

**THE CRIMINAL LAW PROTECTION OF THE FINANCIAL
INTERESTS OF THE EUROPEAN UNION**

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INTRODUCTION

The fight against fraud has always been a matter of great relevance for the European Union, given that the protection of its financial interests has proven to be essential for its survival since the birth of the Communities. In the last few years, after the rulings of the Court of Justice in the *Taricco* and *Taricco-bis* cases and the adoption of a new Directive in the field, the focus has shifted onto the concrete ways to achieve the highest level of efficiency in the fight against fraud. Although the Communities managed the protection of the financial interests at first through administrative law provisions, the necessity for an effective defence against serious harm eventually resulted in the introduction of criminal law rules.

Thus, while originally carried out by instruments belonging to the third pillar, the current set of competences of the European law-making institutions, as established by the Lisbon Treaty, allows for the adoption of legal acts aimed at ensuring a sufficient criminal law protection throughout the territory of the Union.

This thesis is the culmination of a research on the evolution of the fight against fraud in the European Union and on the recent developments, also aiming to address trends and prospective scenarios in the field. Those developments also constitute a reason for the renewed concern with the protection of the financial interests of the Union, which underpins the analysis carried out in this dissertation.

In its first chapter, the thesis tackles how the protection of the financial interests has evolved since the birth of the European Communities, and has truly come to fruition before the abolishment of the three-pillar structure through Regulation (EC, Euratom) 2988/95 and the PFI Convention, whose main achievements were the definitions of ‘irregularity’ and ‘fraud’. The focus is held on the concurrent evolution of criminal law in general, since the creation of a European criminal system is inextricably linked to the development of the punitive regime applicable to the offences affecting the core interest of the Union, i.e. the protection of the EU budget.

Beginning with the origins of the defence of the interests of the Communities by means of criminal law, the focus later shifts onto the reforms achieved by the Maastricht and the Amsterdam Treaties, which exerted a large influence on the matter, until the Lisbon Treaty entered into force. Lastly, the innovations regarding the use of criminal law for the fight against fraud are analysed with a reference to Article 83 TFEU and Article 325 TFEU. The coexistence of a potential legal basis for the fight against fraud in these two articles is the reason why it is relevant to highlight to what extent each of the two can become the foundation of a European criminal law system aimed at the protection of the financial interests of the EU.

The second chapter is dedicated to a commentary to Directive (EU) 2017/1371, with a comparison between its provisions and their original formulation in the Proposal submitted by the Commission in 2012, and a mention of the debates and the amendments by the Council and the European Parliament. The definition of fraud-related offences, as well as the introduction of provisions of a procedural nature are proof of the long-term objective of the Union: the creation of a framework to which norms of both a substantive and a procedural nature belong. The final text of the Directive reveals the aspiration to harmonise the national legislations in such a way as to guarantee a much more efficient protection of the financial interests of the Union than the one attainable up until that moment.

Since the role of the European Court of Justice has gained more and more relevance in the past years, the third chapter deals with the developments in the field of the fight against fraud that can be drawn from the case-law of the Court. The main focus of this chapter is on the *Taricco* case, due to the effect it had on the interpretation of Article 325 TFEU – which has consequently been attributed a prominent role in the field of the protection of the financial interests of the Union – and the influence it exerted on the relationship between Union law and national legislations. The case is also compared to the *Taricco-bis* case, as the latest instance in which the Court has tackled the issue of the Union law provisions at the basis of the fight against fraud, and the duties of the Member States as enshrined in Article 325 TFEU.

The analysis carried out in the three chapters is aimed at pinpointing the main trends of the Union's fight against offences affecting its financial interests. The

constant debate over the choice of a legal basis for the acts adopted in this field, or else the tendency to enlarge the array of prohibited conducts, are only two of the typical features of the fight against fraud as conducted by the Union. An overarching framework might surface from the synthesis of the often-contradictory measures taken by the European institutions in the field.

This thesis therefore intends to identify and comment the provisions which would underpin a future criminal law system aimed at the effective protection of the financial interests of the Union.

CHAPTER 1

THE CRIMINAL LAW PROTECTION OF THE FINANCIAL INTERESTS OF THE EU FROM THE BIRTH OF THE EUROPEAN COMMUNITIES TO THE PROPOSAL FOR A PFI DIRECTIVE

1.1. The Undisputed Relevance of the Financial Interests of the European Communities

A prerequisite for the analysis of the financial interests of the Union is the confirmation of the relevance of these interests and the explanation as to why they are essential.

While discussing the peculiarities of European criminal law, Sotis¹ highlighted the difficulty underlying the definition of the term ‘European interest’. Such a challenge needs to be undertaken in order to pick out which elements are to be considered as interests and, as a consequence, deserve protection and require European law ‘inputs’, i.e. obligations to adopt sanctions, to be addressed to the Member States. An exhaustive classification would however be complex because of the constant development of Europe and the fact that the change in its institutions and features also implies a change in the interests which refer to the European entity. Many classifications have, therefore, been suggested by scholars. Manacorda², for one, begins his analysis of European criminal law by identifying the economic interests, which he divides into ‘supranational interests’, interests common to more than one Member State but whose relevance is not restricted to the national territory, and ‘new European interests’, such as public order or the efficiency of public administrations. In the field of financial interests and birth of

¹ SOTIS, *Il diritto senza codice: uno studio sul sistema penale europeo vigente*, Milano, 2007, pp. 69 et seq.

² Ibid., p. 70; MANACORDA, ‘Union européenne et droit pénal: esquisse d’un système’, *Revue de Science Criminelle et de Droit Pénal Comparé*, pp. 95 et seq.

criminal law, however, Grasso's classification has been arguably the most influential: he proposes a distinction between 'institutional interests linked to the existence of the Community and the exercise of its supranational powers' and 'juridical interests stemming from the activities carried out by the Community'. This latter category finds its relevance in relation to the existence of the Common Market and the fundamental freedoms³, but also to the influence the law-making activity of the Community has on the national markets. Sicurella based her own classification⁴ on Grasso's, distinguishing between 'supranational interests', which directly and specifically relate to the transnational entity, and 'common interests', which are to be related to each and every State, yet are believed to have a 'supranational relevance'⁵ since their protection is aimed at the creation of the Area of Freedom, Security and Justice.

Notwithstanding the differences in the positions proposed by each scholar, there is an element that emerges from all of them. Indeed, some interests seem evidently more relevant for the European Community compared to others, to such an extent that 'the protection of those interests translates into the protection of the Community itself'⁶. Among those interests the financial interests of the Communities find their place⁷. It should therefore be assumed that what constitutes the core of the Community needs and deserves protection from any aggression that might occur against it, even when the interest to be protected is an economic one, which is to be seen as a consequence of the original – and still relevant at the present

³ GRASSO, 'Introduzione: diritto penale ed integrazione europea', in GRASSO, SICURELLA (eds.), *Lezioni di diritto penale europeo*, Milano, 2007 p. 55.

⁴ SICURELLA, 'La tutela "mediata" degli interessi della costruzione europea: l'armonizzazione dei sistemi penali nazionali tra diritto comunitario e diritto dell'Unione Europea', in GRASSO, SICURELLA (eds.), *Lezioni*, p. 254.

⁵ For a correlation between her classification and the two categories of crimes in Article III-271 of the Constitutional Treaty, see SICURELLA, 'Tutela', in GRASSO, SICURELLA (eds.), *Lezioni*, p. 255; GRASSO, 'La Costituzione per l'Europa e la formazione di un diritto penale dell'Unione europea', in GRASSO, SICURELLA (eds.), *Lezioni*, p. 693.

⁶ SOTIS, *Diritto*, p. 74.

⁷ Kuhl moreover assumes the evolution of the protection of the financial interests could result in the strengthening of the protection of other interests arguably essential to the identity and survival of the European entity, such as intellectual property and the Euro. For his analysis of the measures adopted for the protection of the financial interests, see KUHLMANN, 'Stratégie antifraude de la Commission et lutte contre la grande délinquance préjudiciable aux intérêts communautaires. Fonctionnement et rôle de l'UCLAF', in GRASSO (ed.), *La lotta contro la frode agli interessi finanziari della Comunità europea tra prevenzione e repressione: l'esempio dei fondi strutturali. Atti del seminario. Catania, 18-19 giugno 1998*, Milano, 2000, p. 11.

time – purpose of the Communities established in the Fifties. In particular, Sotis defines these interests as ‘vital’ for the existence of the Communities, since their protection brings about the protection of the Communities themselves. A State would find in its sovereignty and personality the core of its existence and channel its efforts into ensuring their safety; comparatively, Europe sees in its power to adopt and implement policies its fundamental core in need of protection.

The importance of those interests is therefore evident from a theoretical point of view. However, a description of the nature of those interests is essential in order to clarify their relevance from a practical point of view.

The very same impulse that brought the first six Member States to the creation of the Communities was intrinsically connected to the protection of the economic interests of those States, and to the purpose of creating a Common Market⁸. Such a market would have simplified interstate trade, while also making the development of a political and social union more likely⁹. The Communities having been born with economic interests in mind, it is an obvious consequence that money has always been a main issue, even to a higher extent than it generally would be because of the undeniable attractiveness of money and of the interests which are connected to it. Furthermore, those Communities were grounded on the need for the implementation of policies and the carrying out of activities, in order not to defeat the purposes for which they had been created. As a result, the protection of the budget allowing for the achievement of those objectives¹⁰ is undoubtedly a matter of great importance for the European Communities.

The fact that a Common Market was created - or rather was being created – meant that the economic activity could not be regulated exclusively at a national level any more. Indeed, a regulation both at the national and supranational level was needed. This was because the economic relationships were no more restricted to the market of a single State, but often displayed elements of transnationality, being

⁸ The abolishment of the frontiers is already listed as a purpose of the Treaty of Rome in its preamble.

⁹ CHALMERS, DAVIES, MONTI, *European Union Law: Texts and Materials*, Cambridge, 2014, pp. 668 et seq.

¹⁰ See Article 4(3) TEU, introduced by the Lisbon Treaty, which, ‘pursuant to the principle of sincere cooperation’, specifically refers to the duty of Member States to adopt measures in order to ensure the achievement of the objectives set out in the Treaties and originating from other acts of the European institutions.

interstate trade already a reality in the Seventies. This phenomenon should be seen as coming both from a natural evolution of modern trade and as a consequence of the free movement of workers and the freedom of establishment, which were enjoyed respectively by natural and legal persons even before the proposal for a European citizenship was submitted¹¹. When making up a market that involves different legal systems, the harmonisation of laws is essential. The establishment of this market, in particular, would have naturally entailed the creation of a European competition law, and the introduction of fines in case of violation¹², aimed at punishing – but also at preventing – abusive conducts by the undertakings acting in the market, which caused distortions of competition. Moreover, where the European budget – that is to say, the revenues of the Communities itself, that are made up of traditional own resources (custom duties, agricultural levies and specific sugar levies¹³), resource based on value added tax, and resource based on gross national income¹⁴, while the expenditures refer to ‘the funding of the Common Agricultural Policy, the Structural Funds programme and smaller items such as food aid or research’¹⁵ – is concerned, there has been from the very start a much more open approach, in order to hinder the commission of frauds, as well as other offences, affecting its revenues and expenditures.

