10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?

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ABSTRACT

10 years ago, on 1 December 2009, the Treaty of Lisbon entered into force and brought judicial cooperation in criminal matters from the sphere of intergovernmental cooperation fully into the fold of EU law and policies. Almost all former framework decisions in the field of substantive criminal law have now been "Lisbonised," i.e., recast in the ordinary legislative procedure as legal acts (directives) of the Union in the sense of Art. 288 TFEU. However, in recent years, the enthusiasm of the early years has waned a bit and there seems to be little appetite for bold new legislative projects. Against this backdrop, the present article takes stock of the progress made in the harmonisation of substantive criminal law in the EU and attempts to look into its future.

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I. Introduction

When the Treaty of Lisbon entered into force on 1 December 2009, the new legal foundation ushered in a new area for the European Union. Qualified majority voting in the Council and equal participation of the European Parliament in law-making became the default rules when the former co-decision procedure was recast as the "ordinary legislative procedure". The Union acquired full legal personality and the pillar structure was abolished. The Charter of Fundamental Rights was elevated to the status of primary law. And, crucially, in the present context, the former intergovernmental cooperation in the area of justice and home affairs was inserted into the Treaty on the Functioning of the European Union (TFEU) as the new Title V "Area of Freedom, Security and Justice," directly after the title on free movement of persons, services, and capital. Indeed, this "area" was even promoted to a Union goal in Art. 3(2) of the Treaty on European Union (TEU).[1]

It may sound surprising then that, when it comes to the Union's competence for substantive criminal law, the Lisbon Treaty did not bring with it any enlarged law-making powers but actually restricted, to some extent, the Union's competence in this field when compared to the situation under the Treaty of Amsterdam. In light of the provisions in the TFEU, it is clear that the Union has no mandate to harmonise or codify criminal law comprehensively. The harmonisation of procedural law is limited, in principle, to three specific areas[2] and can only take place "to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation having a cross-border dimension." In short, the Union cannot adopt a complete code of criminal procedure, and any harmonisation in the area of criminal procedure must be based on the need for judicial cooperation.

Likewise, in the area of substantive criminal law, similar (albeit not identical) restrictions apply, as the Union's competence has been limited to establishing "minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension," areas which are moreover exhaustively listed in Art. 83(1) TFEU. The criminal "annex competence" to ensure the effective implementation of Union policies in areas that have been subject to harmonisation measures has been explicitly codified in Art. 83(2) TFEU, thereby excluding any recourse to unwritten "implied powers". A new legal basis was finally created in Art. 325(4) TFEU but rejected by the Council at the first opportunity.

To explain this further and provide some background, the evolution of EU substantive criminal law will be briefly outlined below in section II. Section III will then sketch out the *status quo* of the harmonisation of substantive criminal law in the EU in order to answer the question set out in the title. Lastly, in section IV, we will try to look into the future and ask *quo vadis* EU (substantive) criminal law?

II. A Brief History of EU Criminal Law and Legal Bases

Unsurprisingly, criminal law and policy was absent from the original founding Treaties of what was, at the time, a regional economic integration organisation.[3]

1. From Schengen to Lisbon

The development of the Union's competence in the area of criminal law dates back to the Convention Implementing the 1985 Schengen Agreement (1990) and the Treaty of Maastricht (1992).[4] While the original TEU contained provisions on cooperation in the fields of justice and home affairs (Title VI), competence to harmonise criminal law was not directly mentioned in these Treaty provisions. This did not, however, prevent the Union from adopting various conventions under international law (notably, on the protection of the

financial interests of the Union[5]) whose clear purpose was to define the elements of certain criminal offences and relevant sanctions for them.

