Where Should the European Union Go in Developing Its Criminal Policy in the Future?

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ABSTRACT

The article reflects on the post-Lisbon framework for EU criminal policy. While the Treaties introduced QMV and co-decision, they also restricted competences to certain procedural and substantive aspects under the principle of conferral. Nilsson warns against legislative lethargy under the "Festina Lente" approach and calls for further work in evaluation, judicial training (including a proposed "Eurotrain"), crime prevention, and harmonisation of offences such as corruption, money laundering, and organised crime. He stresses that fragmented approximation undermines mutual trust and effectiveness, and argues that long-term development will require Treaty change to overcome the casuistic limits of Arts. 82–83 TFEU. Ultimately, the EU must decide between deeper integration towards federal-style criminal law or maintaining fragmented national systems with cautious, piecemeal approximation.

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The Lisbon Treaties sought to address several of the criminal policy shortcomings that I have mentioned in the editorial of this number of eucrim. Whether they have been adequately addressed is still too early to assess, but some of the experiences show that we are on the right track. In particular, the use of QMV (Qualified Majority Voting) and co-decision under the ordinary legislative procedure have permitted less tortuous compromises to be made.

It should also be said that the Lisbon Treaties also brought some new challenges to the development of criminal policy in the European Union. Contrary to what many believe, the Union's criminal law competence was restricted compared with the criminal law competences of the Amsterdam Treaty, since it was made clear that the Union's competence in this area is also based on the principle of conferral. The Union can also only deal with certain procedural issues, certain defined aspects of substantive criminal law, and at most when it is essential to support already adopted policies. In negotiations in the Council, it is sometimes heard that the Union has no competence in relation to certain parts of Commission proposals, e.g., when preventive aspects are dealt with or when statistics are required. When the Council discussed confiscation, it was questioned whether confiscation was a "sanction," and the final result was that the Union only could adopt rules on confiscation relating to the so-called eurocrimes enumerated in Art. 83:1. Confiscation provisions of a general nature could not be adopted.

I. Within this restricted framework provided by the Lisbon Treaty, what could or should the Union do?

Discussions in the context of preparation of the Art. 68 strategic guidelines show that there is not much enthusiasm within the Union for taking many legislative initiatives in the next five years. Words like "consolidation," "implementation," "evaluation," and "no new legislation" have become buzzwords in the debate. In reality, this means legislative lethargy and comes close to a stop in the development of an EU criminal policy. At the recently held Commission conference called "Assises of Justice," the key words repeated by many speakers were "*Festina Lente*" – make haste slowly.

There are a number of areas, however, where the Union could, and should continue its work – and not necessarily legislative work. I will deal with some of these areas in the following.

But first, I would like to make a general remark. Criminal law has been territorially anchored for centuries and even thousands of years. It is an extremely sensitive part of national law, where national parliaments and a number of authorities dealing with law enforcement in the widest sense of the word are involved. It involves the ultimate power of the nation state, namely to arrest and punish individuals that have infringed the criminal code or criminal provisions in specific parts of the legislation.

At the same time, crime has become increasingly international; criminals use the opening up of borders for their own criminal purposes, and they have become highly professional. There is an obvious need for the Member States to cooperate and become more efficient in fighting crime. As one Justice Minister put it: "We cannot fight 21st Century criminals with the weapons of the 19th Century." "Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice," as stated in the preamble to the Framework Decision on the European Arrest Warrant.

There is a paradox in this opening statement – we are trying to create (the Treaty of Lisbon has in fact declared it) an *area* of justice, but at the same time criminal law is exceptionally territorial. And the Treaty

itself obliges the Union to respect the different legal systems and traditions of the Member States (both, in general, in Art. 67 and, in particular, in Art. 82, where they are taken into account). It is clear that the equation is very difficult to apply in a consistent way.

II. Where should the Union continue its criminal law work?

One area in which the Union could do more is the area of evaluation, where the Lisbon Treaties provide a clear legal basis in Art. 70 for a so-called "peer evaluation." The Stockholm Programme has also called on the Commission to come up with a proposal in the area. This has never been done (although the Schengen evaluation was finally adopted on the basis of Art. 70, but it was proposed with Art. 77 as its legal basis), and the Union is still evaluating criminal policies, in fact policies on organized crime, on the basis of an old Joint Action from 1997.

Another area where the Union should continue its work is in the field of judicial training. There as well, the Stockholm Programme made a number of proposals to further this very important area for the creation of mutual trust. However, one proposal was never formally made: the setting up of a special judicial training school within the Union – "Eurotrain." Why should the Union have a police school (CEPOL) and not a judicial one? There is a big difference between networks for judicial training, which are to a great extent focused on national procedures and practices, and a truly European Union School, where general principles of European law, the Charter, and the ECHR as well as the case-law of the ECJ and the ECtHR would be taught. The EU-specific judicial ignorance of judges and prosecutors in many parts of Europe is surprisingly poor, probably because they believe that criminal law is only national and not European. For example, the *Pupino* case is not known among most judges or prosecutors I meet. It is even unknown in many Ministries. Where it is known, it is not applied. A 3-month course in a European Union School would remedy this.

The Lisbon Treaties for the first time also gave explicit competences to the Union in the area of crime prevention, to the exclusion of approximation. Has the Union set up a research institute, as foreseen in the Stockholm Programme? How much money is spent every year on crime prevention? Are we seriously trying to approximate the collection and analysis of crime statistics at the European Union level? The answer is no.

