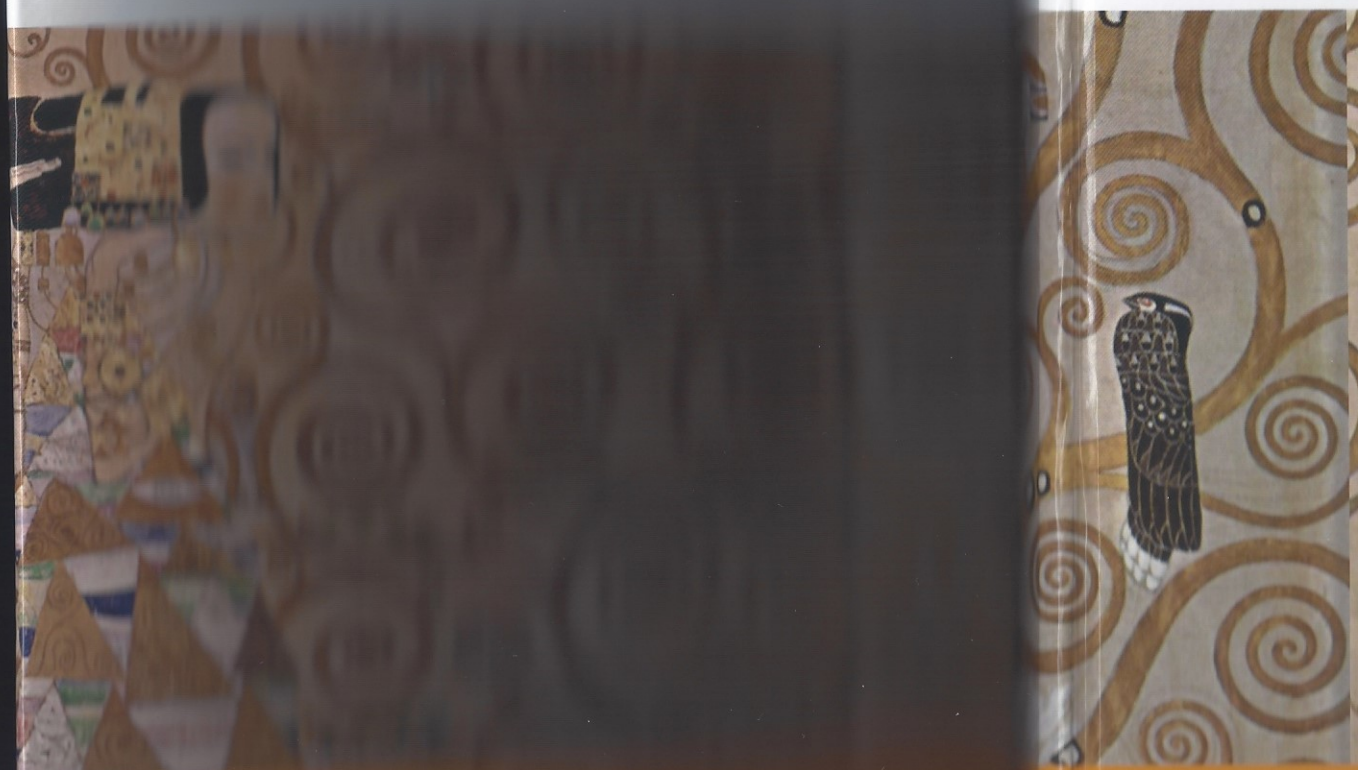
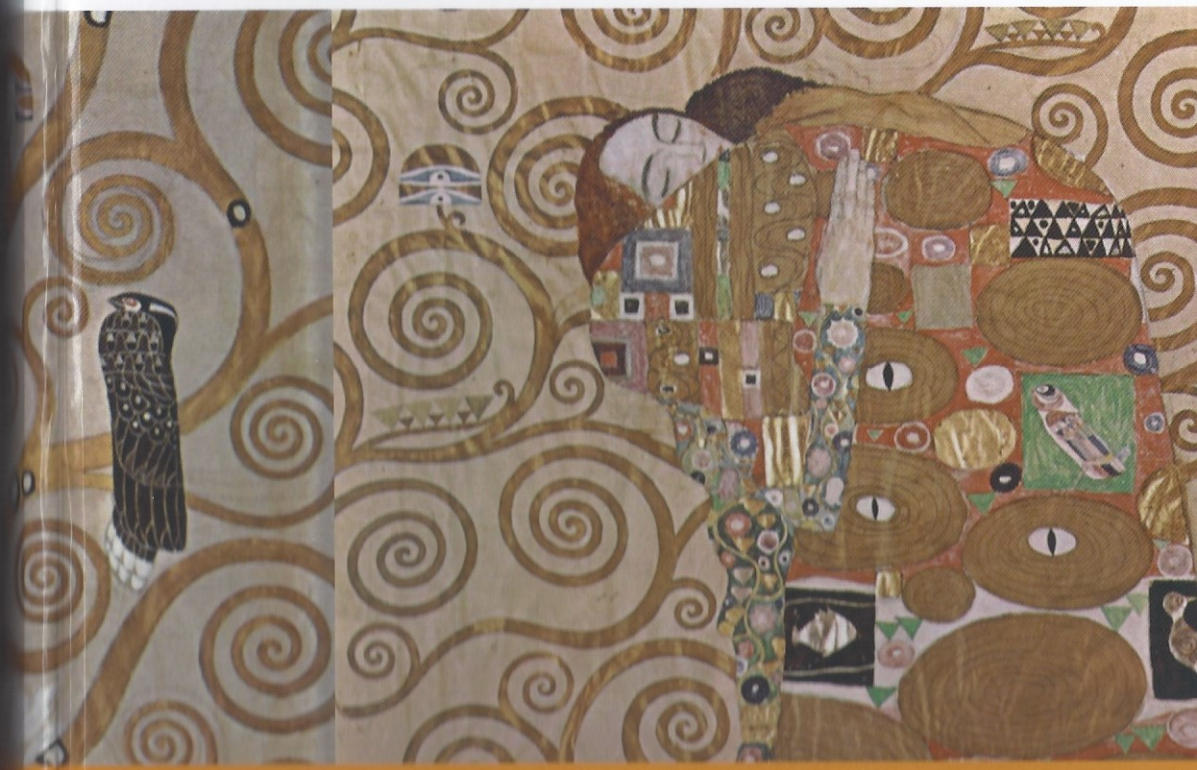
Robert Kert/Andrea Lehner (Hg.)

# Vielfalt des Strafrechts im internationalen Kontext

## Festschrift für Frank Höpfel zum 65. Geburtstag





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RECHT

Frank Höpfel

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## Festschrift für Frank Höpfel zum 65. Geburtstag

herausgegeben

von

**Robert Kert**

**Andrea Lehner**

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importance of cooperation with US-based service providers, the EU-US MLA arrangements should be extended by new cooperation mechanisms allowing for easier and faster exchange of electronic evidence. In order to avoid fragmentation in the AFSJ, it is important to maintain the multilateral framework instead of voluntary bilateral transatlantic arrangements as currently promoted by the UK.



*Pedro CAEIRO*

# Beyond competence issues: why and how should the EU legislate on criminal sanctions?*

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## I. Introduction

**1.** In previous works, I have tried to characterise, in general terms, the role of the European Union (EU) as a holder of *sui generis* prescriptive jurisdiction in criminal matters[1]. Such endeavour has been pursued by taking the state on

* Some of the ideas developed in this chapter were put forward, under a different approach, in an informal paper I have presented at a meeting of the European Commission's Expert Group on EU Criminal Policy in March 2014. That paper benefitted from the reflections of the fellow experts who have shared their own papers on the competence of the EU to legislate on criminal sanctions, namely Béatrice Blanc, Berend Keulen, Dan Frände, Estella Baker, Galina Toneva-Dacheva, Helmut Satzger, Ignazio Patrone, Igor Dzialuk, Joachim Ettenhofer, Jocelyne Leblois-Happe, Jorge Espina, Margarete v. Galen, Paul Garlick and Valsamis Mitsilegas. With their kind permission and the European Commission's authorisation, they will be mentioned where appropriate, for the sake of transparency and honesty.
The present version was finalised during a stay at the International Institute for the Sociology of Law (IISL) – Oñati, whom I wish to thank for having hosted me as a visiting scholar, allowing me to benefit from their resources.
I also wish to thank João Pedro Costa for his valuable suggestions on language and style.