As is so often the case in the evolution of EU law, however, the real impetus for change in EU competences may well have emerged even earlier from the jurisprudence of the European Court of Justice. In fact, Member States' obligation to protect the Community's financial interests, including by means of criminal law, had already been formulated in the late 1980s in the famous landmark judgment of the Court in the Greek Maize Case.[6] In this ruling, the principle of effective and equivalent protection as regards the protection of the Union budget was born, and language from that judgment, for instance on "effective, proportionate and dissuasive" sanctions, still resonates today in the Directive on the fight against fraud to the Union's financial interests by means of criminal law (the so-called "PIF Directive").[7]

In the Treaty of Amsterdam (1997), the Union's competence to harmonise criminal law was, for the first time, unambiguously recognised through the inclusion of new provisions on the subject.[8] The introduction of a new legal instrument called "framework decision" in the field of justice and home affairs represented a paradigm shift. Even though criminal law was still confined to intergovernmental cooperation under what was then the third pillar of the Union (rather than the Community method), framework decisions were acts of Union law, not public international law. In 1999, a special European Council, held in Tampere/Finland, adopted conclusions of great symbolic and programmatic significance that were to guide the development of European criminal law for many years to come.[9]

In the following years, the Council adopted a large number of framework decisions in the area of criminal law and cooperation.[10] In addition, the European Court of Justice, in another landmark judgment, held that, while it is generally true that neither criminal law nor the rules of criminal procedure fall within the Community's competence, this did not prevent the Community legislature from obliging Member States to adopt criminal law measures that are necessary to ensure that the rules laid down in a certain policy area (in the case at hand, on environmental protection) are fully effective.[11]

Ultimately, the Treaty of Lisbon (2007) expressly recognised, for the first time, the competence of the Union to ensure a high level of security through the approximation of criminal laws, if necessary.[12] According to this Treaty, substantive criminal law can be harmonised according to three different legal bases: Art. 83(1) TFEU (to regulate "Euro-crimes"), Art. 83(2) TFEU (to ensure the effective implementation of EU policies), and Art. 325(4) TFEU (to protect the EU's financial interests).

2. Euro-crimes (Art. 83(1) TFEU)

Under Art. 83(1) TFEU, the EU may adopt directives establishing minimum rules in respect of a list of ten specific offences (the so-called "Euro-crimes"): terrorism, trafficking in human beings, 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. The list is exhaustive.[13] Additional Euro-crimes can only be defined by unanimous decision of the Council and with the prior consent of the European Parliament. A legal basis for a comprehensive codification of substantive criminal law has not been included in the Treaties.

The minimum rules may cover the definition of punishable acts, i.e., elements determining what behaviour is to be considered as constituting a criminal act as well as the type and level of penalties applicable to such acts. Euro-crimes are offences which, by definition in the Treaty, deserve to be dealt with at the EU level because of their particularly serious nature and their cross-border dimension.

3. Offences related to ensuring the effective implementation of EU policies (Art. 83(2) TFEU)

As mentioned above, the European Court of Justice has held that the EU is also competent to adopt common minimum standards on the definition of criminal acts and sanctions if these are indispensable for ensuring the effectiveness of a harmonised EU policy. This ancillary or annex competence developed by the case law in the area of environmental crime and ship-source pollution has been expressly codified in the Treaties: Art. 83(2) TFEU authorises the European Parliament and the Council, acting on a proposal from the Commission, to establish "minimum rules with regard to the definition of criminal offences and sanctions," where the approximation of criminal laws and regulations of the Member States is essential to ensure the effective implementation of a Union policy in an area that has been subjected to harmonisation measures. It follows that a recourse to unwritten "implied" powers is no longer possible.[14]

4. Offences related to the protection of the financial interests of the EU (Art. 325 TFEU)

It has always been a problem for the EU that the protection of its very own budget is at the mercy of the Member States' willingness to investigate and prosecute.[15] In a context of budgetary austerity, protecting the European taxpayers' money and fighting the abuse of EU public funds is even more of a priority for the Union. This priority is reflected in the TFEU, which sets out the obligation, and legal basis, for the protection of the financial interests of the EU in a dedicated article. While its predecessor, Art. 280 of the Treaty establishing the European Community, explicitly excluded measures concerning the application of national criminal law or the national administration of justice, Art. 325(4) TFEU contains no such limitation. If follows, *a contrario*, that the article is a legal basis not only for administrative measures but also for measures to protect the EU's financial interests by means of criminal law.[16]

III. The Harmonisation of Substantive Criminal Law in the EU

Against this historical background, this section will analyse the progress that has been made in the harmonisation of substantive criminal law over the past ten years, since the Lisbon Treaty came into effect.