When it comes to the approximation/harmonisation of substantive criminal law and procedural law, is it appropriate that we should take a "legislative break" and concentrate on implementation and evaluation instead? All instruments made under the Amsterdam Treaty should have been implemented by now, several even many years ago, but many of them have either not yet been implemented or have just recently been implemented. Is this an argument for not adopting any new legislation if it is necessary, as shown in impact assessments? Nowadays, impact assessments are a Treaty obligation (but one can easily argue that the Union should continue to improve them).

The European Commission recently published its first anti-corruption report. The report contains country reports, but the Commission did not foresee making any proposals as regards the substantive criminal law aspects of corruption despite the fact that the EU acquis relating to corruption is not that well developed. We have a Framework Decision on private corruption (with exceptions and compromises), a Protocol to the PIF Convention on corruption within the framework of the protection of the financial interests of the Union, a convention on corruption of EU officials, and a contact point network on corruption with a very uncertain future, which seems not to be linked to the Union at all.

This is not much. It is fragmented and not comprehensive. Is so-called trafficking in influence an offense everywhere in the Union? It is not. If a French judge asks for a search in another Member State on the basis

of a trafficking in influence offense, he might not get it because it is not an offense in the other Member State because of lack of double criminality. This is far from being an area of justice.

And what about the offense of money laundering? This is another one of the ten so-called euro-crimes in Art. 83:1 TFEU. There are still Member States of the Union in which it is not punishable to launder the proceeds from your own drug trafficking or kidnapping ransoms. And a number of exceptions still exist in relation to the all-crimes approach of the 1990 (yes, 1990!) Council of Europe Convention on money laundering.

When it comes to organised crime, as mentioned in Art. 83:1, the fact is that the Union has no clear definition of what that is. We have a "definition" in a Framework Decision of a "criminal organisation" but there are so many loopholes in it that it is rendered practically useless for purposes of approximation.

On the non-repressive side, the Union has improved its record considerably in the past few years. We already have a full corpus on victim's rights with six adopted Directives that fully or partially deal with such issues. Moreover, the Union has adopted three measures from the Stockholm Roadmap on suspected and accused person's rights in criminal proceedings, and three more measures are under negotiation.

But more still has to be done. The codes of criminal procedure of the Member States are not confined to six measures but also raise a number of other issues. I am not suggesting that we have to make a European Code of Criminal Procedure – this is pure utopia – but I am suggesting that we need to approximate more standards for suspects in order to increase mutual trust and confidence among citizens, legislators, and the judiciary/law enforcement. It is only in this way that we can progressively increase confidence and trust in each other's judicial systems while fully respecting each other's legal systems and traditions. Issues like judicial remedies come to my mind in this context.

III. Long-term EU criminal policy

From a long-term perspective, it seems clear to me that, if the Union wishes to develop its criminal policy, there is a need for a Treaty change. The casuistic, piecemeal approach of Art. 82 and, in particular, Art. 83, is not very appropriate in order to develop a genuinely effective criminal policy, and is certainly contrary to the very idea of the creation of an *area* of justice.

The right of extension of Union competence provided in Art. 83 is not sufficient, as it requires unanimity and the consent of the European Parliament. The fight against racism and xenophobia is but one example. We have an old Framework Decision but are not allowed to do further legislative work in this area (to the extent that it goes beyond discrimination), since there is no legal basis in Art. 83 for doing so. And yet the fight against racism and xenophobia is mentioned in paragraph 3 of the core Art. 67 as one of the key issues for the Union. There is no logic, but only politics to this choice. The Union, moreover, does not have any competence to approximate all 32 categories of offenses mentioned in Art. 2 of the Framework Decision on the European Arrest Warrant.

In the longer term, the Union will have to make a choice on where to go: in the direction of a United States of Europe, with federal crimes coexisting with "local" crimes, or towards maintaining the 30 different legal systems we have with a careful and cautious fragmented approximation on a step-by-step basis? No doubt the latter approach will prevail. But it may also lead to further fragmentation, opt-ins and opt-outs, and more complexity for law enforcement and judges to the detriment of fighting serious, organised, and cross-border crime – an area where we all share a common view.

Criminal law is a whole. It is a system. If one touches one part of the system, other parts will be affected as well. This is true not only for Member States but also for the Union. If we are serious about our stated Treaty

aim, namely to create an *area* of justice, we need to take down some more of our borders for law enforcement and judicial authorities as well.

We have now inserted into the Treaty the principle of mutual recognition. Taken to its extreme, this would mean that a judicial decision by a judge in one Member State would be immediately and unconditionally executed without any further formality. The reality in Council negotiations, even immediately after 9/11, was/is totally different. In the Framework Decision on the EAW, there are three mandatory grounds for non-recognition, seven facultative ones (which a number of Member States have made mandatory through legislation), and at least seven other different ways of postponing surrender to another Member State. In the European Investigation Order Directive that was recently adopted, there are provisions to the effect that, if you cannot execute an investigative measure for your own law enforcement, you cannot do it for a foreign one either. Through the backdoor, we are reintroducing territoriality in the area of freedom, security and justice.

One can observe a successive "clawing back of powers from Brussels" in a number of areas of discussion in the past five years, in particular in the mutual recognition instruments. The recent yellow card from national parliaments in 11 Member States in respect of the setting up of the European Public Prosecutor's Office is another sign that Member States want to be very cautious in this very sensitive area. In the foreseeable future, as witnessed in the post-Stockholm discussion, *Festina Lente* will rule.

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