1 *Pedro Caeiro*, Fundamento, Conteúdo e Limites da Jurisdição Penal do Estado. O caso português, Wolters Kluwer / Coimbra Editora, 2010, p. 116 f., p. 559 f.; *Idem*,

board, both as a (formal) reference category as well as a (material) reality embodied in the concrete entities that cohabitate with the Union and underpin its very constitution (the Member States). The present chapter seeks to develop said line of research by applying the same theoretical framework to the specific field of criminal sanctions. A few words on the method seem appropriate.

**1.1.** In the first place, it is important to clarify in what sense the concept 'criminal sanctions' is used in this paper.

As J. Öberg has noted[2], the notion might have a dual meaning in EU law (in fact, the same happens in domestic law):

- For the purposes of article 83(1)(2) of the Treaty on the Functioning of the European Union (TFEU) – especially for assessing whether the EU chooses a proper treaty basis for legislating on sanctions, and whether Member States fulfil their duties in the transposition of directives involving 'criminal sanctions' – the concept should be construed in a narrow sense, requiring the accumulation of certain elements;
- However, non-criminal (administrative) EU sanctions might fall under the concept of 'criminal sanctions' for the purpose of applying the guarantees provided for in the European Convention of Human Rights (ECHR).

To the effects of this chapter, it is the former construction that interests us most. More precisely, the analysis will address the sanctions defined by the EU under the norms that provide it with a competence to legislate on criminal matters, irrespective of whether or not they are actually labelled as penal measures. In this sense, it is a narrow concept (because it does not encompass pure administrative sanctions, not even those that might qualify as "criminal" in the light of the ECHR), but, at the same time, it should not be construed strictly on the basis of its formal label, so it can include some sanctions that are triggered by the perpetration of a criminal offence but can be deemed to bear an administrative / civil nature (eg, some forms of enlarged confiscation).

**1.2.** From a purely normative point of view, it might be logical to address the role of the EU concerning the definition of criminal sanctions by analysing the rules on the legislative (penal) competence laid down in the Treaties, which provide the framework within which EU action in this field is legal (*ie.*, treaty-complying). Indeed, the position of the EU as a penal legislator is fundamentally different from that of the states, because the competence to 'define' criminal sanctions, as a legal power, is *created* by the Treaties (principle of conferral or attribution).

However, the identification of the possible meaning of the EU's intervention on the definition of criminal sanctions precedes those rules. In fact, competence is the (more or less thorough) legal translation of a judgement that conveys the meaningfulness of attributing the role of penal legislator to the EU. It is against

'A jurisdição penal da União Europeia como meta-jurisdição: em especial, a competência para legislar sobre as bases de jurisdição nacionais', in Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho, vol. III, Coimbra Editora, 2012, p. 179 f.; *Idem*, 'The relationship between European and international criminal law (and the absent (?) third)', in V. Mitsilegas / M. Bergström / T. Konstadinides, Research Handbook on EU Criminal Law, Elgar, 2016, p. 582 f.

2 *Jacob Öberg*, 'The definition of criminal sanctions in the EU', European Crim. L. Rev. 3-3 (2014), p. 273 f.





the backdrop of such deeper reality that the criminal policy programmes envisaged by the holder of the *ius puniendi* are to be drafted. Consequently, apart from providing the EU with the necessary formal legitimacy to legislate on criminal matters, the rules on legislative competence have a double dimension: they serve both as tools and boundaries to the enactment of those programmes.

This is quite obvious when we read article 83 (TFEU): like most of the norms that regulate competence, article 83 endows the EU with the power to define criminal sanctions in certain conditions (the EU 'may'), but it does not bind the EU to do so. The grounds for taking this kind of legislative action must be found elsewhere, even in the case of article 83(2), which hints already at some goals (ensuring the effectiveness of certain EU policies).

Hence, one should assess the role of the EU regarding the definition of criminal sanctions *as if* the EU was not constricted by the rules on competence. This sort of "bracketing" might be useful in order to dispel the temptation of inferring the lineaments of what the EU *should do* in the field of criminal sanctions from what it *can do* in the light of the Treaties, *ie.*, the 'legal possible'[3]. At the end of the day, the conclusion might be that, in some cases, the policies required cannot be pursued under the current "constitutional" setting, which will lead to pointing out the necessary amendments. This is even more so given the flexibility and changeability of the European "constitutional" rules in comparison with their domestic counterparts. Conversely, one might also conclude that a given course of legislative action in this realm, albeit permissible under the Treaties, is not needed or convenient – no legislator is required to legislate to the full extent of its competence.

**1.3.** In the second place, this chapter does not intend to assess whether or not the specificity of the (non-state) source of EU legislation on criminal sanctions impacts the debate about the aims of punishment (prevention / effective protection, retribution, deterrence, incapacitation, rehabilitation, etc.), or call for specific penological tools. It is likely that such discussion will replicate, in the European context, the divergent views that oppose / complement each other at the domestic level. If the existence of criminal sanctions in the national legal orders does not depend, at a phenomenological level, on the theoretical discussion about the goals punishment should pursue, there seems to be no reason for reaching a different conclusion at the EU level.

**1.4.** In sum, the primary focus of the following considerations is neither the interpretation of the legal provisions regulating the EU's competence to legislate on criminal sanctions, nor the drafting of concrete European policies in that field. Instead, they aim at providing tentative answers to the questions "why should the EU be endowed with the power to legislate on criminal sanctions?" and "how should the unique features of the EU as a holder of jurisdiction over criminal matters reflect on that power?". Finally, the possibility of applying those considerations to the current legal framework of EU competence will be tested.

Indeed, the discussion is inextricably tied to more general issues related to the intervention of the EU in the criminal law field. Nevertheless, this chapter intends to stick to the specific topic 'defining criminal sanctions'.

3 *H. Satzger*, EU-Expert Group on European Criminal Policy. Paper for the 4th Session (12th March 2014), unpublished, March 2014, p. 1.

**2.** Together with the power to establish the elements of criminal behaviour, the power to define the corresponding sanctions is part of the prescriptive jurisdiction[4] of an entity which bears *responsibility* for the security of a given polity (paradigmatically: the state). The approach followed in this chapter draws on the assumption that jurisdiction in criminal matters is not an attribute of sovereignty (even if they usually coincide), but rather of such responsibility. This means that non-State entities can be legitimate holders of jurisdiction in criminal matters, which can (and should) be tailored to fit the specific kind of limited responsibility at stake, concerning not only the fields of social activity to be regulated, but also the powers to be conferred upon them[5]. Jurisdiction over criminal matters is not a 'chunk', but rather a 'basket' that can contain more or less 'groceries' (powers)[6].

Despite their complementary role once they have been translated into the structure of the penal norm, the powers to define the prohibited behavior, on one side, and to establish the applicable sanctions, on the other side, perform separate, autonomous functions[7]. The definition of criminal behaviour aims at regulating conduct by communicating what ought not to be done in a norm addressed to the individual, whereas the definition of sanctions aims at a variety of goals related to public policies in norms addressed to the courts and other public authorities.

In the state-model, the two powers are associated, because the state's jurisdiction tends to be "perfect" (limited only by some duties arising from international and, where applicable, European law): it concentrates all the powers involved in jurisdiction over criminal matters; it aspires to exclusivity in the domain under its authority; and it usually claims supremacy in the definition of the points of balance with other (state and transnational) jurisdictions. Those features are consistent with the state's responsibility for the general security of the national community, in virtually all the aspects of its daily life.

