VIEWS WITH RESPECT TO THE EU LEGISLATIVE COMPETENCE FOR CRIMINAL LAW, ATTRIBUTED TO THE LISBON TREATY

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Abstract

The Lisbon Treaty assigns EU legislative competence in criminal matters (shared, according to article 2 A TFEU).

This news published in legislative union generates a different perspective on European criminal law, previously designed as a right that is born from the cooperation of Member States and is considered the expression of each people's culture, which incorporates the characteristics of its way of life and development.

EU legislative competence in criminal matters, as shown in art. 83 (2) TFEU gives the power to define crimes and establish penalties at least in the particular area of serious crimes with a cross-border dimension, and in those cases where the approximation of laws and regulations criminal Member States proves to be essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures.

If the allocation of legislative competence in criminal matters in favor of the European Union amount to "reconfigure the concept of sovereignty" as is claimed in theory, fears of goals legislating criminal (by covering areas) and lack of perspective real to be implemented effectively and in an effective way through the European institutions, it is understandable given that institutional structures are not operational at the moment.

Seeking an answer to this problem should not circumvent that law-making process at European level in criminal matters as conceived by the Treaty implies both European institutions: the Commission, the Council and specialized agencies on matters AFSJ (Article 68 and 70), as and national parliaments (Article 12).

Moreover, at least declaratively, recognizes the inviolability of sovereign prerogative of Member States to develop and apply the criminal law. In its Resolution of 22 May 2012 the European Parliament on the EU approach on criminal law (act drawn up after the entry into force of the Treaty) states that "whereas criminal law systems and criminal procedure Member States have developed the over the centuries and each Member State has its own characteristics and peculiarities (and therefore) the core areas of criminal law must remain the responsibility of Member States ".

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1. The nature and content of competence established by Article 83 (2) TFEU

Under Article 83 (2) of the Treaty on the Functioning of the European Union (TFEU) The European Union may define criminal offenses and sanctions are, at least in the particular area of serious crimes with a cross-border dimension, and in those cases where the approximation of laws and criminal regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures.

Although the Treaty of Lisbon (TEU) clarifies the division of powers between the European Union (EU) and its Member States, introducing for the first time in the founding Treaties classification accurate in three core competences: exclusive competences, shared competences and skills support, the issue of the competence established of Article 83 (2) TFEU entails some discussions if we look to the principles of proportionality and subsidiarity.

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The founding treaties of the European Union institutions do not confer general jurisdiction exhaustive, to take all necessary measures to achieve objectives of the Treaties, but lay down in each chapter, the remit of action.

Thus, Article 83 (2) TFEU confers jurisdiction on shared action (IN Militaru, p 32) develop rules of criminal nature, to achieve the objective of creating an area of freedom, security and justice, an objective set out in Article 3 paragraph (2) of the Treaty of Lisbon[i].

Building the European area of security and justice is both a form of cooperation, a policy objective of security and a model of integration (Mihalcea, I Mihalcea D-A, p.2).

But recognition of competences of the European Union in criminal law is an issue that generates enough disputes, given that criminal law is recognized (including the European institutions) as an attribute of Member States[ii], an area "no go" over which European Union can not intervene (OMSalomia, A.Mihalache, p.172).

On the other hand it can not be conceived building the European area of freedom and justice (an objective of the EU) without the use of criminal law.

In this European Union was concerned, even before the entry into force of the founding treaties[iii], to find a formula by which the criminal law to contribute to building and strengthening the European security and justice.

The first formulas which became applicable criminal law in the European space were based on cooperation between Member States its classical form, conventions and agreements. With the amplification of the integration process were agreed upon deeper forms of cooperation that lead to near the national criminal laws[iv], fair cooperation[v], harmonization[vi] and mutual recognition[vii] ((I, Mazilu. Pag.4).

As was reached and the creation of joint bodies such as Eurojust[viii], who received skills regarding implementation of more efficient tools of criminal law in Europe.

We can say, therefore, the attribution of legislative power provided by Article 83 (2) TFEU is the result of a constantly evolving process of achieving a unit of legal action by Member States by continuous adaptation of legislation, where an important role was played European legislation, Member States' position flexibility, and Court of Justice of the European Union.

The question now is whether the powers in Article 83 (2) TFEU, in particular those to define crimes and establish penalties (at least) in particular serious crime with a cross-border[ix] dimension agree with progress in the process of approximation of criminal law systems of the Member States and whether there are mechanisms to be implemented in the Member States.

2. The power under Article 83 (2) TFEU must be reported to the subsidiarity principle

However necessary it is, in a certain time, the tasks of defining offenses and establishing penalties for certain offenses committed in the European security and justice can not replace national regulations[x].