The cooperation in the economic field was supposed to bring about the cooperation in police and judicial matters. In a sense, this is what later came to life in the Maastricht Treaty. In particular, it was Article 13 of the Single European

¹¹ The two freedoms found their legal basis already in the Treaty establishing the European Economic Community, that came before the European citizenship, which dates back to the Tindemans Report of 1975 and the proposal by the Spanish government of 1990, and was formalised by the Maastricht Treaty.

¹² STRANDBAKKEN, HUSABO, *Harmonization of Criminal Law in Europe*, Cambridge, 2005, p. 6.

¹³ FRANCE, ‘The Influence of European Community law on the Criminal Law of the Member States’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice in Europe. A Collection in Honour of Prof. em. dr. dr. h. c. Cyrille Fijnaut*, Leiden-Boston, 2013, p. 161.

¹⁴ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests by Means of Penal Law’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation in Penal Matters: Issues and Perspectives*, Padova, 2008, p. 170; VENEGONI, ‘La definizione del reato di frode nella legislazione dell’unione dalla convenzione PIF alla proposta di direttiva PIF’, October 14th 2016, pp. 4-5. Available at: <<http://www.penalecontemporaneo.it/d/4963-la-definizione-del-reato-di-frode-nella-legislazione-dell-unione-dalla-convenzione-pif-alla-propost>>

¹⁵ FRANCE, ‘Influence of EC law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 161-162.

Act¹⁶ (SEA), that first hinted at a possibility for a further-reaching impact of the measures by the establishment of the Internal Market. The general intention was to stop perceiving the cooperation in matters of justice as a way, in and of itself, through which the solidarity among States could come to life, and to start seeing it as a cooperation aimed at the achievement of specific ulterior purposes of the Community¹⁷. Indeed, Satzger and Zimmerman have more recently pointed out that, although the undeniable reason for the protection of the financial interests is to be found in their connection with money, a conduct jeopardising the European budget would ‘both imply a monetary loss and a disturbance of basic community policies’¹⁸. The fraudulent conducts currently being acted are, in fact, as harmful because of the losses they cause to the budget of the Community as they are because of the distortions of competition in the Common Market they entail. It is therefore undeniable that the recognition of the financial interests as core elements of the Union is still as relevant as it was in the past, if not even more so.

1.2. The Reasons¹⁹ for a Criminal Law Protection of the Interests of the European Communities

A natural implication of this depiction is that, once the Communities had been created, even before that recognition of the legal personality of the Union which will later be found in Article 47 of the Treaty on the European Union (TEU) as modified by the Lisbon Treaty, there was already the possibility of seeing them as

¹⁶ The Single European Act is the first major revision to the Treaties of Rome, signed with the express purpose of making the creation of a European Union more likely. See EUR-Lex, ‘The Single European Act’. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0027>> Last updated: October 26th 2010. About the novelty of the Act, it is stated in particular that ‘[b]y creating new Community competences and reforming the institutions, the SEA opened the way to political integration and economic and monetary union to be enshrined in the Treaty of Maastricht of the European Union’.

¹⁷ SICURELLA, *Diritto penale e competenze dell’Unione europea: linee guida di un sistema integrato dei beni giuridici sovranazionali e dei beni giuridici di interesse comune*, Milano, 2005, pp. 98 et seq.

¹⁸ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 170 et seq.

¹⁹ The topic will be dealt with once more from the point of view of harmonisation pursuant to Article 83 TFEU on paragraph 1.6.2.

centre of interests. It is in the nature of the interest itself its need for protection²⁰, and of the most effective protection possible, especially when they are part of a framework such as the one established by the institutions of the European Communities.

An issue that should not be disregarded, neither in the classification of the interests of the Community nor in the analysis of the possible means of protection, is the difference between European law and national law. The two do not work in the same way. In particular, while State law already possesses all the instruments to protect an interest either by means of criminal law or administrative law, the same does not occur as far as European law is concerned. Sotis, in relation to this issue, talks about a necessary ‘legitimation’²¹ that must derive from a juridical system before an interest might be protected by means of criminal law. In a national context, the mere existence of a national interest which deserves protection justifies the introduction of a criminal law provision. By contrast, the legitimation for the introduction of a European criminal law provision does not lie in the need to provide for its protection itself, but it must be underpinned with a specific reference in European law. The principle of conferral implies that the national governments and representatives in the European institutions must find out to which extent a European interest is relevant and deserves protection, and, as a result, confer a specific competence to the European institution before the provision can be introduced.

Generally, the protection of interests, and of public interests in particular, is taken up by administrative law – being the Council and the Community competent to take the necessary measures for the achievement of the objectives set out in the Treaties²² -, in the first instance, and by criminal law when administrative law

²⁰ For a discussion on the attempts at finding a legal basis for administrative sanctions and ‘criminal sanctions with an administrative denomination’, in particular referring to Article 87 EEC Treaty and Article 83 Euratom Treaty as well as other articles in the ECSC Treaty, see GRASSO, *La tutela penale degli interessi delle Comunità Europee*, Catania, 1984, pp. 44 et seq.

²¹ SOTIS, *Diritto*, pp. 70 et seq.

²² COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, December 17th 1970, case C-25/70, *Einfuhr und Vorratsstelle v Köster*, paras. 6 et seq.; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, October 27th 1992, case C-240/90, *Germany v Commission*, paras. 18 et seq.

provisions do not guarantee enough effectiveness²³. However, a more practical²⁴, yet no less relevant, reason for the choice of the criminal law protection, especially insofar as the financial interests of the Communities are concerned, is the fact that harm to the European budget most frequently comes from evidently criminal conducts – as a testament to the particular susceptibility to criminal abuse²⁵ characterising these interests –, which would therefore require criminal law norms in order for those conducts to either be prevented or punished. Indeed, the opening of the frontiers brought about by the creation of the Common Market also meant transnational crimes, and the need to protect the interests affected by those²⁶, which is an obvious necessity even without considering the general increase in organised crime affecting European policies²⁷. Furthermore, the open frontiers might have brought about ‘gaps’²⁸ in the national legislation, which needed to be filled in order to avoid affecting national interests. Lastly, it could be inferred from the usual aims of national criminal law provisions that the protection of the budget of the European Communities is an abstract concept for national legislations, and Member States are much more concerned to develop rules protecting their own interests than they are in relation to those interests which appear to be further from them²⁹. This means

²³ On the relationship between administrative and criminal law and whether an act can be perceived as antijudicial until a criminal sanction has been introduced, and the potential application of the precautionary principle and of the presumption of innocence, see COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Communication from the Commission on the precautionary principle’, COM(2000) 1 final, February 2nd 2010; DONINI, ‘Un nuovo Medioevo penale? Vecchio e nuovo nell’espansione del diritto penale economico’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale: prospettive per il XXI secolo. Omaggio a Hans-Heinrich Jescheck per il 92° compleanno*, Milano, 2006, pp. 71 et seq.

²⁴ See EUROPEAN COMMISSION, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law’, COM(2011) 573 final, September 20th 2011, p. 5.

²⁵ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 170.

²⁶ In his analysis of the transformation of crimes in former socialist countries, Lévy confirms that ‘the vigorous presence of transnational crime, that is crime which overlaps the borders of the countries of transition, is also due to the increase possibilities of the accumulation of capital’. For his analysis, see LÉVAY, ‘Social Changes and Rising Crime Rates’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 76.

²⁷ KUHLE, ‘Stratégie antifraude de la Commission’, in GRASSO (ed.), *Lotta contro la frode*, p. 1.

²⁸ About the gaps in national legislation which, lacking a harmonisation of law, would allow for crimes to ‘be committed in countries where they do not constitute an offence’, see STRANDBAKKEN, HUSABO, *Harmonization*, p. 17.

²⁹ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 173.

an action at the European level would be inevitable to warrant the protection of the European interests. De Francesco mentions two direct implications of the undeniable need for criminal law: first, the increase in harmonisation, because there could not be an effective criminal law protection without a ‘strict uniformity of the applicable provisions’; secondly, the realisation this case would be the ‘opportunity to confer an autonomous competence in some fields of criminal law’ to the European institutions³⁰.

Interestingly, the role of the criminal provision protecting an interest of the Union has been proved to be different than the one protecting a national interest³¹. This is something maintained by the European Court of Justice in the *Commission v Council* case. Even though the facts of the case were based on environmental issues, the ruling of the Court has a further-reaching application. Indeed, it was ruled that the introduction of a criminal provision and, accordingly, of a penalty in European law should not be justified specifically by the protection of an interest, but it should rather be inspired by the general need to ‘ensure the effectiveness of Community law’³².

1.3. The Attempts to Protect the Interests of the European Communities by Means of Criminal Law

Although by now the competences of the European Union have come to include also specific areas of criminal law, it is still relevant to recall the history of the creation of European criminal law. In fact, the protection of the financial interests and the creation of a European criminal law have always gone hand in hand. The former arguably fuelled the development of the latter, which is evident

³⁰ DE FRANCESCO, ‘Le sfide della politica criminale: “integrazione” e sviluppo dei sistemi repressivi, nel quadro dell’internazionalizzazione della tutela penale’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, p. 49. Also, on p. 51 De Francesco finds the second implication to be less pressing, since the first one is what should hinder the creation of national policies in contrast with each other.

³¹ On this topic, see SOTIS, *Diritto*, p. 87.

³² COURT OF JUSTICE OF THE EUROPEAN UNION, September 13th 2005, case C-176/03, *Commission of the European Communities v Council of the European Union (Commission v Council)*, para. 52.

once the importance of those interests for the Communities first and the Union afterwards is proven. A historical analysis of the way those interests have been protected therefore requires a premise and a parallel analysis of the way European criminal law has been phased over the past few decades.

First of all, it should be recalled that the Communities back then – as well as the Union now - were not a typical international organisation. In the international law system, any convention can determine the introduction of a provision, even a criminal law provision, which would directly become part of the international law system. No such thing can happen when European law is concerned, because of the differences between the European entity and international organisations, and those between European criminal law and international criminal law. While the latter is part of the international law system and has a very limited influence on national law³³, the former is a system of laws that influences the national legislations and presumes a loss of sovereignty for those States. As a consequence, an introduction of criminal norms could not happen in the same way international criminal law provisions are created and are made part of the international law system. Instead, a specific reference in the Treaties, which would give the European Communities the power to introduce rules in those matters, is needed. In particular, as far as the fight against fraud is concerned, Article 325 of the Treaty on the Functioning of the European Union (TFEU) now enshrines the powers of the Union in that field, while Article 83 TFEU enumerates the other criminal law competences of the Union.