Hence, it is unnecessary to look for meaningful links between the power to legislate on sanctions and the state: such links are presupposed and unproblematic, inasmuch as it is accepted that the state's authority includes the generic prerogative to pass the criminal law. In that context, defining penal sanctions is an exercise of a purely penological nature and the power to do so comes naturally with the state's prescriptive jurisdiction over criminal matters, with no need for particular justification.

In sum, the reasons why the state should have the competence to legislate on penal sanctions and how it should proceed to do so are questions that lack autonomy.

4 Prescriptive jurisdiction in criminal matters is the legitimate power under international law to lay down the norms prohibiting certain conduct and the rules drawing their scope, as well as the penalties applicable to the offender.

5 In more detail, *P. Caeiro*, 'The relationship' (fn. 1), p. 582-592.

6 The metaphors are borrowed from *M. R. Fowler / J. M. Bunck*, *Law,* Power and the Sovereign State, 1995, when discussing the concept of sovereignty.

7 It is irrelevant whether or not it is theoretically possible to establish the criminal nature of a prohibition without taking into consideration the type of sanctions applicable to its infringement. The point is that it would be possible that the EU had the competence to direct the States to criminalise certain conduct (ie, threatening violations with criminal sanctions) without having the power to define the applicable penalties: see below.





**3.** Nevertheless, the power to legislate on sanctions is by no means inherent to the power to define the elements of the offences: they are not two sides of the same coin. On the contrary, experience shows that many peripheral jurisdictions (as opposed to the central jurisdictions with which they cohabitate) had or have the power to define criminal behaviour, but not to establish the applicable penalties[8].

The European Court of Justice (ECJ) went along this line of reasoning, when it ruled that the European Community had the power to impose upon the states duties to criminalise conduct – but lacked the power to establish the type and level of the applicable sanctions[9]. In a way, the EU followed the same path in the cases where it bound itself to require that the sanctions applicable to certain behaviour be 'effective, proportionate and dissuasive', which is clearly 'outcome focused'[10]: the type and level of the sanctions do not matter, as long as they work[11]. Moreover, nothing prevents the EU, in the current Treaty framework, from deciding on a case-by-case basis whether or not the definition of the offences laid down in secondary law shall be accompanied by a reference to the corresponding sanctions[12], as long as the criteria for such decision are found in a general, reasoned and consistent European policy regarding sanctions[13].

Thus, the two limbs of the *ius puniendi* can be split, if necessary, in order to accommodate the peculiar way in which the Treaties organise the sharing of penal competence between the EU and the Member States.

It follows that it would be perfectly possible to draft a legal framework where the EU would have the power to establish the elements of the offences – as behaviour that must be criminalised because it hampers on EU policies and legal interests – while leaving the definition of the applicable sanctions to the Member States. Consequently, in the light of the limited scope of its responsibility before the European polity, the EU's power to legislate over criminal sanctions requires, in contrast to the state's, a reasoned justification[14] that might reveal a meaningful link between responsibility and that particular power.

8 See *P. Caeiro*, Fundamento (fn. 1), p. 112 f. In contrast, the reverse situation (ie., establishing criminal sanctions while lacking the power to define criminal conduct) does not seem thinkable: see below, II, 2.

9 ECJ, Case C-440/05, Ship-source pollution, 23-10-2007, § 69-70. On the consequences of this part of the judgment, see *Frank Zimmermann*, 'Mehr Fragen als Antworten: Die 2. EuGH-Entscheidung zur Strafrechtsharmonisierung mittels EG-Richtlinien (Rs. C-440/05)', NStZ 2008, p. 665 f.

10 *Estella Baker*, Response to follow-up paper to the third meeting of the expert group on EU criminal policy: Sanctions in European criminal law, unpublished, March 2014, p. 5 f.

11 See *Helmut Satzger*, Die Europäisierung des Strafrechts, Carl Heymanns, 2001, p. 460 f.

12 *Béatrice Blanc*, Common minimum rules on sanctions, unpublished, March 2014, p. 2.

13 *H. Satzger* (fn. 3), p. 8.

14 See *P. Caeiro*, Fundamento (fn. 1), p. 116-135, 565-567; and below, II., 1.1.

## II. Why should the European Union bear the power to legislate on the 'definition of criminal sanctions'?

**1.** It has been suggested that the EU should be endowed with the power to define criminal sanctions in order to foster interests that are of a specific European nature, namely the facilitation of judicial cooperation / mutual recognition[15], the creation of a common sense of justice amongst the European citizens[16] and the prevention of "forum shopping" by potential offenders[17].

**1.1.** In the abstract, the states may agree to cooperate (eg, extradite) for certain or all offences irrespective of the penalties provided by the law; if they do, the scope of the duty to cooperate is expanded, but the applicable penalties are left unaltered.

However, when a minimum threshold of punishment is required for triggering the cooperation procedure[18] or the application of a particular cooperation regime[19], it means that the states wish to reserve such sort of cooperation for offences of a certain gravity. Defining sanctions with a view to meeting those requirements would artificially invert the policy: as P. Asp has aptly put it, "such an argument turns the logic of the system upside down" [20].

It should be noted that, in the specific case of the EU, the facilitation of cooperation would presumably consist of meeting more easily the minimum thresholds of punishment required by several mutual recognition instruments[21]. Nevertheless, such thresholds are a sort of compensation for abolishing the

15 See the latest example, among many, in the Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law, COM(2016) 826 final, 21.12.2016, p. 15: "Setting a minimum level of the maximum penalty at EU level will facilitate international police and judicial cooperation and enhance deterrence".

16 Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (adopted by the Justice and Home Affairs Council of 3 December 1998), [1999] O.J. C 19/1 (Vienna Plan), § 15; and *Anne Weyembergh*, 'Approximation of criminal laws, the Constitutional Treaty and the Hague Programme', 42 Common Market L. Rev. (2005), p. 1581, with further references.

17 See the latest example, among many, in the Proposal for a Directive... (fn. 15): 'Different analyses have highlighted the low level of sanctions/fines and the low prosecution rates (...). While this may have a number of reasons (...), low level of sanctions and evidentiary hurdles must be regarded as contributing to this problem. In addition to enforcement gaps, this situation creates a risk of "forum-shopping" by offenders, i.e. criminals carrying out financial transactions where they perceive anti-money laundering measures to be weakest'.

18 Eg., article 2(1) of the European Convention on Extradition, ETS N.º 024, Paris, 13-12-1957.

19 Eg., article 2(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA); article 14(2) of the Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (2008/978/JHA), etc.

20 *Petter Asp*, 'Harmonisation of Penalties and Sentencing within the EU', 53 Bergen Journal of Criminal Law and Criminal Justice (2013), Vol. 1, Issue 1, p. 61 f.

21 See above, fn. 19.





control of dual criminality in respect of those offences: Member States accepted to renounce the power to control dual criminality only in cases where the acts constitute an offence of a certain gravity in the issuing state.

Finally, it would not make sense that offenders received a harsher punishment, not because it is deemed necessary and adequate for the protection of legal interests (or for pursuing any of the goals usually assigned to criminal sanctions), but rather as a collateral effect of facilitating cooperation.

In sum, the definition of criminal sanctions cannot be a function of facilitating judicial cooperation / mutual recognition.

**1.2.** As for the creation of a common sense of (penal) justice throughout the EU, it is certainly an overly broad goal, if taken generally. Not only because the differences in the definition of the offences in the law of the Member States prevent a common sense of justice through common definitions of sanctions, but also because nothing in the Treaties allows for the conclusion that the EU should be responsible for the creation of such general sentiment, and even less that it should be attained via the common definition of criminal sanctions.

However, this goal can make sense when it is referred to specific conduct for the prevention / repression of which the EU bears responsibility: in those cases, it might be argued that the definition of common sanctions is required for the fostering of equal treatment between European citizens[22].

**1.3.** Finally, it does not seem that the 'prevention of forum shopping' by potential offenders can justify the competence to define criminal sanctions.

Adding to the inadequacy of using the expression in this context[23], there is nothing illegitimate, from a EU perspective, in the fact that a citizen travels to another Member State to "commit" certain acts that are *not* punished by that State. Under some conditions, the citizen might even be exercising his European freedom as a service recipient. At the most, when it is the case, the Member State of destination might be to blame – but not the individual who complies with the territorial law – for not having implemented existing and binding EU law that prohibits such acts[24].