This is because, on the one hand, they do not give the EU, the power to criminalize new facts (defining infrațiunilor not equivalent to criminalization of acts) and establish for them the punishment applicable, since treaties are limited only to sketch the lines they directories and to give European institutions the tasks and power to put them into practice by taking appropriate steps (D, Chile p.2).

Findings confirmed that Article 29 letter d) of the TEU refers to "as necessary harmonization of rules on criminal law of the Member States, in accordance with article 31 item (s), so that European criminal law it can not substitute the criminal law of the Member States (André Klip. P.26).

Means that Article 83 (2) of the TFEU must be understood and applied in connection with the principle of subsidiarity, according to which in areas not within its exclusive competence, the EU can only act if - and insofar as - the objective of the proposed action can not be achieved sufficiently EU countries, but it could be better achieved at EU level.

The provisions issued under Article 83 (2) TFEU should not be construed otherwise than as provided model, standard for implementation of EU criminal law with Member States (André Klip. P.28).

Furthermore, these provisions could not be applied at European level since there is no court to judge these crimes and to impose sanctions when necessary and no institutions to implement them.

Therefore, we think in terms of legislative competence attributed to the European Union by Article 83 (2) TFEU is one shared and come under the principle of subsidiarity[xi].

Anyway we do not support the idea that these provisions involve a reassessment of the concept of sovereignty as it is considered in the literature. (Ola G. p.4), whereas this assessment could be understood as a transfer of sovereignty on criminal law.

3. The forms through which the power provided for by Article 83 (2) TFEU

The provisions of Article 83 (2) TFEU target the achievement of the following objectives:

I. Approximation of rules of substantive criminal law by defining criminal offenses and determining penalties in particularly serious crime with a cross-EU competence to establish "minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a size border resulting from the nature or impact of such offenses or from a special need to combat them from a common base "and if there are differences that constitute an obstacle to law enforcement and judicial cooperation across borders.

Sometimes the quality is considered "good" truly European, which requires that it be ensured protection at EU level[xii].

These areas of crime are: terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

The enunciation is one illustration of that depending on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria mentioned above (D.Bobaru, p.3).

Regarding determining penalties it is a generic one. The penalty is an important part of any regulatory system, and the current regulatory framework gives Member States a considerable degree of autonomy in choosing and applying sanctions at national level.

However, it must be a balance between autonomy in this area and the need for effective and consistent application of EU legislation taking into account the fact that the sanctions have a deterrent effect and act as a catalyst in compliance with EU legislation.

II *Approximation of rules of criminal law material by defining criminal offenses and determining penalties in those cases where the approximation of laws and regulations criminal Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures.* Under the principle of subsidiarity, intervention is justified only if Member States fail to ensure compliance with Union law or if significant differences arise between Member States in the field, causing inconsistencies in its application.

In a Commission Communication[xiii] incidence areas are referred to as road transport, data protection, customs rules, environmental protection, fisheries policy, internal market policies (counterfeiting, corruption, public procurement), stating that the list is not exhaustive. Broadening the scope of European criminal law depends however on the principles of subsidiarity and proportionality.

This concerns the choice between criminal or administrative sanctions should be based on a thorough impact analysis.

The implementation of the provisions of art. 83 (2) TFEU is achieved by directive, to be implemented in national law of the Member.

It may be mentioned in this regard:

- Directive 2008/99 / EC 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 introduction of penalties infringement;
- Directive 2011/93 / EU of the European Parliament and the Council on combating the sexual abuse, sexual exploitation of children and child pornography, and replacing Framework Decision 2004/68 / JHA;
- Directive 2011/36 / EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating human trafficking and protecting its victims, and replacing Framework Decision 2002/629 / JHA;
- Directive 2012/29 / EU establishing minimum standards on the rights, support and protection of victims of crime and replacing Framework Decision 2001/220 / JHA;
- Directive of the European Parliament and the Council on combating fraud against the Union's financial interests by criminal law / * COM / 2012/0363 final - 2012/0193;
- Directive 2012/13 / EU of the European Parliament and the Council on the right to information in criminal proceedings; transposition deadline expired on June 2, 2014
- 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 Framework Decision 2001/220 / JHA
- Directive 2014/62 / EU of the European Parliament and of the Council of May 15, 2014 on the protection of the criminal law of the euro and other currencies against counterfeiting and replacing Framework Decision 2000/383 / JHA
- Directive (EU) 2015/849 of the European Parliament and of the Council of May 20, 2015 on prevention of the use of the financial system for money laundering or terrorist financing, amending Regulation (EU) no. 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60 / EC of the European Parliament and of the Council and Directive 2006/70 / EC

Conclusion

Article 83 (2) TFEU confers a shared competence that proves to be necessary to achieve the objective of creating an area of freedom, security and justice, an objective enshrined in Article 3 paragraph (2) of the Treaty of Lisbon. However, they can not substitute for national regulations as article 29 letter d) of the TEU refers to "as necessary harmonization of rules on criminal law of the Member States, in accordance with article 31 item (s), so right European criminal to criminal law can not substitute Member.