1. Use of legal bases

Even though the new legal framework introduced by the Lisbon Treaty did not fundamentally alter or enlarge the possible scope of EU criminal law, it can be said that it considerably enhanced the possibility to progress with the development of a coherent EU criminal policy, which is based on considerations of both effective enforcement and a solid protection of fundamental rights.

a) Euro-crimes (Art. 83(1) TFEU)

A closer look at the ten Euro-crimes reveals that most of these criminal offences were already covered by pre-Lisbon legislation, i.e., framework decisions. This gives rise to the suspicion that the authors of the Lisbon Treaty may not have chosen them through a systematic evaluation exercise starting with a blank sheet of paper – but rather by looking at existing law. This is a bit unfortunate, as it implies that the enumeration is somewhat random. Moreover, it does not even encompass all pre-existing legislation.[17]

Most of the framework decisions on substantive criminal law have now been repealed by directives based on Art. 83(1). They are as follows:

- The 2011 Directive on preventing and combating trafficking in human beings and protecting its victims;[18]
- The 2011 Directive on combating the sexual abuse and sexual exploitation of children and child pornography;[19]
- The 2013 Cybercrime Directive;[20]
- The 2014 Directive on the protection of the euro against counterfeiting;[21]
- The 2017 Directive on terrorism;[22]
- The 2017 Drugs Directive;[23]
- The 2018 criminal anti-money laundering Directive[24];
- The 2019 non-cash counterfeiting Directive[25].

This means that, of the ten Euro-crimes, seven have been addressed in specific directives.[26] While arms trafficking, corruption, and organised crime have not been the subject matter of dedicated directives (yet), they are referred to in the other directives (e.g., as predicate offences for money laundering).

b) Offences related to ensuring the effective implementation of EU policies (Art. 83(2) TFEU)

Unlike the first paragraph of Art. 83 TFEU, the second paragraph of that article does not establish a closed list of specific crimes but makes the prior adoption of harmonisation measures a precondition for the adoption of criminal law measures at the EU level. EU institutions need to make policy choices in terms of the use or non-use of criminal law (instead of other measures, such as administrative sanctions) as tools to enforce legislation and to decide which EU policies require the use of criminal law as an additional enforcement tool. Already in 2011, the Commission issued specific guidance on this point in a Communication which outlined the principles that should guide EU criminal law legislation and the policy areas where it might be needed.[27]

As is well known, the policies of the European Union are wide-ranging and cover such diverse areas as road transport, environmental protection, consumer protection, social policies, regulations for the financial sector, data protection, and the protection of the financial interests of the EU. All of them require effective implementation but not necessarily through criminal sanctions. Certainly, criminal law can, as a last resort (*ultima ratio*), play an important role when other means of implementation have failed. The development of an EU criminal policy on the basis of Art. 83(2) TFEU is therefore particularly sensitive and the need to introduce criminal measures must be demonstrated in a way that goes beyond the traditional scrutiny imposed by the principles of proportionality and subsidiarity. These considerations may explain why, to date, only two directives have been based on Art. 83(2): the 2014 Market Abuse Directive[28] and the 2017 PIF Directive.[29] [30]

It is easy to see why the Commission, in 2011, chose market abuse as the first area to buttress its administrative regulation of insider trading and market manipulation with criminal sanctions: In the wake of the financial crisis, the case for the added value of action at the European level to strengthen and better protect the integrity of the EU financial markets was easy to make. Therefore, the 2014 Directive requires Member States to take measures necessary to ensure that insider trading and market manipulation are subject to

effective, proportionate, and dissuasive criminal penalties. The Directive thus complements the Market Abuse Regulation,[31] which improved the existing regulatory framework in the EU and strengthened administrative sanctions. The PIF Directive, however, was also based on Art. 83(2) TFEU, but this was an incorrect legal basis, as will be explained in the following section.

c) Offences related to the protection of the financial interests of the EU (Art. 325 TFEU)

In 2012 already, the Commission proposed a Directive to criminalise fraud and other crimes affecting the financial interests of the Union. This proposal[32] was based on Art. 325(4) TFEU, which – after the changes introduced by the Lisbon Treaty (i.e., the deletion of the exclusion of criminal law measures) – offered a new legal basis that was *lex specialis* compared to Art. 83 TFEU. During the negotiations, however, this legal basis was changed to Art. 83(2) by the Council. In the Council's view, all measures of a criminal law nature – irrespective of their purpose – have to be based on articles from Title V of the TFEU.