Secondly, in the absence of convincing empirical evidence, it is not likely that there is an established pattern of a significant number of individuals travelling abroad to perpetrate crimes just because they are less punished in the country of destination[25]. Other factors, such as the probability of getting caught, certainly play a much more important role.

**2.** Arguably, the legislative intervention of the EU on criminal sanctions can only be meaningful in the cases where the undesired behaviour jeopardises legal interests for the protection of which the EU is (co-)responsible, as an adequate and effective means of securing such protection.

22 See below, III, 1.

23 As noted by *Jorge Espina*, Paper submitted to the Expert Group, unpublished, March 2014, p. 1.

24 The exercise of European freedoms can lead to the restriction of the extraterritorial application of the home state's penal norms: see *P. Caeiro* (fn. 1), p. 481 f.

25 In the same direction, *E. Baker* (fn. 10), p. 6 and 9 argues that taking legislative action on sanctions to prevent forum shopping supposes the gathering of empirical evidence that "shopping" for more lenient sanctions is a problem within the EU.

As a consequence, the EU may legislate only on the sanctions applicable to the offences in the definition of which it takes part. Otherwise, the connection between the protected interests and the sanctions might be inexistent: if the offences were indicated by a generic name (say, "corruption", or "fraud"), it would not be possible to assume that the corresponding legal provisions in each Member State would relate, at all, to EU interests, or, at least, in the way the EU would want them to[26]. In this sense, the definition of sanctions – as part of a criminal policy programme[27] – is certainly an "annex competence" *vis-à-vis* the definition of offences[28]: not because the former should necessarily inhere to the latter, but because the former *presupposes* the latter.

This leads to the first conclusion: given the limited parcel of the European polity's security for which the EU is responsible, the intervention on sanctions must always refer (explicitly or implicitly) to the offences that affect the interests under its protection.

**3.** At this point, it is crucial to introduce a distinction between two types of responsibility of the EU for the protection of certain interests. Such distinction is not to be confused with the generally acknowledged difference in nature between the types of offence set out in article 83(1) and 83(2) TFEU[29], nor should it be drawn from the rules on the sharing of "competence" regarding the areas set out in articles 3 and 4 TFEU. Rather, this distinction is rooted in an autonomous reasoning, and results from the often overlooked circumstance that, irrespective of the competence arrangements made in the Treaty, some legal interests pertain exclusively to the EU, whereas other interests might also be of the Member States' direct concern – in a sense, the latter *were already there* before the EU came along, even if they had a different content.

**3.1.** The fraud to the EU budget, the misappropriation of EU funds, the corruption of EU officials and, possibly, the laundering of such property – in short: the *Corpus Iuris* offences, to which one might add terrorist offences committed against the Union – would simply not exist without the EU. We can perhaps call them *European core crimes*. This means that the EU is *the* entity who bears responsibility for the protection of the underlying interests, and ensuring their effective protection through the definition of criminal sanctions is consistent

26 In a similar direction, *Valsamis Mitsilegas*, Commentary on the EU competence to impose criminal sanctions, unpublished, March 2014, p. 1.

27 Indeed, the conclusion might be different when the relevant point of view is the protection of individual freedoms against state action: there might be a competence to prohibit, eg, the death penalty in general, or to set aside, as inapplicable, penalties that impermissibly hamper on European freedoms: see, eg., ECJ, C-348/96, Donatella Calfa, 19-01-1999; *Estella Baker*, 'The emerging role of the EU as a penal actor', in Tom Daems, Dirk van Zyl Smit, Sonja Snacken (eds.), European Penology?, Oñati International Series in Law and Society, Hart, 2013, p. 84 f.; and *Helmut Satzger*, Internationales und Europäisches Strafrecht, 7. Aufl., Nomos, 2016, p. 132 f.

28 *P. Asp* (fn. 20), p. 56.

29 *E. Baker* (fn.10), p. 3, establishes a correspondence with the categories *mala in se* and *mala mere prohibita*, while *Valsamis Mitsilegas*, EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe, Hart, 2016, p. 53 f., draws a distinction between 'securitised and functional criminalisation'.





with such responsibility[30]. The circumstance that Member States are bound to ensure 'sincere cooperation' with the EU and to protect those interests as if they were their own (assimilation) is the most complete proof of the latter's heterogeneity vis-à-vis the states. Indeed, the principle of assimilation has been drafted as a sort of protection by default and it should play a role only where no proper (legal or institutional) means are available[31].

Therefore, it is primarily for the EU to draft a scale where (ordinal and cardinal) proportionality and equal treatment are guaranteed within the EU penal framework of valuations. It does not matter whether the sanctions defined for those European core crimes are different (in type or level) from the sanctions provided for by (some) national systems for the domestic homologous offences, because they are inserted in separate legal orders and established by distinct "sovereigns"[32].

Nevertheless, the definition of the European sanctions should be inspired by a careful analysis of the national systems, because a EU "penal culture" should not be built from scratch[33]. Moreover, if the Member States should still be somehow involved in the implementation of this penal system (eg., via the application and execution of sanctions), there might be the need for respecting a few national constitutional clauses of *ordre public*, as it will be argued below.

Finally, the concept of harmonisation[34] cannot really be applied to the sanctions related to these offences, because it supposes a preservation of differences between the national penal norms that does not belong in this field.

**3.2.** In other cases, the EU shares with the Member States the task[35] of protecting certain interests. They might relate either to classic offences to which EU freedoms or policies have brought a new meaning (eg., trafficking in drugs, trafficking and smuggling in human beings, racism), or to offences connected with the implementation of EU and domestic policies (eg, environment, competition, food safety, etc.). In both groups, the national and European dimensions of

30 In the same direction, *Galina Toneva-Dacheva*, Sanctions in European Criminal Law, unpublished, March 2014, p. 1.

31 See below, III. 1.

32 In this direction, *H. Satzger* (fn. 13), p. 6 f.

33 *Pedro Caeiro*, "Résumé du rapport de la délégation portugaise", in Perspectives de Formation d'un Droit Pénal de l'Union Européenne. VIèmes Journées Gréco-Latines de Défense Sociale, Publications de la Section Hellénique de la Société Internationale de Défense Sociale, Thessalonique, 1996, p. 153, footnote 17. The importance of the national legal orders for the construction of a European system of criminal sanctions is underlined by *Mireille Delmas-Marty*, 'Harmonisation des sanctions et valeurs communes: la recherche d'indicateurs de gravité et d'efficacité', in M. Delmas-Marty/G. Giudicelli-Delage/E. Lambert-Abdelgawad (sous la direction de), L'harmonisation des sanctions pénales en Europe, Société de législation comparée, 2003, p. 585 f., who advocates the identification of 'common indicators' regarding the gravity of the offences and the effectiveness of the sanctions.

34 As Inês Horta Pinto aptly puts it, 'proximity, not identity; disparity, not opposition' (*Inês Horta Pinto*, A Harmonização dos Sistemas de Sanções Penais na Europa. Finalidades, Obstáculos, Realizações e Perspectivas de Futuro, Coimbra Editora, 2013, p. 136).

35 In other languages, one might use the more technical concept of *atribuição*, *attribuzione*, *Aufgabe*, as the parcel of the public interest to be pursued by a given body or institution, which is different from competence / power, ie., the tools to accomplish it.

each of those interests are intermingled and the attempt to separate them seems artificial (we can recover an ancient expression and call them crimes *mixti fori*). Hence, there is a genuine *co-responsibility* of the EU and the Member States when it comes to defining the criminal sanctions that might make the protection of those interests effective and, at the same time, proportionate, at a transnational, European level[36].

As a consequence, the EU cannot simply ignore, in those cases, the domestic dimension of the legal interests at stake. Precisely because their protection is a shared responsibility, the norms that punish conduct that affects them "wear two hats": the arrangement between the holders should enable the attribution of the communication embedded in the sanction to both of them[37]. At a criminal policy level, the articulation between the EU and the Member States is needed, so that their interventions are coherent and do not hamper on each other's programmes.