However, before the Lisbon Treaty came into force, there were already different means through which a European criminal law was being created and the criminal law protection of the financial interests of the Union was being guaranteed. In order to more accurately describe the evolution of the matter and the stratification of provisions that has later brought about the current system, it is important to distinguish between a pre-Maastricht period and a post-Maastricht one. The creation of the three-pillar structure and the introduction of the third pillar caused a shift in the way criminal law at the Community level was perceived, even before it was finally absorbed by the first pillar with the Lisbon treaty.

³³ RIZ, 'Il diritto penale transfrontaliero e il rilevante contributo dato da Hans-Heinrich Jescheck', in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 23 et seq.

It should be noted that originally there was no competence regarding the introduction of criminal law sanctions, nor there was a rule either in primary or in secondary law³⁴ that allowed for the introduction of offences by means of a European juridical act³⁵. As a consequence, there could not have been a duty to criminalise certain conducts. There was however a possible interpretation of some primary law rules³⁶ that could have brought about the introduction of criminal sanctions by Member States. Both scholars and the Court of Justice inferred the duty for Member States to introduce penalties, which would have ensured a higher level of protection of the interests of the Communities³⁷.

The lack of a European law-making power was relevant also when considering procedural law, since without harmonisation, the need for a closer cooperation among the law enforcement agencies was that more poignant. Even the least intrusive harmonisation of criminal law and procedure would have appeared to be necessary, although it was evident that, at that point in time, it could not have been reached through a directly applicable European law, but through treaties on mutual assistance in criminal matters, or through the indirect effect on national law, arising from the obligation for national law to comply with European law in matters regulated by the latter³⁸.

No European substantial or procedural criminal law comparable to a national one existed before the Lisbon Treaty, nor a criminal law system could have been constructed with the scarce criminal law provisions already in force before the Maastricht Treaty. Indeed, if, on the one hand, a criminal law protection of the interests of the Communities had always been perceived as inevitable, on the other hand the plan of the creation of a European criminal law had always been seen more

³⁴ It is here used the definition provided by SATZGER, *International and European Criminal Law*, München – Oxford, 2012, p. 44, and inferred by STREINZ, *Europarecht*, Heidelberg, 2012, paras. 3 and 4, by ‘primary law’ meaning ‘the founding treaties of the European Union and their supplements, annexes and protocols’; while by ‘secondary law’ meaning ‘the law established by the European institutions on the basis of primary law’, therefore mostly, but not exclusively, regulations and directives.

³⁵ The conferral principle is now expressed in Article 4(1) TEU, introduced by the Lisbon Treaty.

³⁶ Article 5 of the Rome Treaty was the main provision regarding this issue, in stating the States ‘shall take all general or particular measures which are appropriate for ensuring the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community’.

³⁷ SATZGER, *International and European Criminal Law*, p. 44.

³⁸ STRANDBAKKEN, HUSABO, *Harmonization*, p. 6.

as utopic than realistic. Scholars held diverging positions on the matter, some of them positive a European criminal law could be created because there were not that many differences³⁹ between national juridical systems, others still stubbornly maintaining the idea that criminal law was linked in such a close way to national law that a creation of a supranational criminal law, of a system which was instated by an institution at the centre and yet would have applied directly in all the Member States, could not reasonably become a reality, especially until the democratic deficit⁴⁰ existed. There is truth in both opinions, since a European criminal law would eventually be created, but decades would be needed before a system resembling a national one could come to life⁴¹.

Lacking a European competence in criminal law, and being that necessary because of the principle of conferral and the rule of law, other means were used to provide for a strong protection of the financial interests of the Communities. First and foremost, the European Communities have made good use of their competences in administrative law, both by introducing preventive measures that tackle fields which would be ‘particularly vulnerable to criminal attacks’⁴² and by introducing repressive administrative measures and sanctions⁴³. It should not come as a surprise that the first act to properly regulate sanctions and checks on the conducts likely to harm the European budget – the so-called ‘irregularities’ – was indeed an administrative law regulation (see paragraph 1.5.1.). However, being criminal sanctions more severe, dissuasive and effective than administrative ones, the underlying question was whether a criminal law system could likely be created. At first, obstacles to the idea of a European system that overcame national boundaries were both the general concept of criminal matters being a beacon of national law,

³⁹ On this topic, see SATURNINO, *Diritto penale europeo. I reati contro il patrimonio. Prospettive di riforma e integrazione*, Napoli, 1995.

⁴⁰ On the democratic deficit and the rule of law as elements hindering the creation of a European criminal law system before the Constitutional Treaty, see GRASSO, ‘Introduzione’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 56 et seq. On this issue, see also FOLLESDAL, HIX, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, *European Governance Papers (EUROGOV) No. C-05-02*, 2005. Available at: <http://edoc.vifapol.de/opus/volltexte/2011/2454/pdf/egp_connex_C_05_02.pdf>

⁴¹ It should not be forgotten that the existing framework is far from an autonomous criminal law system.

⁴² SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 176.

⁴³ See paragraph 1.5.2.3. about criminal sanctions in a broader sense.

and also the position of those who did not see harmonisation of criminal laws ‘as a special virtue’⁴⁴. Of course, European law was still indirectly influencing national laws⁴⁵, but that was happening without an actual awareness that the basis for a criminal law system was being laid. The Council of 1971 shared that opinion and rejected the proposal of a Penal Code submitted in the same year. We would have to wait until 1996 before the position of the Council was reversed, and Sieber was asked to ‘assist the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly in the preparation of a report on a Model European Penal Code’. In his memorandum, Sieber starts by explaining the reason why twenty-five years later a code could eventually become necessary, and provides the examples of the impact computer crimes and environmental crimes were having in a global society, in order to demonstrate social and scientific developments had changed reality to such an extent that criminal provisions tailored to protect citizens and governments from transnational crimes and to face new challenges were now required more than ever⁴⁶. In that same decade, before the new project was commissioned, a common matter of discussion was whether a closer intergovernmental cooperation would have been more effective than a harmonisation of laws. The blossoming intention of creating a social and political community is however what caused this particular discussion to become irrelevant, especially when the Constitutional Treaty was adopted and a harmonisation of criminal provisions, albeit in a restricted number of fields, was called for⁴⁷.

⁴⁴ This is a quote of Louis B. Schwartz by Prof. Enschedé in ENSCHEDÉ, *Model Penal Code for Europe*, Council of Europe, AS/Jur (22) 45, March 23rd 1971.

⁴⁵ See chapter 3 of this thesis for remarks regarding the influence of European law on national law because of the *primauté* principle in this field.

⁴⁶ SIEBER, *Memorandum on a European Model Penal Code*, European Journal of Law Reform, Vol. 1, 1998/1999, pp. 445-471.

⁴⁷ AMBOS, ‘Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections’, *Maastricht Journal of European and Comparative Law*, vol. 12, 2005, p. 174. Available at: <<https://ssrn.com/abstract=1972252>>

1.3.1. The Principle of Assimilation

No actual power to introduce sanctions or to harmonise national legislations existed in the Treaties before the Constitutional Treaty was adopted and the Lisbon Treaty came into force.

Certainly, a push for the introduction of specific offences had already started. This came from harmonisation and it was relevant because a regulation of those matters was needed to protect the freedom of movement of goods, on the one hand, and the creation of competition law, on the other. The existence of an undeniable want for a strong protection of the interests urged the scholars to discuss on the means through which this aim could be achieved. Already in the Eighties⁴⁸, two possibilities were seen as attainable, besides administrative law sanctions. First, the introduction of a treaty which specifically dealt with the matter, much in the way the creation of international criminal law had worked, by setting out obligations for the adhering States; secondly, the application of the principle of assimilation, which would have allowed to overcome the problem of giving specific competences to the EU.

A discussion on the principle of assimilation cannot start without mentioning the ambivalent approach that the European Communities have always shown towards national law. If the protection of European interests by means of national law for lack of a competence and, therefore, a better alternative, is unavoidable, at the same time the European institutions have highlighted over the years the dangers to the fundamental freedoms and the survival of the Common Market that could derive from national legislation⁴⁹. As previously mentioned in paragraph 1.2., States would naturally prefer the protection of national interests to that of supranational ones.

⁴⁸ GRASSO, 'Verso un diritto penale comunitario', in PEDRAZZI ET AL. (eds.), *Il diritto penale europeo dell'economia. Incontro di studio e documentazione per i magistrati "Vittorio Bachelet"* (Siracusa, February 9-14 1982), Consiglio Superiore della Magistratura, Quaderni di incontri di studio, vol. 3, Roma, 1983; GRASSO, *Comunità Europee*, pp. 83 et seq.

⁴⁹ SATZGER, *International and European Criminal Law*, p. 44.

Among the means to be employed in order to ensure a protection of the interests of the European communities, the assimilation⁵⁰ principle therefore plays a fundamental role. It entails the application of national rules to infringements which are similar, yet feature an element of transnationality. Therefore, according to the assimilation principle, a conduct affecting the interests of the EU would be treated in the same way as a similar one affecting national interests. The immediate consequence of the application would be the inevitability of the use of criminal sanctions if ‘the corresponding national provision constitutes a criminal offence’⁵¹. Indeed, many scholars throughout the years have made reference to this principle. It was well-known, as well as easily applicable in that it allowed for a protection of the interests of the Communities without supranational law being too intrusive in national law.

The first reference to the principle is to be found in Article 14, Chapter IV of the Draft Treaty of 1976, which states the national provisions sanctioning infringements of the kind⁵² specified in the article ‘shall apply in like matter’ to comparable acts or omissions⁵³. However, the first clear definition of the principle is to be found in *Greek Maize*⁵⁴, the leading case in which the Court of Justice provided for means of sanctioning a violation of European law⁵⁵ – in general, but also in particular since the case dealt with a damage to the financial interests of the EC –, keeping Article 5 of the Treaty Establishing the European Community (TEEC) in mind as the legal basis for its reasoning⁵⁶. This case is of the utmost

⁵⁰ PEDRAZZI, ‘Relazione introduttiva’, in PEDRAZZI ET AL. (eds.), *Diritto penale europeo dell’economia*, pp. 16-19.

⁵¹ FRANCE, ‘Influence of EC law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 171.

⁵² That is to say, ‘infringements committed with the intent to cause, or actually causing the unlawful reduction of [the] revenue [of the State], or the unlawful collection of its public subsidies, refunds or financial aid’ pursuant to Article 14.

⁵³ In particular, Article 24 refers to ‘acts or omissions committed with the intent to cause, or actually causing the unlawful reduction of revenue forming part of the Communities’ own resources, or the unlawful collection of public subsidies, refunds, financial aid or other moneys financed directly or indirectly from the budget of the Communities’.

⁵⁴ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 174 et seq.

⁵⁵ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, September 21st 1989, case C-68/88, *Commission v Hellenic Republic (Greek Maize)*, para. 24. The Court rules that ‘they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance’.