This means that Article 83 (2) of the TFEU must be understood and applied in connection with the subsidiarity principle.

Definition of criminal offenses and determining penalties is not directly Union European, as distinct entity but its institutions, since treaties are limited only to the sketch lines to them directly and give European institutions the tasks and power to put them into practice by taking appropriate steps.

Directive is the act by which this is achieved proficiency.

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ENDNOTES

[i] Treaty on European Union (TEU) states in Article 3 (2): "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which the free movement of persons, in conjunction with appropriate measures concerning, inter alia, crime prevention and combating of crime '

[ii] Criminal law is essentially the expression of the sovereign will and the legal culture of a people. That in this respect the EU can not legitimize competence in criminal law creating a supra-national states (through their parliaments) the only with full powers, led much reluctance in addressing legislative issues of criminal law.

[iii] By the mid 1970s penal policy at EU level is conducted in an informal, non-governmental. The Maastricht Treaty, which entered into force on 01.01.1993 gives a new perspective field of justice and home affairs as a result of the incorporation of the basic institutional framework as the third pillar of the European Union discussed cooperation in law enforcement and the fight against racism and xenophobia. An appeal launched by seven magistrates Europeans corruption in Belgium (Benoit Dejemeppe), France (Renaud Van Ruymbeke), Italy (Edmondo brutal Liberati and Gherardo Colombo), Spain (Baltasar Garzón Real and Carlos Jiménez Villarejo) and Switzerland (Bernard Bertossa) 1 October 1996 on the creation of a "European judicial area" in order to counter transnational nature of crime has been adopted and used to define

cooperation within the JHA as the area of freedom, security and justice. Another milestone in the activation of criminal law at EU level is the entry Schengen Agreement, which provided among other benefits and police and judicial cooperation in criminal matters, on the assumption that people's security can not be ensured without a criminal justice appropriate requirements Lisbon comunitare.Tratatul already provides a framework that makes this possible, because it allows the EU to resort to criminal law in order to strengthen the application of EU rules and policies.

[iv] Approximation involves "an alignment of laws, regulations" which requires the initiation and implementation of measures leading to a formal agreement with the European text. Approximation of criminal laws was conducted and international law.

Initially close was designed asymmetrically in that Member States undertake to incriminate at least some practices, but are free to incriminate any other.

[v] Article 4, paragraph 3 TEU (ex Article 10 TEC) provides this essential obligation "Under the principle of loyal cooperation, the Union and the Member States respect and help each other in carrying out tasks which flow from the Treaties. Member States shall take any general or particular, to ensure fulfillment of the obligations under the Treaties or resulting from the acts of Union institutions. Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of its objectives.

[vi] Harmonization of criminal law put a compatibility of their improving cooperation in criminal matters and criminal proceedings. It is stipulated in Article 29 letter d) of the TEU which refers to "as necessary harmonization of rules on criminal law of the Member States, in accordance with article 31 item (s).

[vii] In the Hague Programme, the European Council stressed that the strengthening of justice it is necessary to develop equivalent standards for procedural rights in criminal proceedings, to align the laws, regulations to prevent criminals take advantage of differences between systems legal and guarantee citizens the opportunity to receive protection wherever they are in the EU. The effective application of the principle of mutual recognition, it is necessary to strengthen mutual trust.

[viii] Eurojust is an EU body with legal personality made up of representatives of Member States, assisting national investigative bodies, having a center of expertise and role at the judicial level for effective activities to combat different forms of the cross-border crime.

[ix] Article 83 of the Treaty provides that such minimum standards may be adopted for the so-called "Euro crimes", included on a list of facts particularly serious crime with a cross-: terrorism, human trafficking and sexual exploitation women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

[x] This is the European Parliament's position expressed in a document after entry into force of the Treaties and Commission ruling explicitly that national criminal law of each State must remain the responsibility of Member States

[xi] The subsidiarity principle aims to limit the extension of Union competences and protection of legislative autonomy of Member States.

[xii] See explanatory memorandum to Directive 2014/62 / EU of the European Parliament and of the Council of May 15, 2014 on the protection of the criminal law of the euro and other currencies against counterfeiting and replacing Framework Decision 2000/383 / JHA

[xiii] 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 of September 20, 2011 COM (2011) 573 final.