## III. How should the European Union legislate on the 'definition of criminal sanctions'?

**1.** Regarding the European core crimes, the attainment of the proposed goals – namely: effective protection, absolute and relative proportionality and equal treatment – can only be ensured if the definition of criminal sanctions is pursued within a full-fledged, unified "mini penal system"[38], providing for directly applicable substantive norms (offences and sanctions), rules on sentencing and on the execution of sanctions[39].

Such power would be consistent with the type of responsibility of the EU for the protection of such (rather limited number of) interests. It would eliminate the paradox inherent to the principle of assimilation, which makes punishment vary according to the protection afforded by each State to its *own* similar

36 *Berend Keulen*, The EU's competence to harmonise minimum sanctions, unpublished, March 2014, p. 2.

37 On the issue of the 'authorship of the (...) normative message' embedded in criminal sanctions, see *E. Baker* (fn. 27), p. 96 f.

38 The seed of this pledge can be found in the Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union Européenne (sous la direction de Mireille Delmas-Marty), Ed. Economica, 1997, which was followed by her sibling in the economic field Eurodelitos. El Derecho Penal Económico en la Unión Europea (dir. K. Tiedemann; coord. A. Nieto Martín), Ed. UCLM, 2003. Other scholars have argued, since long, for a unified European criminal law, limited to the protection of European legal interests: see, eg., *André Klip*, 'Definitions of harmonisation', in André Klip / Harmen van der Wilt (eds.), Harmonisation and Harmonising Measures in Criminal Law. Proceedings of the colloquium, Amsterdam, 13-14 December 2001, 2002, p. 23 f., esp. p. 29.

39 Some members of the Expert Group have upheld such an extended scope of the EU's legislative competence regarding criminal sanctions already *de lege lata*, without however differentiating between the two categories of offences submitted in this chapter: explicitly, *Margarete v. Galen*, Does the Treaty allow for the European Legislator to determine minimum sanctions?, unpublished, March 2014, p. 1 f., and *Joachim Ettenhofer* Follow-up paper on sanctions in European criminal law, unpublished, March 2014, who in any case concede that the 'time is not ripe' for exercising that competence.





interests... as long as it is deemed effective enough under the standards established by the *European* bodies.

As a matter of fact, one fails to see why Member States, in their individual capacity, should have a say regarding the effectiveness or the proportionality of the sanctions deemed necessary by the EU for the protection of its own interests. Thus, the principle of assimilation should not apply to the legislative level anymore: it ought to be replaced, at that level, by an autonomous regulation of the protection of EU interests. The scope of assimilation would be restricted to the *judicial* level, where the authorities of the Member States would continue to act on behalf of the EU (principle of loyal cooperation) as if they were adjudicating offences against the homologous domestic interests.

In that context, there would be no place for opposing the full definition of sanctions by the EU on the grounds that, in some countries, effective protection could be achieved through less severe sanctions; or that EU sanctions are disproportionate in relation to those provided for by national law for the domestic homologous offences; or that equal treatment is jeopardised because, eg., the material conditions of the execution of the imprisonment penalty[40] are much harsher in some countries than in others.

In this vein, the EU would have to assess, at an empirical level, the actual need for criminal law intervention regarding each of those interests, and, should it be the case, ponder – based on, but not bound by, the penal systems of the Member States – which type and level of sanctions would be adequate (necessary and proportionate) in order to protect them. It might not be far-fetched to guess that, considering the interests at stake, four basic types of criminal sanctions would be of use: imprisonment, fines, disqualifications and confiscation. Obviously, the (abstract) levels would have to be determined according to the specific needs raised by each type of offence.

This limited, albeit self-standing penal system would render the EU fully and exclusively accountable for the quality and effectiveness of the legal framework in force (although its application would remain, under European surveillance, in the hands of Member States). It would also allow for establishing a EU scale of sanctions contemplating ordinal and cardinal proportionality[41], while guaranteeing, at the same time, equal treatment before the applicable standard: European law.

The sole limit to this European penal system might lie in a few "hard" national constitutional limits of *ordre public*, inasmuch as Member States are called to implement it. Certainly, the EU should not demand that national courts apply sanctions that are formally forbidden by their Constitution (this would be a sort of limit to cardinal proportionality of EU sanctions), or that national authorities enforce penal sanctions exclusively with a view to (individual) incapacitation when their Constitution imposes upon them a duty to pursue the rehabilitation

40 The legal conditions of the execution should also be unified (see above).

41 The lack of coherence in EU legislation regarding sanctions has been often pointed out by the literature: see *A. Weyembergh* (fn. 16), p. 1586; *Anabela Miranda Rodrigues*, 'Um sistema sancionatório penal para a União Europeia', in Studi in Onore di Giorgio Marinucci a cura di Emilio Dolcini e Carlo Enrico Paliero, II – Teoria della Pena. Teoria del Reato, Giuffrè Ed., 2006, p. 1229 f.; *European Criminal Policy Initiative* (ECPI), 'The Manifesto on European Criminal Policy in 2011', 1 European Crim. L. Rev. (2011), p. 91, 102 ('horizontal coherence'); and *H. Satzger* (fn. 27), p. 152.

of all convicts, irrespective of the nature of the offence[42]. Consequently, these 'outer limits'[43] of EU sanctions would have to be taken into consideration while drafting the EU criminal sanctions system.

**2.** In a different direction, the mechanisms for implementing EU definitions of sanctions regarding the offences *mixti fori* should reflect the *co*-responsibility of the EU and Member States for the protection of the underlying interests, bearing in mind that those sanctions will (also) form part of the latter's legal systems.

Indeed, articulating (*rectius*: merging) the action and programmes of various holders of the *ius puniendi* is not an easy task, especially when – as in the present case – they are entities of a different nature. The actual location of the points of balance to be established between them is open to debate. Thus, the following considerations should be read as an attempt to draw a rational and feasible framework that reflects the co-responsibility of the EU and Member States for the protection of said interests through the definition of criminal sanctions.

**2.1.** It is submitted that the very concept of European integration, in its normative and institutional dimensions, implies a general precedence of EU action *vis-à-vis* the Member States', of which the primacy of EU law and the pre-emption clause laid down in article 2(2) TFEU are just technical consequences. Such primacy is not at odds with the principle of subsidiarity: once EU action is deemed necessary, the national legal systems should not constitute obstacles to its adoption[44].

Hence, the co-responsibility of the EU and Member States is not of the same nature as, eg., the co-responsibility of the states at large for the punishment of international crimes. The latter is horizontal in shape and homogeneous in its contents (in the sense that all the States of the international community are supposed to exert powers of the same kind), whereas the former is vertical and differentiated.

When it comes to identifying the European dimension of possible threats to the legal interests for the protection of which it is (also) responsible, the EU might be in a better position than the Member States (taken separately) to assess: (i) whether criminal sanctions are necessary to protect a given legal interest against certain conduct (in the definition of which the EU takes part); (ii) the type of penalties required to counter such behaviour, in view of the criminological features of that kind of offence.

In fact, bearing in mind the current stage of European integration, the power to decide for the use of criminal sanctions (even where it will cause a true criminalisation in Member States that do not punish such conduct as a criminal offence) seems to be reasonably implied in the EU co-responsibility for the protection of certain interests. Also, the choice of the type of criminal penalties is crucial for the effectiveness of any criminal policy programme and does not seem to be a potential cause for serious disruptions in the national legal systems:

42 In any case, and for the moment, this risk seems to be more theoretical than real under the (eclectic) current EU 'penological approach': see *E. Baker* (fn. 27), p. 99 f.

43 The expression is borrowed from P. Asp, who uses it in a different context.

44 On the interplay between the concepts of primacy and subsidiarity, see *P. Caeiro*, 'The relationship...' (fn. 1), p. 590 f.





imprisonment, fines, disqualifications and confiscation are widely known in the Member States.