⁵⁶ *Ibid.*, para 23.

importance since it not only put the European interests on the same level as the national ones, but it also required effective, proportionate and dissuasive sanctions⁵⁷. Moreover, the requirement of diligence must be met during both the application of the rule and the implementation of the national provision⁵⁸, which includes also the moment of enforcement. It should also be kept in mind that the choice of the appropriate sanction is left to the Member States and the only requirement is that they are effective⁵⁹, even though they clearly need to comply with Community law and principles⁶⁰. In the matter of effectiveness, the *Amsterdam Bulb* case⁶¹, one of the firsts to deal with assimilation, was harshly criticised because, while it referred to a duty to introduce sanctions, it ‘allowed’ – rather than formally acknowledge the duty of – the States to ‘choose the measures which they consider appropriate’. It should be noted that the Court of Justice had also specified the limits of application of the principle in the *Ferwerda*⁶² and *Fromme*⁶³ cases by then, and the *Greek Maize* case would have been in line with the principles⁶⁴ therein expressed.

Even though the primary law underpinning this rule is to be found first of all in Article 5 TEEC, the true recognition of the principle in the Treaties occurred with the introduction of Article 280 TEC. Its second paragraph creates, indeed, an assimilation of the European interests with the national ones. Its direct implication would be, therefore, in the field of sanctions, and of their enforcement in order to ensure a similar protection of both of the European and national interests. The Maastricht Treaty introduced Article 209A(1), which became Article 280(2) TEC

⁵⁷ Ibid., para. 24. PIZZOLANTE, ‘Frodi comunitarie’, in CARELLA ET AL. (eds.), *Codice di diritto penale e processuale penale dell’Unione Europea*, Torino, 2009, p. 557.

⁵⁸ Case C-68/88, *Greek Maize*, para. 25; VERVAELE, ‘The European Community and Harmonization of the Criminal Law Enforcement of Community Policy: Ignotti nulla cupido?’ in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 33.

⁵⁹ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 175.

⁶⁰ SICURELLA, *Linee guida*, p. 87.

⁶¹ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, February 2nd 1977, case C-50/76, *Amsterdam Bulb v Produktshap VoorSiergewassen (Amsterdam Bulb)*, paras. 32-33.

⁶² COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, March 5th 1980, case C-265/78, *Ferwerda v Produktschap Voor Vee En Vlees (Ferwerda)*, para. 20

⁶³ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, March 5th 1982, case C-54/81, *Fromme v Balm (Fromme)*, para. 4.

⁶⁴ FRANCE, ‘Influence of EC law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 171 et seq. summarises the cases with this specific purpose.

after the Amsterdam Treaty, enshrining the obligation for the Member States to apply the same national rule that would be applied were the damaged interests national ones, to a crime harming the interests of the Communities. This is not a direct implication of the principle of mutual collaboration and of the obligations listed in Article 5 TEEC. As a matter of fact, not all national laws would be applicable to a crime showing elements of transnationality, in particular when it not only harms national interests, but also European ones⁶⁵. Article 280 TEC, therefore, obliges the Member States to enlarge the field of application of national law so as to also cover crimes damaging the interests of the European Community⁶⁶.

However, besides being a principle which does not ensure the effectiveness of the protection because of the excessive discretion it allows the States⁶⁷, the acceptance of the assimilation has not been without concerns for its compliance with the fundamental principles of the Treaties and the constitutional values shared by the Member States. Indeed, the principle has been criticised⁶⁸ with reference to the principle of the rule of law, and of equality. The former would be violated because Article 280(2) TEC implies the introduction into the European law system of new provisions which have been created by legislative institutions other than European ones; on the contrary, a violation of the latter would occur because of the inequality in treatment that would result from the application to similar situations of provisions coming from different juridical systems.

1.4. The Establishment and Evolution of the Third Pillar

It directly derives that in an analysis on the protection of the financial interests of the Communities, it would be negligent to forget about the Maastricht Treaty,

⁶⁵ However, while a distinction could have been possible in the past, it is questionable whether at this point in time there might actually be a difference between the two, especially considering how large the variety of interests of the Union has grown.

⁶⁶ PIZZOLANTE, 'Frodi comunitarie', in CARELLA ET AL. (eds.), *Codice*, p. 558.

⁶⁷ On the lack of uniformity in the protection of interests, see GRASSO, 'Introduzione', in GRASSO, SICURELLA (eds.), *Lezioni*, p. 67.

⁶⁸ BACIGALUPO, 'La tutela degli interessi finanziari della comunità: progressi e lacune', in GRASSO (ed.), *Lotta contro la frode*, p. 15.

which represents the starting point for an actual recognition of those matters, with the introduction of the judicial cooperation into a clear framework.

Before the Maastricht Treaty came into force, the cooperation among Member States was based on the implementation of policies adopted by the European Communities, either the European Coal and Steel Community (ECSC) - established in 1951 by the Paris Treaty - or the European Economic Community (EEC) – whose birth dates back to the Rome Treaty of 1957, and which was later renamed European Community and absorbed the steel and coal field – or else the Euratom – a community also established by the Rome Treaty. Each of those communities was vastly different from an international organisation because of the legislative power bestowed upon them. Some scholars have maintained the difference lies in the legitimacy to introduce binding provisions directly addressed to the States – which is not a feature of international organisations, whose power is restricted to the adoption of recommendations⁶⁹ –, while others have mentioned a conferral of sovereignty that the States executed through the signature and later ratification of the Treaties⁷⁰. The European Communities therefore make up a *tertium genus*, their structure and main features being different from those of a federal State and of an international organisation, and their belonging to their own peculiar category justifying the denomination of ‘supranational entities’.

Therefore, when the Maastricht Treaty was being drafted, the need for an enlargement of the cooperation among Member States could have been realised by the strengthening of either their supranational nature or their international one⁷¹. The matters that needed an enhancement of cooperation being central to the protection of the identity of the States and their sovereignty, the choice of the Member States was to create a ‘forum for intergovernmental cooperation’⁷² in the fields of the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). The new structure that resulted from putting two new pillars of cooperation beside the pillar made up of the Economic Community created the so-called three-pillar structure, the first pillar being the Community one, and the

⁶⁹ CONFORTI, *Diritto internazionale*, Napoli, 2013, pp. 168 et seq.

⁷⁰ DANIELE, *Diritto dell’Unione Europea*, Milano, 2014, pp. 50 et seq.

⁷¹ For a comparison between the two natures of the Communities and their respective legislative procedures see DANIELE, *Diritto dell’Unione Europea*, pp. 12 et seq.

⁷² SATZGER, *International and European Criminal Law*, p. 45.

second and the third respectively the CFSP and the JHA ones. The first pillar is the one where there is the highest integration and ‘every institution fully acts according to its own role’⁷³. The powers and functions of the institutions were different in the second and third pillars, where the Parliament usually played a smaller role and the unanimity rule caused the Council to be the main actor.

In the matter of the financial interests, the most relevant pillar is the third one, which, by actually mentioning criminal law for the first time in primary law, is a long step forward on the creation of a criminal law system, even in a time when it still appeared quite unlikely. This also implies a first proper recognition of the relevance of criminal law issues. However, the choice to introduce it in the third pillar shows how far the Treaty truly was from the idea of a European Union in the sense that we understand today: a supranational entity trying to step closer to the federal State model, rather than to the international organisation one.

The most relevant part in the Treaty, as far as criminal law and the protection of the financial interests are concerned, is Title VI, whose provisions were to govern the cooperation in the field of justice and home affairs, pursuant to Article K of the Maastricht Treaty. It is with these provisions that the cooperation in criminal matters acquired a central role among the purposes of the newly established European Union. There is not a clear categorisation of the acts mentioned nor of the provisions themselves, which are undoubtedly part of Union law instead of belonging to the international law system, yet are not part of the Community law of the third pillar. No matter the nature, however, they officially bring the judicial cooperation in criminal matters under the architrave of the European Union.

As a matter of fact, it is evident that the creation of the three-pillar structure is a testament to the uneasiness at making criminal law one of the competences of the Union because of the effects on national sovereignty that it would have entailed. Indeed, when the supranational method is strengthened, the European institutions gain more power while the States lose sovereignty, while, when the intergovernmental method is strengthened, there is little involvement of the supranational institutions in the creation of directly applicable law, and the

⁷³ PIRIS, *Il trattato di Lisbona*, Milano, 2013, p. 76.

European Council and the Council have a much larger role⁷⁴. As such, criminal matters became part of the third pillar and were dealt with through the procedures therein expressed, much more resembling those typical of intergovernmental cooperation than those of a supranational institution with legislative powers such as the EC, especially evident in those cases when unanimity is required in order to decide⁷⁵.

The introduction of the third pillar shows the recognition of the relevance of criminal law and the attempt at creating a peculiar system, because of the international and transnational elements featured in some offences⁷⁶. It reveals that the judicial cooperation in criminal matters is an issue of common interest for the Communities⁷⁷. As a consequence, in order not to damage their own sovereignty, the States opted in the Treaty for an enforcement of judicial cooperation. It was going to happen through the legal instruments introduced by Article K.3(2), with a strengthening of the role of the European Council. Therefore, the choice to make these matters part of those discussed by the Council meant that each decision had to be taken unanimously, and that implementation by the national Parliaments would be needed before the provisions in those acts could become part of national law⁷⁸.

The structure of the third pillar evolved throughout the years. Some of the fields of cooperation were moved under the Community pillar, so that, eventually, that was aptly renamed 'Police and Judicial Cooperation in Criminal Matters' after the Amsterdam Treaty. Moreover, some institutional changes were brought about by the latter Treaty⁷⁹. The Commission was indeed given the right of initiative together with the Member States, while the European Parliament acquired a new advisory role, and the field of control of the Court of Justice was enlarged, even though it was still not the same as the one it exercised under the first pillar.

⁷⁴ On the topic of the change in power and functions of the institutions throughout the years, see ROSSI, 'A New Inter-Institutional Balance: Supranational vs. Intergovernmental Method After the Lisbon Treaty', in *Global Jean Monnet - ECSA WORLD Conference. The European Union after the Treaty of Lisbon, 25-26 May 2010, Brussels*, pp. 1 et seq.

⁷⁵ The unanimity principle has often been connected in the past to international law, since an international convention requires the agreement of all the States involved before it can be adopted.

⁷⁶ SICURELLA, *Linee guida*, p. 4.

⁷⁷ *Ibid.*, pp. 100 et seq.

⁷⁸ STRANDBAKKEN, HUSABO, *Harmonization*, pp. 6-7.

⁷⁹ PIRIS, *Trattato*, p. 77.

The creation of the Area of Freedom Security and Justice with the Amsterdam Treaty did change the way the provisions of title VI were interpreted. Indeed, this new purpose of the European Union, now explicitly connected to the judicial cooperation in criminal matters, pushed forward the idea of the unification led by the strengthening of the Internal Market to include matters more connected to the protection of the rights of the person. This particular thread would be central until the Lisbon Treaty, when it became the basis for the creation of the European criminal law system. The direct implication of this novelty is that, even though there was no such thing as a European criminal law yet, the use of its instruments was deemed ‘essential in order to achieve one of the main purposes of the European Union’⁸⁰.