Surprisingly, the European Parliament accepted this change. Even more surprisingly, the Commission did not attack the choice of legal basis in the European Court of Justice, as it had in previous cases, despite the Court's encouraging jurisprudence on the choice of legal bases, in general,[33] and on criminal law measures, in particular. Indeed, the analogy to the environmental crime directive, in which the judges in Luxembourg annulled Council Framework Decision 2003/80/JHA on the grounds that its main purpose was the protection of the environment and should therefore have been properly adopted on the basis of Community law (at that time Art. 175 EC), is striking.[34] It is therefore submitted that an unfortunate precedent was created by not challenging the legal basis of the PIF Directive in court. This means that, in the future, the nature of the measure, rather than its finality, will be considered decisive for the choice of legal basis. Under these circumstances, it seems doubtful if Art. 325 TFEU will ever be used as the basis for criminal law measures.

2. Content and structure

The directives adopted so far all have more or less the same structure and are usually limited to the following:

- Definition of the offences;
- Provisions on aiding and abetting, inciting, and attempt;
- Liability of legal persons;
- Sanctions for natural and legal persons; and
- Jurisdiction.

Some contain additional provisions, e.g., on confiscation, investigative tools, and the exchange of information. Very few go beyond these points and take a more "holistic" approach to criminal law, including provisions for prevention, training, and investigation. For example, the two 2011 Directives on trafficking in human beings and on the exploitation of children contain provisions aimed at preventing the prosecution of victims.[35] This aim is achieved, for instance, by the obligations to use "effective investigative tools:" to support and give assistance to victims; to provide for specific assistance, support, and protection measures for child victims; and to compensate victims.

a) Sanctions

So far, the approximation of sanctions was limited to the obligation of Member States to provide for effective, proportionate, and dissuasive sanctions in their national law and to common minimum levels of

the *maximum* sanctions against natural persons (the so-called "minimum-maximum penalties approach"). This means that there is no harmonisation of minimum penalties. That is understandable to the extent that criminal penalties are an extremely sensitive area for the Member States, as they touch upon a core area of national sovereignty and very much reflect national traditions and values. Harmonising concrete minimum sentences would thus create huge problems in practice. However, the effect of the current system of approximation on serious cross-border criminality remains difficult to demonstrate.

Therefore, a better approach for the future might be to harmonise penalties according to categories of offences. A directive would not prescribe a concrete minimum sentence (e.g., two years of imprisonment) but instead classify the offence into a system of categories (e.g., a class two offence). The Member States would remain free to determine the range of penalties for each class. This has been advocated in the literature, as it would respect Member States' sovereignty while at the same time providing for a coherent system of punishment throughout the Union.[36]

b) Other provisions and legal concepts

The various instruments adopted in criminal matters at the EU level contain references to some legal notions that are used more regularly, such as "serious cases" and "minor cases." Although one might argue that flexibility needs to be maintained in order to adapt these notions to specific instruments, and also to the particularities of the national systems of criminal law, it would seem preferable to develop a common understanding of these legal notions. Indeed, the absence of guidance on the interpretation of these legal notions has led to implementation issues, e.g., in the case of the Market Abuse Directive.

Likewise, the concepts of incitement, aiding and abetting, and attempt, which are used in all the criminal law directives, have not been harmonised. Again, it can be argued that the interpretation of these legal notions should be left to national law. Nevertheless, this means that the exact extent of criminalisation will vary between the Member States. It would seem desirable to at least agree on recitals for the coherent application of these concepts.

Another area in which no uniform level has been achieved is the liability of legal persons. This liability can be civil, administrative, or criminal. The directives do not impose criminal liability. Nonetheless, a certain trend towards establishing corporate criminal liability in the past is perceptible. It seems doubtful, however, whether criminal liability is more effective than administrative liability. EU competition law is a striking example of how highly effective administrative sanctions can be and, in all likelihood, how they can even be more severe than criminal penalties. At the end of the day, a fine is a fine for a company, and the absolute amount is more important than its label.

IV. The Way Forward

The 2011 Commission Communication on EU criminal policy[37] concluded with a "vision for a coherent and consistent EU Criminal Policy by 2020.", so now is the time for a reality check.