**2.2.** Differently from the decisions concerning the European core crimes[45], the decisions regarding offences *mixti fori* affect the Member States' interests in the shaping of their own penal systems. This has two consequences:

**2.2.1.** First, the respect for the principles of necessity (including adequacy), proportionality and subsidiarity (in its double vest) should be enhanced[46];

**2.2.2.** Second, the effectiveness sought with the establishment of a certain type of criminal sanctions should be reconciled ('*praktische Konkordanz*') with the respect for the systems of valuations embodied in the national criminal laws, so that the discharge of responsibility by the EU does not preclude Member States from fulfilling their own obligations in a proper way (principle of 'vertical coherence'[47]). As a consequence, it is debatable whether the power to define criminal sanctions should extend to further aspects, namely, the (abstract) levels of the (minimum and / or maximum) penalties to be associated with a given kind of offence – or, in the case of disqualifications and confiscation, the specific conditions for the application of the sanctions and their material contents –, sentencing guidelines, the admissibility of suspending the sentence or replacing it with a more lenient penalty (eg, imprisonment for a fine or community service) and the rules on early (or conditional) release.

**a)** Starting with the first aspect, it seems that the EU should have the power to have a say on the gravity of the applicable sanctions. Adding to the decision to use penal sanctions, the EU might also legitimately wish to express the relative gravity of a given offence within the European penal "universe" by building a European penal scale. However, the definition of precise (abstract) levels of sanctions by the EU is likely to disturb the proportionality of punishment within the legal systems of the Member States, especially when it consists of a blind reference to an "amount of sanction". The possibility of applying a sentence of ten years imprisonment has certainly different meaning and weight depending on the system where it will be implemented[48]. In short, relative proportionality with other offences cannot be ensured by applying the same penalties in legal systems with quite different penal scales, inasmuch as such penalties are to be viewed also as a product of domestic valuations.

Consequently, adding to undesirable normative contradictions in the domestic systems, equal treatment becomes a tricky issue as well: equality under the European standard might cause inequalities before the (also applicable) national parameter.

45 Above, 2.1.

46 See *Maria Kaiafa-Gbandi*, 'The importance of core principles of substantive criminal law for a European criminal policy respecting fundamental rights and the rule of law', 1 European Crim. L. Rev. (2011), p. 12 f.

47 See *European Criminal Policy*... (fn. 41); *Petter Asp*, 'The importance of the principles of subsidiarity and coherence in the development of EU criminal law', 1 European Crim. L. Rev. (2011), p. 47 f., 51 f.; *Pedro Caeiro*, 'A coerência dos sistemas penais nacionais em face do direito europeu' in Constança Urbano de Sousa (coord.), O Espaço de Liberdade, Segurança e Justiça da UE: Desenvolvimentos Recentes, Ediual, 2014, p. 241-255.

48 *P. Asp* (fn. 20), p. 61.

In this context, and in order to mitigate these shortcomings, a scheme providing for the accommodation of both EU and national valuations would be necessary[49].

**b)** Should the EU have the power to legislate over minimum as well as maximum thresholds for the applicable sanctions? It is submitted it should. Why should it be otherwise? Restricting the power of the EU to defining minimum limits for minimum or maximum sanctions equates to creating a one-legged *ius puniendi*, which is entitled to identify the penalties that are not effective enough but not those that are disproportionate or unnecessary.

Should that power refer to minimum sanctions, to maximum sanctions, or both? From a pure criminal policy point of view, it would make more sense for the EU to define, where necessary, the minimum limits of minimum sanctions and the maximum limits of maximum sanctions. The former provide, in the abstract, the threshold below which the response to the offence is deemed ineffective, whereas the latter indicate the threshold above which the sanction is considered to be disproportionate or unnecessary. Within that framework, all sanctions are both effective and proportionate under EU law – and that should suffice for the purposes at stake.

Of course, these are "in-principle limits", established for regular situations, and they might not apply in particular circumstances where there are causes for (mandatory or discretionary) mitigation / aggravation, generally available in the Member States. It is advisable not to set aside the national rules on sanctioning, due to a series of factors, namely, the diversity and complexity of the national systems in this respect, the (normative) distance between the EU and the valuations underlying those legal provisions, as well as the fact that they are more properly dealt with as elements of the general part of a penal system. Notwithstanding, the EU might legitimately wish to address some of those issues (eg., creating specific causes for mitigation and / or aggravation) while legislating over a concrete offence[50].

Setting minimum limits to minimum sanctions requires great care, so as not to unnecessarily increase the punitiveness of national penal systems[51]. Especially for offences that are less serious, the old, result-oriented formula "effective and proportionate sanctions" might still be a better means of ensuring effectiveness and proportionality[52].

On the other hand, the usefulness of setting minimum limits for maximum sanctions is scarce[53]: if they are seen by the Member States as being too low, the national legislator will raise them; if they are deemed too high, the courts will simply ignore them.

49 See below, IV., 2.2.2.

50 See *Estella Baker*, 'Sentencing Guidelines and European Union Law', in Andrew Ashworth / Julian V. Roberts (ed.), Sentencing Guidelines: Exploring the English Model, Oxford University Press, 2013, p. 264.

51 *Jocelyne Leblois-Happe*, Les règles minimales relatives à la définition des sanctions, unpublished, March 2014, p. 2, f.; *H. Satzger* (fn. 3), p. 6.

52 In this vein, *E. Baker* (fn. 10), p. 5; and *H. Satzger* (fn. 3), p. 3. But see, in a different direction, *I. Horta Pinto* (fn. 34), p. 337, who argues that such wording is an open-ended formula, encompassing concepts of a different nature, and is intended to leave the definition of the aims of punishment to the Member States.

53 *J. Leblois-Happe* (fn. 51), p. 2.





**c)** Concerning disqualifications and confiscation, it should be noted that, as a rule, and contrary to imprisonment and fines, their application does not depend solely on the perpetration of an offence, but rather on additional requisites (eg., abuse of position or office, a connection between the offence and the instrumentalities / proceeds, etc.).

There seems to be no reason to prevent the EU from legislating over this kind of sanctions, which can play an important role[54], as long as the general requirements are met.

**d)** The remaining issues pertain to the application of sanctions (sentencing)[55] and their execution. In a framework of shared responsibility between the EU and the Member States, those tasks should probably stay, for the most part, in the hands of the latter[56].

In this context, it is submitted that the concrete result of the enforcement – eg., a given offence must carry (at least) X years of actual imprisonment – is not an appropriate basis for a European definition of criminal sanctions.

In the first place, drafting an aim in those terms would probably cause national legislators to sharply increase the minimum levels of the sanctions applicable to the relevant offences, in order to circumvent the (otherwise applicable) non-institutional forms of State response, including procedural mechanisms (eg., diversion and mediation) and alternative sanctions (replacement of imprisonment by fines or community service, suspended sentences, etc.).

In the second place, defining the sanctions by reference to their concrete effect would predictably lead the EU to have systematic recourse to actual imprisonment, whereas defining the minimum applicable sanctions still allows for the application, where appropriate, of said mechanisms and non-institutional sanctions. From a criminal policy point of view, it is important that the EU does not shatter the progress that has been made over the last decades, at the domestic and regional level, in the fight against institutional measures.

## IV. Legislating on the 'definition of criminal sanctions' under the current competence framework

### 1. Legal bases in the Treaties

**1.1.** It is clear that article 83(1)(2) TFEU enshrines the competence to define criminal sanctions. It is less clear whether or not criminal sanctions can be adopted under other legal bases, namely articles 325 and 86(2) TFEU, and, in the affirmative, whether or not the instruments and procedures should follow the requirements of article 83 (directives, minimum rules, applicability of the "emergency brake", status of the opt-outs, etc.).

54 This view has been upheld by *B. Keulen* (fn. 36), p. 1, and *Ignazio Patrone*, Paper submitted to the Expert Group, unpublished, March 2014, p. 3.

55 Extensively on sentencing and Union law, *E. Baker* (fn. 50) and *P. Asp* (fn. 20).

56 The issue is not consensual: in this direction, *J. Espina* (fn. 23); *I. Patrone* (fn. 54); probably with a different view, *E. Baker* (fn. 10), p. 7.