1.4.1. The Specific Reform of Title VI of the Amsterdam Treaty: the First Phase in the Development of a European Criminal Law System

The choice to move some areas of cooperation from the third pillar to the first one, so that only a small part of the original matters regarding justice and home affairs remained part of the newly named Police and Judicial Cooperation in Criminal Matters pillar, was in and of itself a testament to the intention not to introduce a criminal law competence. Pursuant to the provisions in Title VI of the Amsterdam Treaty, the power of harmonisation was to be exercised exclusively through intergovernmental cooperation instruments belonging to the third pillar⁸¹ and requiring the unanimity of the Member States governments to be approved. It was clearly a political choice⁸², rather than a technical one.

The Treaty which, on the one hand helped formally define in Article K.1 the objectives of the action in the third pillar, on the other hand introduced the framework-decision⁸³. As a matter of fact, the result was an increase in the number

⁸⁰ GRASSO, ‘Introduzione’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 85 et seq.

⁸¹ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 172.

⁸² FRANCE, ‘Influence of EC law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 179.

⁸³ STRANDBAKKEN, HUSABO, *Harmonization*, p. 7.

of acts adopted by the Union in the criminal field. A comparison between the two main acts of the third pillar, the convention and the framework-decision, however, may lead to the argument that the introduction of the latter instrument and its preference to the convention mirrored the intention of the European institutions to influence the national systems more extensively, given that the adopted framework-decisions have always shown a tendency to detail that goes over⁸⁴ the simple result of binding the States to a specific outcome. It is now clear that the strength of national legislation was giving in to the power of harmonisation of the EU, even though the rule of law would have qualified this phenomenon as non-acceptable⁸⁵. However, the framework-decision is not an act of the first pillar – specifically, it is not a directive. Therefore, it cannot be treated as an act having direct effect, which would imply the application of the *primauté* principle whenever a national provision does not comply with the act⁸⁶.

Article K.1, whose norms were later enshrined in Article 29 of the Treaty of the European Union (TEU), was again inherently connected to the freedom of movement and the strengthening of the Common Market. It should not surprise that the fight against fraud on an international scale was listed as one of the aims of the third pillar in Article 29(5) TEU. As such, apart from the assimilation principle in Article 280(2) TEC, Article K.1 of the Maastricht Treaty first and Article K.1 of the Amsterdam Treaty later introduced a specific and clear reference to the protection of the financial interests of the Union⁸⁷. This was included among the matters of the third pillar, therefore implying that it should be carried out through the typical means of the PJCCM pillar. It should be noted also that an act based on Article 29 TEU (now Article 67 TFEU) would have been different from one based

⁸⁴ KAIAFA-GBANDI, 'The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commencement of 21 Century', in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 184 et seq. in this context mentions a 'deterioration of criminal law's democratic legitimization'.

⁸⁵ *Ibid.*, p. 186.

⁸⁶ SATZGER, *International and European Criminal Law*, p. 108 also points out that the difference between acts of first pillar and acts of third pillar was not abolished by the Lisbon Treaty. By contrast, Article 9 of Protocol 36 states that 'the legal effects of the acts [...] adopted on the basis of the Treaty of the European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties', implying that the already adopted framework-decisions 'remain in force [...]'. However, they retain their legal status which means they must not be treated like directives' pursuant to Article 10 of Protocol 36.

⁸⁷ PIZZOLANTE, 'Frodi comunitarie', in CARELLA ET AL. (eds.), *Codice*, p. 558.

on Article 31 TEU (now Article 83 TFEU). This difference lies in the original intention of the European legislator: while the latter provision was aimed at strengthening the juridical cooperation, Article 29 TEU delivered an answer to a technical necessity. Therefore, no specific judgement regarding the political opportunity of the rule would accompany the adoption of an act based on Article 29 TEU, since that act would have derived from an actual need for harmonisation caused by a gap in legislation. From a practical point of view, a clear-cut distinction could hardly be drawn⁸⁸, however the *ratio* of the two main norms is clearly not the same. Articles 29 and 31 TEU provide for two different procedures as well as two lists of matters which could have been dealt with. It should be noted that, while Article 29 TEU allowed for a wider array of subjects, Article 31 TEU only listed three. However, the enumeration of the latter provision must be interpreted together with the conclusions to the Tampere Council of 1999, which had granted an increase in the number of concerned matters, and had specifically made a reference to financial crimes⁸⁹.

1.4.2. The Likelihood of the Creation of a European Criminal Law System after the Amsterdam Treaty

Although the new provisions in Title VI could have been interpreted as the Amsterdam Treaty hinting at an effort towards the construction of a system, at that point in time, a competence in criminal matters could not have been recognised to the EC yet. The conferral of a competence entailed a symmetrical limitation of sovereignty of the Member States, particularly when that competence concerned matters as close to the core values of the State as criminal law is. It could be argued that a competence in criminal matters could have been inferred from the Treaties by a wide interpretation of some categories of competences in the TEC⁹⁰ – since

⁸⁸ SOTIS, *Diritto*, p. 89.

⁸⁹ SALAZAR, 'Articolo 83 TFUE', in CURTI GIALDINO (ed.), *Codice dell'Unione Europea operativo: TUE e TFUE commentati articolo per articolo, con la carta dei diritti fondamentali dell'Unione Europea*, Napoli, 2012, p. 916.

⁹⁰ BACIGALUPO, 'La tutela degli interessi finanziari', in GRASSO (ed.), *Lotta contro la frode*, p. 22 who mentions Articles 100A TEU and 7A TEU; SATZGER, ZIMMERMANN, 'The Protection of

they had always been described as objectives to be achieved through the necessary means, criminal sanctions included, rather than fields in relation to which acts could be adopted⁹¹ –, or by that specific power that Article 172 TEEC had conferred on the Court of Justice⁹². It is nevertheless obvious that the peculiar nature of criminal law would have required an explicit mention and that the aforementioned wide interpretation would not have been compliant with the principles of European primary law, in particular the one which requires the Court to be inspired in the exercise of its powers by the compliance with the constitutional traditions of the Member States⁹³. The argument even found an official confirmation in a formal act of the Commission, later echoed by the Court of Justice, which clarified that criminal law belonged to the competences of each Member State⁹⁴. It seems safe to assume that the States drafting the Maastricht and Amsterdam Treaties did not appear to be favourable to a law-making competence in this field, yet it is also important to consider that this is something that was bound to happen, with some scholars indeed going as far as to deem it a ‘natural’⁹⁵ conclusion.

The introduction of the provisions regarding criminal law in the Maastricht Treaty caused the matter of the possible creation of a European criminal law to be brought up once again. Even though no specific competence had been given to the EC in criminal matters, it was evident that the creation of the third pillar was directly implying the construction of a ‘formal framework’⁹⁶, one that would have made the mutual assistance and cooperation in criminal matters much more relevant.

As previously stated, the creation of a European criminal law has been approached with different attitudes by scholars. Saturnino⁹⁷ analysed the provisions regarding similar offences in France, Germany, and Italy, and found that the

EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 172. See also paragraph 1.3.

⁹¹ Art 5 TEU; MITSILEGAS, *EU Criminal Law*, London, 2009, pp. 65 et seq.; SATZGER, *International and European Criminal Law*, p. 54.

⁹² GRASSO, *Comunità Europee*, pp. 52 et seq.

⁹³ *Ibid.*, pp. 59 et seq.

⁹⁴ COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Seventh general report on the activities of the European Communities in 1973’, Brussels – Luxembourg, 1974. Available at: <<https://publications.europa.eu/en/publication-detail/-/publication/64ce1e52-6d31-41c1-99dd-965a4bb5372b/language-en>>; SICURELLA, *Linee guida*, p. 15.

⁹⁵ SICURELLA, *Linee guida*, pp. 21 et seq.

⁹⁶ STRANDBAKKEN, HUSABO, *Harmonization*, p. 7.

⁹⁷ On this topic, see SATURNINO, *Diritto penale europeo*. See also paragraph 1.5.2.2.

development of a European law was indeed likely to happen. Back in the past when the common juridical traditions of the States had governed the conducts of the individual, a European criminal law had, in a way, already existed. That *corpus iuris* was underpinned by the common culture shared by the European peoples and the similarities in the social issues tackled by each national government. According to Saturnino, unemployment, organised criminality, youth crimes, protection of collective goods against some forms of criminality were all issues a supranational criminal law that does not care about frontiers could have tackled more effectively. In particular, the crimes affecting financial interests could have represented the first step towards a unification of legislation, since a crime of this kind would have required a supranational protection⁹⁸.

On the other hand, there is evidence that the Member States lacked the strain for the creation of a European criminal law⁹⁹, in the complexity of the matter, as well as in the manifest aversion of some scholars to the realisation of a supranational criminal law system. Riz¹⁰⁰ maintained that a European criminal law or code could not be born because of the inherent characteristics of European law and criminal law, and because of the existing differences among countries, even in a situation where the need for a common protection of some interests was impellent. His proposal was therefore to unify national criminal laws by starting with the harmonisation of single offences, which would have gradually made the establishment of a whole system more likely.

1.5. The Framework from Maastricht to Lisbon: Means of Protecting the Financial Interests

All things considered, it is not difficult to understand why Donini has talked about a Criminal Middle Ages¹⁰¹ in relation to the new sources of criminal law.

⁹⁸ Ibid., pp. XI-XV.

⁹⁹ SICURELLA, *Linee guida*, pp. 17 et seq.

¹⁰⁰ RIZ, 'Diritto penale transfrontaliero', in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 42-43.

¹⁰¹ On this topic, see DONINI, 'Un nuovo Medioevo penale?', in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*.

Indeed, there is a wide variety of sources of law, and the harmonisation coming from Europe has had for a short while after its birth the typical feature of the medieval *lex mercatoria* – a common law whose birth had to be found in the need for simplification of the rules applied to commerce. However, this should not be seen as a return to the past, rather as a natural implication of globalisation, which leaves less and less power to the identity of the State. Moreover, this strain was counterbalanced by a contrary movement, namely the one aimed at the restoration of the ownership of identity by the States, happening at the same time. There is no more a single source of law, and criminal law in particular is characterised by a larger number of sources, both transnational and international, much like in the Middle Ages.

This situation is evident once we analyse the means of protecting the financial interests of the Union, even though, as Sotis¹⁰² pointed out, this variety of means was also a testament to their importance. Indeed, in the past a criminal law protection of European interests could come either from international law provisions or from the assimilation principle. The Maastricht and Amsterdam Treaties, however, helped define the new ways in which this protection could be carried out.

First of all, in the matter of protection of the financial interests of the Communities a first reference is to be found in the reformed text of Article 280 TEC: when deemed necessary, the Communities could have ‘an active role’¹⁰³ in the fight against fraud affecting the European budget, while in the past only the Member States could have played this kind of role. It is hereby recognised a power to take all measures necessary to achieve the objective of the protection of the financial interests, eventually also through the introduction of penal sanctions. This interpretation, argued by Tiedemann¹⁰⁴, has been denied by Bacigalupo¹⁰⁵, who maintained an enlargement of the meaning of a treaty provision cannot occur because a treaty cannot be interpreted. Indeed, a law, which is adopted by a national

¹⁰² SOTIS, *Diritto*, pp. 78 et seq.