On the one hand, the Communication identified a number of policy areas that have been harmonised and where the Commission considered criminal law measures at the EU level to be required. These areas included the financial sector (market abuse), the fight against fraud affecting the financial interests of the Union, and the protection of the euro against counterfeiting. All of these areas have been "Lisbonised." On

the other hand, the Communication gave examples of other policy areas where the role of criminal law could be explored further as a necessary tool to ensure effective enforcement:

- Road transport, concerning, for instance, serious infringements of EU social, technical, safety, and market rules for professional transports;
- Data protection, in cases of serious breaches of existing EU rules;
- Customs rules on the approximation of customs offences and penalties;
- Fisheries policy, in order to counter illegal, unreported, and unregulated fishing; and
- Internal market policies to fight serious illegal practices, such as counterfeiting and corruption or undeclared conflicts of interest in the context of public procurement.

More than eight years later, none of these areas has been addressed in a Commission proposal. Likewise, as noted above, not all Euro-crimes have been defined in specific directives, either. Corruption and organised crime, in particular, would lend themselves to legislation at the Union level, because they are also already the subject of international conventions[38] and have been referred to in Union legislation.[39]

Moreover, as Commission President *Ursula von der Leyen* noted in her political guidelines for the new Commission,[40] the EU should do all it can to prevent domestic violence, protect victims, and punish offenders. Therefore, EU accession to the Istanbul Convention on fighting violence against women and domestic violence remains a key priority for the Commission. If the Council continues to block accession, however, the Commission will consider tabling proposals on minimum standards regarding the definition of certain types of violence and strengthening the Victims' Rights Directive.[41] In addition, the Commission will propose adding violence against women to the list of Euro-crimes in the TFEU.

At the same time, it must be noted that Member States' appetite for new initiatives seems to be rather limited. In a debate on the "Future of EU substantive criminal law" launched by the Romanian Presidency in 2019, Member States stated that "further 'Lisbonisation' seems unnecessary." They underlined that, at this stage, the emphasis should be on ensuring the effectiveness and quality of implementation of *existing* EU legislation.[42] Likewise, they saw no need to develop a common understanding of certain notions, such as "serious crime" and "minor cases." Nevertheless, Member States agreed that it may be appropriate to carry out an analysis of the necessity and advisability of establishing (further) minimum rules concerning the definition of criminal offences and sanctions in certain areas, including environmental crime, non-conviction based confiscation, manipulation of elections, identity theft, and crimes relating to artificial intelligence. This was deemed preferable to extending the scope of Art. 83(1) TFEU.

The prediction can thus be ventured that the harmonisation of substantive criminal law on the basis of Art. 83(2) TFEU will continue to make further progress, also in new areas not covered by previous framework decisions. The reticence of Member States as regards any harmonisation of concepts belonging to the "general part" of penal codes will inevitably lead to tension that can only be solved with a bolder approach. It is to be hoped that the Commission does not lose sight of this challenge.

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1. On this "new era" in judicial cooperation in criminal matters, cf. e.g. F. Meyer, in: H. von der Gröben/J. Schwarze/A. Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. 2015, Vor Art. 82-86 AEUV, mn. 21 et seq.↩
2. I.e. admissibility of evidence, rights of individuals in criminal procedure, and rights of victims of crime. According to a flexibility clause in Art. 82(2)(d) TFEU, harmonisation can also concern "any other specific aspects of criminal procedure" that have been identified by unanimous Council decision with consent of the European Parliament.↩
3. Interestingly, however, the Treaty establishing the European Atomic Energy Community contained from the beginning an obligation to criminally prosecute breaches of professional secrecy by an official, cf. Art. 194(1) of the Euratom Treaty.↩