**1.2.** The scope of article 325 TFEU has been extensively discussed by the legal literature and it would not be wise to repeat the debate in this chapter. It might suffice to point out two issues of particular relevance.

From a criminal policy standpoint, the protection of the financial interests of the EU is certainly one of the paradigmatic bases for setting up European core crimes and justifies a uniform definition of offences and sanctions, as well as their application and execution[57]. Nevertheless, it is submitted that article 325 TFEU is not a *lex specialis vis-à-vis* article 83(2) TFEU, which would allow for a more or less extensive derogation of the requisites laid down in the latter: to my view, it is rather the other way around (penal sanctions being a special kind of the 'measures' mentioned in the former), since article 325 does not entail a specific and explicit competence to legislate in criminal matters.

The suppression of the safeguard contained in article 280(4) of the Treaty on the European Community (TEC) should not be given great significance[58]. For one, the clause had a merely emphatic function and, in any case, its suppression leaves article 325 TFEU in the same situation of other norms with a general scope that existed in the previous versions of the Treaties (eg., article 176 of the former TEC)[59], from which most authors rightly refused to infer an implicit penal competence[60]. Moreover, the argument according to which Member States were well aware of the controversy over the interpretation of article 280(4) TEC and, by striking down the safeguard, they could only have intended to create a special penal competence, proves too much. It is precisely because the states knew well the problems surrounding the interpretation of article 280(4) TEC (and similar norms) that it does not seem likely that they would condition the penal competence of the EU in many ways when they regulate it explicitly (in article 83 TFEU), and, at the same time, allowed for an implicit, unconditioned competence under article 325 TFEU[61].

In conclusion, a provision in the Treaties conferring explicit competence to the EU to establish 'supranational' offences and sanctions in the limited ambit of European core crimes (including PIF) would be welcomed and necessary in order to implement a correct criminal policy in this field, but is not to be found in article 325 TFEU.

**1.3.** As for the competence allegedly conferred by article 86(2) TFEU, the analysis of the several linguistic versions of the Treaty seems to show that, notwithstanding important divergences[62], the drafters did not mean that the

57 See also *Martin Böse*, 'Die Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon und ihre Bedeutung für die Europäisierung des Strafrechts', ZIS 2/2010, p. 88.

58 In the opposite direction, see, among many authors, *H. Satzger* (fn. 27), p. 117 f.; *Kai Ambos*, Derecho Penal Europeo, Civitas / Thomson Reuters, 2017, p. 73 f.

59 *P. Caeiro*, 'A jurisdição penal da União Europeia...' (fn. 1), p. 183 f.

60 See *A. Weyembergh* (fn. 16), p. 1571.

61 *P. Caeiro*, 'A jurisdição penal da União Europeia...' (fn. 1), p. 183 f. For a more complete discussion, see *Petter Asp*, The Substantive Criminal Law Competence of the EU, 2012, p. 141 f.

62 For instance, the Spanish and French versions unequivocally refer the adjective 'determined' to the 'financial interests', whereas the Portuguese version unequivocally refers it to the 'offences', as well as, apparently, the German, Italian and Dutch versions, which might however be more ambiguous at the literal level.





offences should be defined by the regulation creating the EPPO, but rather that the EPPO would be competent to investigate and prosecute the offences *indicated* therein[63].

**1.4.** The preceding considerations do not imply that the definition of sanctions for European core crimes (including PIF offences) cannot enjoy a special regime under the current legal setting (article 83 TFEU) that meets more adequately the criminal policy lineaments set out in the previous section[64].

## 2. 'Minimum rules'

**2.1.** There is a debate in the literature over the meaning of the expression 'definition of minimum rules', namely when it comes to assessing whether the EU can (also) establish maximum limits for (minimum and maximum) sanctions.

In the context of the expression 'establish minimum rules concerning the definition of criminal offences and sanctions', it seems hard to argue that minimum rules mean also 'maximum rules', in the sense that they would allow for a true unification of the applicable penalties[65], or, at least, the exclusion of sanctions of a certain type or duration[66]. Notwithstanding the circumstance that the unification of penalties would be, *de lege ferenda*, a positive development concerning European core crimes, such construction seems to be plainly *contra-legem* under the current Treaties. Therefore, I would rather join the traditional opinion according to which minimum rules mean, in this realm, a minimum of punishment, leaving the Member States free to set harsher (minimum or maximum) penalties[67]. This approach is fully consistent with the securitarian approach that still dominates European criminal law[68] and is corroborated by the way the stakeholders (the European bodies and the Member States) understand and apply the concept.

As argued, this unbalanced competence – which can only be understood as the result of a political arrangement, aiming at leaving the powers of the most

Arguably, the English ('as determined by') and Romanian ('în conformitate cu') versions are the most accurate ones. On the issues caused by the linguistic plurality and the principle of equal treatment of all EU languages, see *Friederike Zedler*, Mehrsprachigkeit und Methode. Der Umgang mit dem sprachlichen Egalitätsprinzip im Unionsrecht. Heidelberger Schriften zum Wirtschaftsrecht und Europarecht, Bd. 75, Nomos, 2015.

63 *P. Caeiro*, Fundamento... (fn. 1), p. 563; and P. Asp (fn. 61), p. 150.

64 See below, 2.2.1.

65 *Hans Nilsson*, 'How to combine minimum rules with maximum legal certainty?', Europaraettslig Tidskrift (2011), p. 665; and *V. Mitsilegas* (fn. 65), p. 62 f. Whether or not the choice of administrative sanctions by the EU in order to counter certain behaviour precludes its criminalisation by the Member States – because, eg., such choice stands for an authoritative decision on the effectiveness and proportionality of the means chosen – is arguably a different problem, not related to the interpretation of the expression 'minimum rules'.

66 *I. Horta Pinto* (fn. 34), p. 230.

67 *André Klip*, European Criminal Law. An Integrative Approach, 3rd. ed., Intersentia, p. 181 f.; *P. Asp* (fn. 61); *Catherine Haguenau-Moizard / Fabienne Gazin / Jocelyne Leblois-Happe*, Les Fondements du Droit Pénal de l'Union Européenne, Larcier, 2016, p. 152; *K. Ambos* (fn. 58), p. 367 f.; but see below, 2.2.1.

68 *A. Miranda Rodrigues* (fn. 41), p. 1231 f.

punitive Member States unscathed – should be reassessed in a future revision of the Treaty.

**2.2.** The EU has the competence to establish minimum limits to both minimum and maximum sanctions[69]. Those limits are to be seen as "abstract limits", which will be embodied in the national law, and they should not purport to impinge upon the judiciary or restrict in any other way the sentencing process. In short, they condition legislative action, not the powers of the judiciary[70].

Indeed, the nature of the offence should reflect upon the way in which those limits are set:

**2.2.1.** Regarding European core crimes, and as the Treaty does not allow for the establishment of the actual applicable penalties, minimum rules can consist of setting quantitative minimum thresholds for both minimum and maximum sanctions (eg, respectively, an imprisonment penalty that varies between not less than 3 years and not less than 8 years) [71]. In these cases, legislating on the minimum maximum limit is a second best way of ensuring that the sanction might attain, if need be, a certain degree of gravity, which might be necessary from the point of view of the holder of the *ius puniendi* (the EU).

As the Treaty does not allow for the use of a regulation either, Member States are free to establish harsher penalties. Nevertheless, one fails to see a good reason for them to do so, since the holder of the affected interests has pronounced on what would effective (and proportionate) sanctions be.

In any case, the "time-span" method adopted by the Council for defining the minimum limits of maximum sanctions ("penalties of a maximum of at least between *X* and *Y* years of imprisonment" [72]) is of little use[73], since the adoption of any penalty that equals or exceeds *X* years will fulfil the duty imposed by the EU instrument, and the value *Y* is not really a limit ('at least').

**2.2.2.** As for the offences *mixti fori*, it seems more convenient to adopt a course of legislative action that allows for the respect of national systems by following a three-step procedure[74].