¹⁰³ BACIGALUPO, ‘La tutela degli interessi finanziari’, in GRASSO (ed.), *Lotta contro la frode*, pp. 24 et seq.

¹⁰⁴ TIEDEMANN, ‘Pour un espace juridique commun après Amsterdam’, *Agon*, 17, 1997.

¹⁰⁵ BACIGALUPO, ‘La tutela degli interessi finanziari’, in GRASSO (ed.), *Lotta contro la frode*, p. 25.

– or supranational – institution, could be interpreted so as to enlarge its field of application. By contrast, a treaty, which is drafted and adopted by the same States that will be bound by its provisions, could not be interpreted, but only explained in order to make the will of those States clearer. Therefore, what is not already in the letter of the treaty could not be inferred from it.

However, the discussion on the matter was evidently always bringing the protection of the financial interests of the Communities at the centre. The specific provisions in Article 280 TEC indeed referred to those interests, both¹⁰⁶ in the field of the creation of law (paragraph 2) and in that of the cooperation with the national agencies (paragraph 3). However, there is a difference between the acts based on paragraph 2 and those based on the other paragraphs. Indeed, the field of application of the former is much less wide¹⁰⁷. As a matter of fact, the new formulation of Article 280 TEC granted a legal basis for the application of the assimilation principle in paragraph 2, while a larger power to create provisions of criminal law was introduced in paragraphs 1, 3 and 4. In particular, the fourth paragraph, providing the European Union with the power to adopt ‘necessary measures’ in this field, factually granted the possibility that criminal law provisions could be introduced¹⁰⁸. Meanwhile, both paragraph 1 and paragraph 3 dealt with the need for Member States to be involved in the fight against fraud, both by taking the measure in accordance with Article 280 TEC in order to ‘afford effective protection in the Member States’, and organising ‘close and regular cooperation¹⁰⁹ between the competent authorities’ together with the Commission. This means that both the Member States and the Community should provide for an effective protection against fraudulent conducts and, only when this aim cannot be reached by means of national law, the Community should be asked for a specific effort¹¹⁰.

Moreover, Article 29(5) TEU was dedicated to the issue of the ‘fight against fraud on an international scale’ through the means of intergovernmental

¹⁰⁶ SOTIS, *Diritto*, pp. 82 et seq.

¹⁰⁷ *Ibid.*, p. 80.

¹⁰⁸ Case C-176/03, *Commission v Council*, para. 52.

¹⁰⁹ For a further-reaching analysis on cooperation between Member States in criminal law matters, see VERVAELE, ‘The European Community and Harmonization of the Criminal Law Enforcement of Community Policy: Ignoti nulla cupido?’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 33 et seq.

¹¹⁰ SICURELLA, *Linee guida*, pp.8 et seq.; *ibid.*, pp. 131 et seq.

cooperation. This provision became the legal basis for the specific convention¹¹¹ whose purpose was to create a common basis for the criminal law protection of the financial interests of the European communities. The PFI Convention (henceforth ‘the Convention’) is an act of third pillar, and Article 29 TEU does introduce the possibility of adopting third-pillar acts. However, the general idea implemented by this provision is the same¹¹² which underpinned the competence enshrined in Article 280(2) TEC. Both provisions meet the need for a protection of those interests and the potential future application of national criminal sanctions. On the one hand, the principle of assimilation pursuant to Article 280(2) TEC allows Member States to apply those penalties to conducts having a supranational impact; on the other hand, the Court of Justice of the European Union (CJEU)¹¹³ has maintained national criminal sanctions can be applied with the purpose of providing the most effective protection possible to a European interest.

New developments came also from the principle of mutual recognition¹¹⁴, which matters from a procedural point of view, yet it is also relevant when dealing with substantive law in general. The mutual recognition is in fact an essential instrument through which the basis for harmonisation of national laws is achieved¹¹⁵.

Notwithstanding the ever-growing relevance of criminal law, before the Lisbon Treaty the only legislative competence held by the Parliament in the matter of protection of the financial interests of the Communities kept being an administrative law¹¹⁶ competence. There is indeed proof of that in the difficulties met when adopting the first Directive on money laundering¹¹⁷. The original

¹¹¹ Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities’ financial interests (PFI Convention), July 26th 1995, OJ C 316/49.

¹¹² PIZZOLANTE, ‘Frodi comunitarie’, in CARELLA ET AL. (eds.), *Codice*, pp. 558-559.

¹¹³ COURT OF JUSTICE OF THE EUROPEAN UNION, October 23rd 2007, case C-440/05, *Commission v Council*, para. 66.

¹¹⁴ SATZGER, ZIMMERMANN, ‘From Traditional Models of Judicial Assistance to the Principle of Mutual Recognition: New Developments of the Actual Paradigm of the European Cooperation in Penal Matters’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*.

¹¹⁵ On the connection between mutual recognition and harmonisation of laws, see paragraphs 1.6.2. and 1.6.4.

¹¹⁶ Even though it will be later pointed out in paragraphs 1.5.1. and 1.5.2.3. that administrative sanctions have a punitive character which makes them of a criminal nature in a sense.

¹¹⁷ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166/77.

proposal by the Commission obliged the States to treat money laundering ‘as a criminal offence according to their national legislation’¹¹⁸, which would have hindered Member States to exercise the discretion they had been granted up until that point in choosing the implementing measure that better suited each case. This was one of the first instances when the legal services of the Commission and the Council of Ministers acknowledged that the Community had a competence to impose ‘an obligation to criminalize’ insofar as ‘necessary to obtain the full effect of the measures which it adopted’¹¹⁹. However, the draft imposing a duty to criminalise never came into force, since the obligation was replaced with a general prohibition to commit money laundering as defined in that directive¹²⁰. Thus, it should not surprise that the first act to provide an actual framework for this subject-matter has been an administrative law act. Its adoption is particularly relevant because, being a directly applicable act of first pillar, since its entry into force, it was law in all the Member States. In a moment when harmonisation could not become a reality yet, the introduction of directly applicable rules definitely represented a further step towards the creation of a system.

¹¹⁸ Article 2 of EUROPEAN COMMISSION, ‘Proposal for a Council Directive on prevention of use of the financial system for the purpose of money laundering’, COM(90) 106 final, March 23rd 1990, OJ C 160/06.

¹¹⁹ FRANCE, ‘Influence of EC law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 176.

¹²⁰ Article 2 of Council Directive 91/308/EEC.

1.5.1. Regulation (EC, Euratom) 2988/95 on the Protection of the European Communities Financial Interests

Regulation (EC, Euratom) 2988/95¹²¹ (henceforth ‘the Regulation’) and the PFI Convention¹²² are the two main acts founding the common framework for the fight against illegal conducts affecting the European budget¹²³.

Because of the lack of a competence in criminal matters, the Communities tried to circumvent the limit by introducing provisions and sanctions that, while not criminal in a strict sense, resembled them nonetheless. As a consequence, the implementation of repressive administrative measures¹²⁴ became one of the means of protecting financial interests¹²⁵ through the adoption of regulations, directly applicable acts which do not require a translation into national law. Article 235 TEC and 203 TEAEC were the legal basis of Council Regulation (EC, Euratom) 2988/95, the main act adopted together with the Convention, which instead established the duty to introduce specific offences and adequate criminal law sanctions in the national juridical systems. Although regulations could only deal with administrative matters, because criminal matters were not yet part of the first pillar, this act nonetheless was essential for the protection of the financial interests of the Communities.

The Regulation established the main criteria governing European administrative penalties with the intent of building a clear framework¹²⁶. Although the Regulation belongs to the field of administrative law, the wide definition of irregularity is relevant also as far as criminal law is concerned. It deals with all matters of fraudulent conducts, applying to all Community policy fields, but for the

¹²¹ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312/1.

¹²² The preamble of the Regulation indeed distinguishes between the ‘irregular conduct, and the administrative measures and penalties relating thereto, [...] provided for in sectoral rules in accordance with this Regulation’ and ‘fraudulent actions as defined in the Convention’, which are nevertheless to be considered as a kind of ‘irregular conduct’ according to Article 1 of the Regulation.

¹²³ DAMATO, DE PASQUALE, PARISI, *Argomenti di diritto penale europeo*, Torino, 2014, pp. 289 et seq.

¹²⁴ See paragraph 1.5.2.3. about the difference between administrative and criminal penalty.

¹²⁵ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 176.

¹²⁶ GRASSO, ‘Introduzione’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 63-64; SOTIS, *Diritto*, p. 78.

common agricultural policy¹²⁷, designing the main principles for the action of the Community regarding those matters, and introducing sanctions for violations of the law affecting the financial interests of the EC¹²⁸. It does not deal with fraud in a proper sense, rather with ‘irregularities’ which are ‘primarily a matter of administrative law’, while ‘fraud’ should be seen as ‘mainly, but not necessarily, a matter of criminal law’¹²⁹.

The first main achievement of the Regulation is therefore the definition of irregularity provided for in Article 1(2). An irregularity is ‘any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure’. That is to say, not all acts or omissions violating a Community law provisions are covered by the Regulation. On the contrary, they are relevant only insofar as they impact the Community budget with one of the enumerated results.

The second main point of the Regulation is the reference to ‘administrative checks, measures and penalties’ in Article 2(1), which should be established only when ‘necessary to ensure the proper application of Community law’, in compliance with the principles of proportionality and subsidiarity. Moreover, they should be ‘effective, proportionate and dissuasive’ so as to adequately protect the budget of the Communities or other budgets managed by them. Paragraph 2 recalls the principles of legal certainty and *lex mitior*, while paragraph 3 sets ulterior requirements for the measures and penalties to be introduced, stating that, in defining each of the two, Community law should consider also the ‘nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility’. Finally, Article 5(1) lists types of administrative penalties which could be applied to those whose action corresponds to an irregularity pursuant to Article 1(2) of the Regulation.

¹²⁷ The preamble to the Regulation indeed states that ‘Community law has established Community administrative penalties in the framework of the common agricultural policy’.

¹²⁸ PIZZOLANTE, ‘Frodi comunitarie’, in CARELLA ET AL. (eds.), *Codice*, p. 557.

¹²⁹ VAN GERVEN, ‘Constitutional Conditions for a Public Prosecutor’s Office at the European Level’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 568.

