if necessary, harmonisation of the Member States' laws and regulations in this area.

The mutual recognition of judicial decisions model was advanced by the political impulses provided by the European Council in Cardiff in 1998 and Tampere the following year on the basis of another key principle of European construction, namely mutual trust.[34] According to EU Court of Justice practice, there is a necessary implication that Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even if the outcome would be different if its own national law were applied.[35] This because judicial cooperation in criminal matters, but also in the entire area of freedom, security, and justice, is based on a relationship between Member States, between national judicial authorities and enforcement authorities, based on the commonality of fundamental values that constitute mutual trust and refer not only to the values of art. 2 TEU, but also, pursuant to art. 67, para. 1 TFEU, to respect for fundamental rights, as well as the different legal systems and traditions of the Member States. As a result, common minimum standards are required for one EU country's judicial decisions to be recognised by the others. The EU worked to protect the fundamental rights of suspects and

[34] The concept of mutual trust was expanded upon in the 2001 *Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters*, in OJ C 12, of 15 January 2001, which stated: „*The implementation of the principle of mutual recognition of decisions in criminal matters presupposes mutual trust of the Member States in each other's criminal justice systems. This trust is based in particular on the common ground of their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law*". There is an obvious differentiation that results from the 2005 *Hague Programme: strengthening freedom, security and justice in the European Union*, in OJ C 53, of 3 March 2005, where one part is defined as „*confidence-building and mutual trust*", even more so in the 2010 *Stockholm Programme — An open and secure Europe serving and protecting citizens*, in OJ C 115, of 4 May 2010, where there is a broad articulation distinguishing the two concepts.

[35] Court of Justice of the European Union, Judgment of 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*; also, with respect to the application of the European Arrest Warrant, see Court of Justice of the European Union, Judgment of 29 January 2013, Case C-396/11, *Radu* and Court of Justice of the European Union, Judgment of 28 June 2012, Case C-192/12 PPU, *Melvin West*. According to S. Montaldo, *I limiti della cooperazione in materia penale nell'unione europea*, Naples, 2015, p. 368, the required trust is divided into two levels: trust in the counterpart authority's work and the information that may be transmitted; and trust in the foreign criminal justice system as a whole, including the adequacy of the procedural institutions that characterise it, the suitability of the penalties, and the ability to protect fundamental rights to a satisfactory degree.

accused persons.[36] When designing and implementing criminal law, the EU must strike the right balance between measures that protect the rights of suspects and accused, on the one hand, and measures that facilitate the investigation and prosecution of crime, on the other.

The Court of Justice continues to provide guidance on when this mutual trust breaks down, as in the case of the extension of the optional ground of non-execution of the European Arrest Warrant.[37] However, as stated, „[a] *more holistic vision of what EU criminal justice should encompass is also one which clearly defines what it should not. It must naturally be strongly guided by the principle of subsidiarity. Nevertheless, some concept of the EU as a community and its citizens as equal stakeholders in certain interests would contribute to a more positive and comprehensive means of defining the legitimate subject-matter, and bounds, of any EU criminal justice area. Such a definition is the necessary first step to forging any such area*".[38] Conversely, the high level of fragmentation in the European legal framework risks affecting legal certainty and eventually leading to contradictory

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[36] Directive (EU) 2016/1919 of the European Parliament and of the Council, *on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings*, of 26 October 2016, in OJ L 297, of 4 November 2016; Directive (EU) 2016/800 of the European Parliament and of the Council, *on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, of 11 May 2016, in OJ L 132, of 21 May 2016; Directive (EU) 2016/680 of the European Parliament and of the Council, *on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*, of 27 April 2016, in OJ L 119, of 4 May 2016; Directive (EU) 2016/343 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 the trial in criminal proceedings*, of 9 March 2016, in OJ L 65, of 11 March 2016; Directive 2013/48/EU of the European Parliament and of the Council, *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*, of 22 October 2013, in OJ L 294, 6. November 2013,; Directive 2012/13/EU of the European Parliament and of the Council, *on the right to information in criminal proceedings*, of 22 May 2012, in OJ L 142, of 1 June 2012; Directive 2010/64/EU of the European Parliament and of the Council, *on the right to interpretation and translation in criminal proceedings*, of 20 October 2010, in OJ L 280, of 26 October 2010.

[37] See the case of a real risk of inhuman or degrading treatment for detention conditions in the Court of Justice (Grand Chamber), 5 April 2016*, Aranyosi and Căldăraru* (C-659/15 PPU), Joined Cases C-404/15 and C-659/15 PPU and in the Court of Justice (Grand Chamber), 15 October 2019, *Dorobantu*, C-128/18.

[38] M. L. Wade, *Developing a Criminal Justice Area in the European Union*, 2014, p. 53, the study was conducted on behalf of the Directorate General for internal policies policy, Department C: citizens' rights and constitutional affairs, www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493043/IPOL-LIBE_ET(2014)493043_EN.pdf.

outcomes, playing right into the hands of the very organised criminal groups it was designed to combat.[39] Finally, cooperation between the EU and the acceding countries in the fields of justice and home affairs is critical to the enlargement process. Its goal is to assist countries in meeting the political criteria set by the Copenhagen European Council (institutional stability, rule of law, and respect for human rights),[40] which is made more difficult when some Member States face multiple implementation challenges. Furthermore, given Ukraine's status as a candidate country for accession, the war in Ukraine raises new concerns about the enlargement of the European Union and its area of freedom, security, and justice.

[39] According to L. Picotti, *Sui tre volti del diritto penale comunitario: passato e future,* in C. Grandi (ed.), *I volti attuali del diritto penale europeo. Atti della giornata di studi per Alessandro Bernardi,* Pisa, 2021, p. 124: „*starting from the identification and graduation of 'European' or 'Europeanised' legal goods deserving of common criminal protection, from the requirements of 'European' offensiveness that make it necessary to exercise the Union's criminal jurisdiction in compliance with the principle of criminal, as well as European, subsidiarity, as well as of the principle of proportionality of penalties and of the other possible 'punitive' sanctions (including against entities), with respect to the different offences to the different legal goods, according to an overall coherent framework, which overcomes the sectoral fragmentation that still characterises much of the Union's criminal policy*". See also V. Mongillo, *Strengths and Weaknesses of the Proposal for a EU Directive on Combating Corruption*, in *Sistema Penale*, No. 7, 2023, p. 19.

[40] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on the EU Strategy to tackle Organised Crime 2021–2025*, of 14 April 2021, COM(2021) 170 final, para. 1.3: „*It is essential to step up international cooperation including through the activities of the relevant justice and home affairs agencies, in particular in relation to the neighbourhood and enlargement countries*" and „*to equip partners with the tools allowing them to root out complex criminal structures potentially affecting the EU*".