69 In the same direction, *Dan Frände*, Paper submitted to the Expert Group, unpublished, March 2014, p. 1.; *H. Satzger* (fn. 3), p. 6.; *I. Patrone* (fn. 54), p. 1; *Igor Dzialuk*, Follow-up comments on the possible scope of the of the harmonization of the minimum penalties within the EU, unpublished, March 2014, p. 1.

70 Several members of the Expert Group have expressed their concern about the way the EU intervention on (minimum) sanctions might affect the separation of powers between the legislator and the judiciary: *E. Baker* (fn. 10), p. 4, f.; *G. Toneva-Dacheva* (fn. 30), p. 1 f.; *I. Dzialuk* (fn. 69), p. 2; and *Paul Garlick*, Response to the call for contributions, unpublished, March 2014, p. 1 f. Arguably, the divergent views on the reach of EU competence in this field are due to differences in the presupposed meaning of 'minimum sanctions' (namely, concerning their mandatory / discretionary nature).

71 *H. Satzger* (fn. 3), p. 6.

72 Council Conclusions on the approach to apply regarding approximation of penalties of 24 and 25 April 2002, Brussels 27 May 2002, 9141/02.

73 For a more detailed analysis, see *I. Horta Pinto* (fn. 34), p. 251 f.

74 An earlier version of this scheme can be found in *Pedro Caeiro / Miguel Ângelo Lemos*, 'Content and impact of approximation: the case of terrorist offences (Council Framework Decisions of 2002 and 2008)', in Francesca Galli / Anne Weyembergh (eds.), Approximation of Substantive Criminal Law in the EU. The Way Forward, Bruxelles: Ed. ULB, 2013, p. 165 f.





In the first place, the EU should establish, by the means of a directive, a three or four-position general penal scale that measures the gravity of the sanctions (eg., A, B, C, and D types) and impose on Member States the duty to pass legislation that fills in those categories with values drawn from the domestic systems. Once this equivalence is implemented in the Member States, the EU will be able to direct them to ascribe, e.g., (at least) C-type (minimum or maximum) penalties for a given offence. Finally, each Member State would transpose the European concept of C-type penalties according to the previously defined national parameters.

The obvious advantage of such a mechanism of *double qualification* lies in the circumstance that the European assessment of the gravity of punishment would still be uniform and binding on the Member States, ensuring at the same time a kind of *peræquatio*[75] at the European level. Actually, this mechanism is already present in the definition of some elements of criminal offences: for instance, if a European act provides for the punishment of attempt, or complicity, it is for the national systems to fill in those concepts[76]. At the end of the day, depending on the applicable national law, the same conduct can be considered as punishable attempt or as (non-punishable) preparatory acts – but that does not hamper on the European law purpose to punish attempt[77].

It might be objected that the EU has no competence for adopting a directive aimed at the harmonisation of penal sanctions in the abstract, but solely for establishing "minimum rules" concerning the applicable penalties in the fields designated in Article 83(1) (2) TFEU. I do not share that view. First, a directive with the said content could certainly be seen as a minimum rule (in the sense of a pre-condition) concerning "the definition of (...) sanctions" in the fields under the EU's jurisdiction. Second, the general scope of the directive would not infringe upon that limitation, because it would not entail *per se*, in any sense, a duty to modify the penalties provided for by the Member States' systems, which would emerge only with the specific definition, by the means of a directive, of the actual sanctions applicable to the said offences.

## IV. Conclusion

**1.** The answers to the questions raised in the title of this chapter imply an assessment of the responsibility of the EU for the security of the European polity, which goes deeper than the analysis of the rules on competence.

Unlike the state's, the responsibility borne by the EU for such security is limited, because it covers only a number of sectors of social life and because it is shared with the Member States in several ways.

75 *José de Faria Costa*, Direito Penal Especial. Contributo a uma Sistematização dos Problemas "Especiais" da Parte Especial, 2004, p. 57.

76 See *K. Ambos* (fn. 58), p. 385.

77 Expressing doubts about the possibility of building common European concepts of the "general part", such as attempt, in a way that might be satisfactory to all Member States, see *Manuel Cancio Meliá*, 'Consideraciones sobre una regulación común europea de la tentativa', in Eurodelitos... (fn. 38), p. 53 f. In the opposite direction, upholding the possibility of drafting European concepts of *mens rea* and defences, see *Jeroen Blomsma*, Mens Rea and Defences in European Criminal Law, Intersentia, 2012.

By the same token, the unique features of the European construction explain the *sui generis* nature of the EU's jurisdiction on criminal matters and, in particular, the dissociation between the power to criminalise certain conduct (directly or via the mediation of the Member States) and the power to establish the corresponding penal sanctions. As a direct consequence of this dissociation, each of those powers needs a specific justification. Nevertheless, the legitimacy of the latter is not to be found in oblique and slightly awkward aims, such as the facilitation of judicial cooperation or the prevention of forum shopping. The legislative intervention of the EU on the definition of criminal sanctions is – together with the power to legislate on the definition of criminal behaviour – a legitimate (albeit not inherent) offshoot of the Union's (co-)responsibility for adequately and effectively protecting certain legal interests against behaviour that jeopardises them. Indeed, this approach to legitimacy entails a consequence for the exercise of that power: it will be legitimate if and as long as it will serve the protection of (certain) legal interests. In a way, the theory on criminal punishment that seems to prevail currently at the state level is arguably reinforced at the European level by the functional nature of the EU's (penal) powers.

**2.** There is a distinction that also accounts for the *sui generis* nature of the EU's jurisdiction over criminal matters. In the context of the cohabitation between the EU and the Member States, which lies at the very heart of the European experience, a crucial differentiation should be made between exclusive and shared responsibility for the protection of certain legal interests.

The former materialises when the legal interests at stake belong exclusively to the EU (the budget, the integrity of European bodies, etc.), notwithstanding the duties of cooperation binding on the Member States. The penalties applicable to the offences against those interests (the 'European core crimes') should be designed exclusively by the EU, together with the definition of the offences themselves and the relevant rules for the application and execution of the sanctions. Since the Member States have acknowledged, in the Treaties, that the EU legitimately holds certain highly relevant interests, as well as jurisdiction in criminal matters, there is no reason why they should take an individual part in such exercise. Therefore, it is for the EU to draft a scale where (ordinal and cardinal) proportionality of sanctions and equal treatment are guaranteed within the EU penal framework of valuations, which should be in any case inspired by the national laws, as a repository of shared values.

In contrast, defining criminal sanctions for offences against legal interests for the protection of which the EU and the Member States are responsible raises delicate problems. In fact, such exercise requires the merging of programmes of various holders of a different nature and the articulation of their actions. At the end of the day, the actual location of the points of balance to be established between them should be determined with a view to lay down a rational and feasible framework that might reflect accurately the said co-responsibility. In this context, it is submitted that the EU should have the power to decide – on the basis of empirical data and in compliance with the principles of adequacy, proportionality, subsidiarity and coherence – whether or not the use of criminal sanctions is necessary in each given instance, as well as their type. It would also be consistent with its responsibility to have the power to establish, in the abstract, the minimum limits of the sanctions (below which the protection is, in





principle, ineffective) as well as their maximum limits (above which the sanction is, in principle, disproportionate). The rules on application and execution (as well as, evidently, the application and execution themselves) should rest with the Member States, which would allow for a smoother articulation with national systems.

**3.** Under the current legal framework laid down by the Treaties, the EU may legislate on criminal sanctions (only) under article 83(1) (2) TFEU, as long as the conditions set therein are present. In particular, the 'minimum rules' requirement means that the EU can only pass directives providing for minimum (minimum or maximum) abstract sanctions.

Again, the differentiation between "European core crimes" and "crimes *mixti fori*" advises that the sanctions relating to the latter are introduced by EU law via a method of double qualification, where European qualitative categories regarding the gravity of the penalties are locally translated into quantitative values previously indicated, in general, by each national legal order. The correspondence between the European categories and the figures set by the Member States would help to accommodate the European valuations, while preserving to a certain extent the coherence of the domestic penal systems.