It should be recalled that the European juridical system generally provides for different types of sanctions¹³⁰. According to the classification proposed by Satzger, the first type is fines, the second type includes all other financial penalties, while the third type is made up of other detriments. This classification, which has been taken into account by many scholars throughout the years, does not present elements of complexity as far as the definition of fine or the distinction between financial penalties and detriments of other kinds is concerned. Different opinions have however fuelled the discussion on the distinction between types of penalties. Maugeri, for instance, has pointed out the existing difference between a kind of sanction which is typically financial, and another which is *sui generis* while implying a loss of assets in the same way as a financial penalty¹³¹. While sanctions of the first kind are introduced by Community provisions and enforced by supranational authorities, those belonging to the second category are introduced by Community provisions yet enforced by national authorities, according to the rules governing the national law system concerned. The classification hereby provided is however not just a matter of scholarly appreciation, but it is connected to the legal basis for any of those sanctions, being the first type based on Article 83 TEC¹³² (now Article 103 TFEU) and the legislative acts who have implemented its provisions, and the second one on Article 229 TEC (now Article 261 TFEU), which implies the power to introduce sanctions exists every time there is a law-making power conferred to the Council¹³³, as confirmed by the CJEU both in the *Greek Maize* and *Germany v Commission* cases. Regulation 2988/95 was the first act to regulate the field of *sui generis* sanctions¹³⁴.

The other issue dealt with by the Regulation in Article 10, and Title III as a whole, is *in loco* checks, which required specific criteria to be set by a legislative

¹³⁰ It is in this case irrelevant to consider whether those sanctions are criminal or administrative, because we are now dealing with the concept of 'sanction' in general.

¹³¹ It is the distinction between financial sanctions (*sanzioni accentrate*) and *sui generis* sanctions (*sanzioni decentrate*), see MAUGERI, 'Il sistema sanzionatorio comunitario dopo la carta europea dei diritti fondamentali', in GRASSO, SICURELLA (eds.), *Lezioni*, p. 100.

¹³² Penalties of the first type are therefore all those imposed by means of regulation or directive in the field of competition law in order to implement the prohibitions set out in Articles 101 and 102 TFEU, which respectively concern agreements between undertakings and abuses of dominant position on the market.

¹³³ MAUGERI, 'Il sistema sanzionatorio comunitario', in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 101 et seq.

¹³⁴ *Ibid.*, p. 105.

act¹³⁵. As a consequence, the implementation of the Regulation should be carried out by its application together with Regulation 2185/96¹³⁶.

Finally, as for the action aimed at the fight against fraud carried out by the Commission, the provisions enshrined in the Regulation governed its ‘external action’, while the matter of ‘internal inquiries’ and the description of the powers and prerogatives of UCLAF were addressed by the Commission Decision of July 14th 1998¹³⁷.

1.5.2. The PFI Convention

The Convention is a third pillar act, resulting from the intergovernmental cooperation brought about by meetings of the Council, and aimed at protecting the financial interests of the Community¹³⁸. It was adopted after the Maastricht Treaty had entered into force and therefore had created a separate pillar for all matters of judicial cooperation and, specifically, cooperation in criminal matters. Its legal basis is therefore evidently Article 29(5) TEU, together with Article K.3(2)(c) which gave the Community the competence to adopt conventions imposing duties on the Member States. Being a third pillar act, it was not part of Community law in similarly to an act of the first pillar – either a regulation or a directive –, therefore the application of its provisions by a new member of the Union should have followed the accession to the act pursuant to Article 12 of the Convention. For all other Member States, the adoption according to their constitutional requirements should have been followed by a notification of its conclusion to the Secretary-

¹³⁵ PIZZOLANTE, ‘Frodi comunitarie’, in CARELLA ET AL. (eds.), *Codice*, p. 557.

¹³⁶ VAUDANO, VENEGONI, ‘Articolo 325 TFUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 2245; EUROPEAN PARLIAMENT COMMITTEE OF INDEPENDENT EXPERTS, ‘Second report on reform of the Commission. Analysys of current practice and proposals for tackling mismanagement, irregularities and fraud’, September 10th 1999, Vol. II, pp. 14 et seq. Available at: <<http://europarl.europa.eu/experts/pdf/rep2-2en.pdf>>

¹³⁷ VAN GERVEN, ‘Constitutional Conditions for a Public Prosecutor’s Office’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 571-572.

¹³⁸ GRASSO, ‘Introduzione’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 83 et seq.

General of the Council of the European Union. The entry into force would have come 90 days after the last State had completed those formalities¹³⁹.

The preamble mentions the purpose for the Convention, that is to say ‘combat together fraud affecting the European Communities’ financial interests’, which does not clarify, as it is, which pillar the act belongs to. The following description of the obligations undertaken, in the matters of ‘jurisdiction, extradition, and mutual cooperation’ provides for a clarification instead.

The expressly declared need for a protection of the financial interests is accompanied with the reference to the cross-border element and organised crime which made the need for the framework provided for by the Convention more impellent, even though those were only additional reasons (see paragraph 1.1.) to the general issue of protecting the core identity of the Union.

However, the explicit main purpose of the act was a practical one, namely the introduction of a common definition of fraud – and, marginally, of money laundering and corruption –, which could have made the prosecution of the conducts affecting the European budget more effective. Two were the possible solutions to this issue: either for a new definition of those offences to be introduced at the European level, or for an already existing definition belonging to one of the national criminal law systems part of the Communities to be borrowed. The latter solution would have been too complicated in its implementation, being every national criminal law system characterised by peculiar elements: every State formulates a different definition and some of them might have provided for a larger one, while others for a stricter one. By contrast, the former solution would have helped avoid a danger of this kind. Therefore, a specific act was needed¹⁴⁰. An analysis of the provisions of the Convention show that the act was indeed adopted because of a necessity lying beneath. As a matter of fact, the Manifesto proved that

¹³⁹ The Convention, its first protocol and the protocol on the interpretation by way of preliminary rulings by the Court of Justice entered into force on October 17th 2002, while its second protocol entered into force on May 19th 2009.

¹⁴⁰ VAUDANO, VENEGONI, ‘Articolo 325 TFUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 2247.

the Convention actively responded to the evident necessity of ‘the preservation of the financial independence and capacity of the European Community’¹⁴¹.

Already in the preamble a reference to ‘another legal instrument’ which would supplement the Convention can be pointed out. In fact, while the draft for an act of first pillar was being presented, the evident misgivings of the Convention, in particular concerning the issues of judicial assistance, money laundering, criminal responsibility of legal persons and corruption of national and Europeans servants¹⁴² justified the introduction of the two additional Protocols. The First Protocol deals with the duty to introduce criminal offences in the national legislations in order to protect the European budget from the corruption carried out by and committed against public officials; the Second Protocol, on the other hand, deals with the criminal and administrative liability of legal persons.¹⁴³ This last element is of particular importance since it has been recognised¹⁴⁴ as one of the trends of European law, which together with the increase in number of approved legislative acts and the ever-growing appreciation for the effectiveness of criminal law, was seen in the past as the possible fuel for the realisation of a protection of the interests of the Union by means of criminal law.

The signature of Bulgaria and Romania came late. The adoption of the act, as a matter of fact, met some obstacles. In the end, it was the proposal for a directive on the same subject which brought about the entry into force of the Convention¹⁴⁵.

1.5.2.1. An Overview of the Norms Introduced by the Convention

The Convention sets out minimum rules¹⁴⁶ with the intent to warrant harmonisation to some extent. It introduces a duty for the Member States to

¹⁴¹ EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto on European criminal policy*, 2011, p. 709. Available at: <<http://www.crimpol.eu/manifesto/>>

¹⁴² DAMATO, DE PASQUALE, PARISI, *Argomenti di diritto penale europeo*, pp. 289 et seq.

¹⁴³ PIZZOLANTE, ‘Frodi comunitarie’, in CARELLA ET AL. (eds.), *Codice*, pp. 563-564.

¹⁴⁴ FOFFANI, ‘Il “Manifesto sulla politica criminale europea”’, *Criminalia*, 2010, p. 663. Available at: <<http://www.edizioniets.com/criminalia/2010/026-foffani.pdf>>

¹⁴⁵ VAUDANO, VENEGONI, ‘Articolo 325 TFUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 2248.

¹⁴⁶ Article 9 of the Convention allows the States to go ‘beyond the obligations deriving from this Convention’.

transmit¹⁴⁷ to the Commission of the European Communities the national provisions implementing the Convention. Moreover, pursuant to Article 10(2), ‘the information to be communicated or exchanged between the Member States or between the Member States and the Commission, and also the arrangements for doing so’ shall be determined by the High Contracting Parties within the Council of the European Union.

As far as the procedural matters are concerned, Article 4 of the Convention compels each Member State to take the ‘necessary measures’ in order to establish its jurisdiction over the offences established in the implementation of Articles 1 and 2(1), when the conduct features a cross-border element. The following provisions tackle those instances when, because of the transnationality of the crime, the case turns out to be complex and to require a close cooperation between the States involved in order for the prosecution to be successful.

Article 6, in particular, deals with the duty to cooperate. The effective cooperation of the States should feature during all the phases of the proceedings (investigation, prosecution, enforcement of the punishment) by the means provided for by international and European law. Also, the second paragraph - inspired by the objective of simplifying the prosecution and making the procedure more efficient - clarifies the duty to cooperate should also apply when a conflict of jurisdiction arises, and the States involved must decide whose institutions will carry out the proceedings.

It should be noted that an act guaranteeing the effectiveness of the punishment of a harmful conduct should also be concerned with the enforcement of a judgement. As a consequence, the Convention implies the possibility of extradition, and in a time when the European Arrest Warrant was not yet a reality and the double criminality principle had to be applied in order for extradition to happen, the need that all States introduced an offence and an adequate penalty was reaffirmed. Indeed, besides the double criminality, extradition also calls for the possible enforcement of detention, and that is why there is also a duty for the Member States to introduce those penalties¹⁴⁸. Article 5 of the Convention, moreover, governs the

¹⁴⁷ Article 10(1) of the Convention.

¹⁴⁸ On this topic, see paragraph 1.5.2.3.

cases when a Member State refuses to extradite¹⁴⁹ its own nationals who allegedly committed fraud pursuant to Articles 1 and 2(1) of the Convention outside its territory. The provision compels the State to ‘take the necessary measures to establish its jurisdiction over the offences’. Furthermore, when the decision not to extradite the national was taken ‘solely on the ground of his or her nationality’, the concerned State must, if appropriate, ‘submit the case to its competent authorities for the purpose of prosecution’, and, in accordance with Article 6 of the European Convention on Extradition, transmit the ‘files, information and exhibits’ which would enable the prosecution of the offence. The last sentence of paragraph 2, finally, sets the duty to inform the requesting Member State ‘of the prosecution initiated and of its outcome’.

The Convention also specifically mentions the *ne bis in idem* principle¹⁵⁰ in Article 7, and states that its application is obligatory within the limits of the following paragraphs, without prejudice to any other existing relevant bilateral or multilateral agreement between Member States. Paragraph 2 introduces exceptions to the application of the rule all related to the closer link the Member States asking for the disapplication of the *ne bis in idem* has with the facts of the judged case, which should however apply unless the Member State concerned ‘had requested the other Member State to bring the prosecution or granted extradition of the person concerned’.