4. On the history of EU criminal law, see also D. Flore/S. Bosly, *Droit Pénal Européen. Les enjeux d'une justice pénale européenne*, 2nd ed. 2014, pp. 25 et seq.↩
5. Convention drawn up on the basis of Art. K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (*O.J.* C 316, 27.11.1995, 49), the so-called "PIF Convention" (where PIF stands for the French term "protection des intérêts financiers").↩
6. ECJ, 21 September 1989, Case 68/88, *Commission v Hellenic Republic*, [1989] ECR 2965.↩
7. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J.* L 198, 28.7.2017, 29–41. For an introduction into this Directive, see A. Juszczak and E. Sason, (2017) *eucrim*, 80↩
8. Art. K.1 and K.3.↩
9. See the article by Lorenzo Salazar in this issue.↩
10. E.g.: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA); Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA); Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA); Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.↩
11. ECJ, 13 September 2005, Case C-176/03, *Commission v Council* (on the legal basis for Framework Decision 2003/80/JHA – Protection of the environment).↩
12. Art. 67(3) TFEU *in fine*.↩
13. As a consequence, nowadays there would be no legal basis to recast, as a directive, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (*O.J.* L 328, 6.12.2008, 55–58).↩
14. Cf. F. Meyer, in: H. von der Gröben/J. Schwarze/A. Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. 2015, Art. 83 AEUV, mn. 47.↩
15. To address this issue, the European Anti-fraud Office (OLAF) was set up to exercise the Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, cf. Art. 2(1) of Commission Decision 1999/352 of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (*O.J.* L 136, 31.5.1999, 20). Moreover, on the basis of Art. 86 TFEU, the European Public Prosecutor's Office (EPPO) was established by Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (*O.J.* L 283, 31.10.2017, 1).↩
16. This is the view clearly shared in the doctrine, cf. e.g. H. Spitzer/U. Stiegel, in: H. von der Gröben/J. Schwarze/A. Hatje (ed.), *Europäisches Unionsrecht*, 7th ed. 2015, Art. 325 AEUV, mn. 68, with further references. The opposing view will be discussed below in section III.3.↩
17. ECJ, *Commission v Council*, op cit. n. 13.↩
18. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *O.J.* L 101, 15.4.2011, 1–11.↩
19. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *O.J.* L 335, 17.12.2011, 1.↩
20. 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, *O.J.* L 218, 14.8.2013, 8–14.↩
21. Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, *O.J.* L 151, 21.5.2014, 1.↩
22. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *O.J.* L 88, 31.3.2017, 6.↩
23. Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 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, *O.J.* L 305, 21.11.2017, 12.↩
24. Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, *O.J.* L 284, 12.11.2018, 22–30.↩
25. Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, *O.J.* L 123, 10.5.2019, 18–29.↩
26. Moreover, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (*O.J.* L 127, 29.4.2014, 39) was based both on Art. 82(2) and Art. 83(1) TFEU.↩
27. 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) 573 final.↩
28. Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), *O.J.* L 173, 12.6.2014, 179.↩
29. Op cit. n. 7.↩
30. In addition, there are the two directives on environmental crime and ship-source pollution that were adopted prior to the Lisbon Treaty on the basis of Art. 175 EC and Art. 80(2) EC, respectively, following the judgment of the ECJ (cf. n. 11 above): Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law; and 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.↩
31. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), *O.J.* L173, 12.6.2014, 1.↩

32. 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.↩
33. Cf., *inter alia*, ECJ, Case C-300/89, *Commission* v *Council* ('*Titanium dioxide*'), para. 10, and Case C-336/00, *Huber*, para. 30.↩
34. ECJ, *Commission v Council*, op cit. n. 11, para. 51.↩
35. Given the nature of the offences, victims can sometimes technically become accomplices in criminal activities, which they have been compelled to commit, cf. Art. 14 of Directive 2011/92, op. cit n. 19.↩
36. H. Satzger, "The Harmonisation of Criminal Sanctions in the European Union – A New Approach", (2019) *eucrim*, 115.↩
37. Op cit. n. 27.↩
38. Above all, the UN Convention against Corruption (UNCAC) and the UN Convention on Transnational Organised Crime (UNTOC).↩
39. E.g.: Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *O.J.* L 192, 31.7.2003, 54.↩
40. Ursula von der Leyen, "A Union that strives for more: My agenda for Europe, Political guidelines of the Commission 2019-2024", available at: <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> accessed 16 January 2020.↩
41. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *O.J.* L 315, 14.11.2012, 57.↩
42. See Council doc. 7945/19 of 11 April 2019, p. 7. For the debate in the Council, see also T. Wahl, "Future of EU Substantive Criminal Law", (2019) *eucrim*, 85.↩

* Authors statement

The views expressed in this article are those of the authors and do not necessarily reflect the official opinion of the European Commission.

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