It should also be recalled that a modern point in the Convention is the reference to businesses. Indeed, both when considering the areas financed by the Communities and the specific element of fraud, businesses play a large role. As a result, the Convention explicitly dealt with the matter of their responsibility. Yet, businesses cannot go to jail and only penalties of other kinds could be applied to them. Thus, the preamble clarified the intention to provide for illicit conducts carried out by people in decision-making roles in a business. The criminal liability of heads of businesses, enshrined in Article 3, was aimed at preventing possible gaps in the law. Each State may accordingly introduce provisions implying the possibility of criminal liability of ‘heads of businesses or any persons having power

¹⁴⁹ However, pursuant to paragraph 3, a refusal for the sole reason that the conduct concerns a tax or customs duty offence is prohibited.

¹⁵⁰ On the issues connected to the *ne bis in idem* principle, see paragraph 1.6.4.

to take decisions or exercise control within a business' when the conduct of 'a person under their authority acting on behalf of the business' constitutes fraud pursuant to Article 1 of the Convention.

Since the Convention was an act of third pillar drafted before the Treaty of Amsterdam enlarged the competences of the Court of Justice, the Convention provides for a clarification of the role of the Court of Justice in the interpretation and application of the Convention. Pursuant to Article 8, two different procedures are set out. Paragraph 1 does refer to the procedure set out in Title VI of the TEU, which implies the initial examination of the dispute between Member States on the interpretation and application of the Convention by the Council, with the eventual discussion of the case before the Court of Justice, if no solution was found within six months. By contrast, when a dispute happens between one or more Member States and the Commission, concerning the application of either Article 1 or Article 10, negotiations should be attempted before the case is submitted to the Court of Justice, which would occur only if no settlement is otherwise possible.

1.5.2.2. The Common Definition of 'Fraud'

The definition of fraud provided for by the Convention, arguably its most relevant achievement, is to be found in Article 1.

A first element to be highlighted is that there is no apparent distinction to be inferred from the article regarding the complexity¹⁵¹ of the fraud. Whether, indeed, the fraud is simple and with a small impact on the budget, or complex and with the involvement of a larger number of persons operating in a vast territory and with more advanced techniques is irrelevant. It will still be a fraud according to the definition provided by Article 1.

The Convention embraces the distinction between *actus reus* and *mens rea* according to the traditional dichotomy that is typical of both the common law systems and the civil law system of most countries in Europe, compared to those

¹⁵¹ SCALIA, 'L'applicazione delle sanzioni in materia di frodi comunitarie da parte delle autorità nazionali', in GRASSO (ed.), *Lotta contro la frode*, pp. 65 et seq.

who – in seeing ‘the guilt of the perpetrator as an autonomous category’ - apply a tripartite system¹⁵².

Indeed, as far as the *mens rea* is concerned, there is a specific reference to the intention of the conduct, with the description of the conduct itself taking up most of the article. Therefore, the only reference to the subjective element concerns the *dolus*, while no other reference can be found regarding the fault of the perpetrator or the wrongfulness of his or her conduct. This is a clear recognition and application of the principle of guilt¹⁵³ as expressed in the Manifesto, although to the greatest possible extent. Indeed, there could not be fraud pursuant to Article 1 without an intention to commit the crime. Nevertheless, paragraph 4 appears to be a way to ‘circumvent’¹⁵⁴ the compliance with the requirements regarding the *mens rea*, since the possibility of inferring the intention from objective circumstances is taken into account, insofar as the offences on paragraphs 1 and 3 are concerned.

By contrast, as regards the *actus reus*, while describing the conducts to be sanctioned, Article 1 distinguishes between conducts in respect of expenditures and others in respect of revenue. On the one hand, in respect of expenditures the intentional act or omission constitutes a criminal conduct when it relates to ‘the use or presentation of false, incorrect or incomplete statements or documents’, or ‘non-disclosure of information in violation of a specific obligation’, insofar as either of the two conducts entail ‘the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities’. Moreover, it constitutes fraud in respect of expenditures ‘the misapplication of such funds for purposes other than those for which they were originally granted’. On the other hand, in respect of revenue, the conduct is criminal when it constitutes of an intentional act or omission relating to ‘the use or presentation of false, incorrect or incomplete statements or documents’, or ‘non-disclosure of information in violation of a specific obligation’, or the ‘misapplication of a legally obtained benefit’, insofar as any of the listed conducts

¹⁵² AMBOS, ‘Is the Development of a Common Substantive Criminal Law for Europe Possible?’, pp. 179 et seq.

¹⁵³ EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto on European Criminal Policy*, p. 707.

¹⁵⁴ *Ibid.*, p. 711.

entails ‘the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities’.

The *actus reus* is therefore made up of the actual act or omission and of the monetary loss that it entails. However, it should be noted that the definition of the act or omission is wide enough to include a vast variety of conducts. It has been maintained that what transpires is a concept that is much larger than its traditional meaning¹⁵⁵. The definitions provided for by national law are indeed way more restricted than the one proposed by the Convention. For instance, the French *escroquerie*¹⁵⁶ requires one of the specific means listed in Article 313 – 1 to be used, with the purpose to deceive a natural or legal person, reaching the double result of a monetary benefit of the perpetrator, and a symmetrical loss of the person deceived or of others¹⁵⁷. The Italian definition of *truffa* also requires more than one feature to characterise the conduct before it can constitute fraud. The perpetrator must have deceived someone in such a way as to mislead him or her and, due to that deception, gained an undue benefit for himself or others while causing a loss to someone else¹⁵⁸. Finally, German law¹⁵⁹ defines *Betrug* as the conduct of someone who, with the purpose of gaining an undue material benefit for oneself or others, causes someone else a monetary loss, by means of deception or simulation of fake information or alteration or dissimulation of real one, in such a way as to mislead him or her¹⁶⁰. It is therefore evident national laws set more requirements to be met for a conduct to be recognised as fraudulent. First of all, the specific intention to obtain a benefit by means of deception is needed; secondly, the conduct must be successful in the double result of benefit of the perpetrator and material loss of the offended person; lastly, each of the elements must be linked to the other in a strict connection of cause to effect.

¹⁵⁵ PIZZOLANTE, ‘Frodi comunitarie’, in CARELLA ET AL. (eds.), *Codice*, p. 561; VENEGONI, ‘La definizione del reato di frode nella legislazione dell’unione dalla convenzione PIF alla proposta di direttiva PIF’, October 14th 2016, pp. 5-6.

¹⁵⁶ Code pénal, Articles 313-1 to 313-3.

¹⁵⁷ SATURNINO, *Diritto penale europeo*, pp. 50 et seq.

¹⁵⁸ ANTOLISEI, *Manuale di diritto penale. Parte speciale I*, Milano, 2008, pp. 363 et seq.; Codice penale, Article 640.

¹⁵⁹ Strafgesetzbuch (StGB) § 263.

¹⁶⁰ SATURNINO, *Diritto penale europeo*, pp. 101-102.

Notwithstanding the width of the definition, it should not be forgotten that the one proposed by the Convention is actually a definition which would only have relevance when the financial interests of the Communities are affected. The intention that the first sentence of Article 1 makes clear is that the definition is of the concept of ‘fraud affecting the European Communities’ financial interests’, which is a peculiar crime part of a more general definition of fraud. However, the obvious width of the concept makes it easy for many conducts to be brought under the field of application of the Convention.

1.5.2.3. The Duty to Introduce Effective, Proportionate and Dissuasive Criminal Penalties

The common definition of fraud would be useless without the introduction of offences¹⁶¹ by the Member States, and even more so without correspondent sanctions. As a consequence, Article 2 establishes the duty to introduce ‘effective, proportionate and dissuasive criminal penalties’ which should punish those ‘participating in, instigating, or attempting’ the conducts enshrined in Article 1.

Noticing that in the matter of sanctions the uncertainty can already be found in the definition of the term ‘penalty’ itself, which in the Nineties was definitely set as ‘any reaction of the system to the violation of a law’¹⁶², it does not surprise that the discretion left to the Member States with this provision has resulted in even less clarity.

A necessary premise refers to the definition of the expression ‘criminal penalty’, which has been provided by European Court of Human Rights (ECtHR) case-law through the interpretation of Article 6 of the European Convention of

¹⁶¹ Article 1 paras. 2 and 3 concern the duty of the Member States to ‘take the necessary and appropriate measures to transpose paragraph 1 into their national criminal law in such a way that the conduct referred to therein constitutes criminal offences’, and ‘to ensure that the intentional preparation or supply of false, incorrect or incomplete statements or documents having the effect described in paragraph 1 constitutes a criminal offence if it is not already punishable as a principal offence or as participation in, instigation of, or attempt to commit, fraud as defined in paragraph 1’.

¹⁶² MAUGERI, ‘Il Regolamento n. 2988/95: un modello di disciplina del potere punitivo comunitario’, in GRASSO (ed.), *Lotta contro la frode*, p. 154.

Human Rights (ECHR)¹⁶³. The application of the Convention in all of the Member States, even lacking a ratification of the ECHR by the Communities, has therefore been the most straightforward way to grant the harmonisation on basic principles of law concerning the protection of human rights since.

However, given that the European sanctioning system does not present a clear distinction¹⁶⁴ between criminal and administrative penalties, a principle to be applied in case of doubt was needed. That principle is now to be found in the *Germany v Commission* case¹⁶⁵, even though the definition of the sanctions as administrative does seem more of a legal fiction than an actual legal definition. The nature of the sanctions mentioned in the case is criminal, yet they are ‘handed down by an administrative authority in order to protect an administrative function’, and they are, therefore, administrative¹⁶⁶. Nonetheless, the recognition of the sanction can sometimes come from the imposing provision itself¹⁶⁷. This is the instance of penalties applied when there is no culpability of the person. In such a case the penalty is administrative, because the principle of guilt¹⁶⁸ would not allow for a criminal penalty to be applied lacking at least fault of the individual.

However, the clearest distinction which is usually taken into consideration is the one derived from the ECHR. In fact, notwithstanding the type of penalty considered in the particular case – were this a fine, a different kind of financial sanction, or a detriment of other kind¹⁶⁹ –, a specific threshold is set for a sanction

¹⁶³ On the topic of competition law sanctions being considered as criminal penalties for the purposes of application of the guarantees for the person listed in Article 6 ECHR, see MAUGERI, ‘Il Regolamento n. 2988/95’, in GRASSO (ed.), *Lotta contro la frode*, pp. 156 et seq.; STRANDBAKKEN, HUSABO, *Harmonization*, pp. 126 et seq.; SATZGER, *International and European Criminal Law*, pp. 49 et seq.

¹⁶⁴ SAGGIO, ‘Orientamenti della Corte di Giustizia delle Comunità Europee in materia di illeciti economici’ in PEDRAZZI ET AL. (eds.), *Diritto penale europeo dell’economia*; MAUGERI, ‘Il sistema sanzionatorio comunitario’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 107 et seq.; SATZGER, *International and European Criminal Law*, pp. 48 et seq.

¹⁶⁵ Case C-240/90, *Germany v Commission*.

¹⁶⁶ FRANCE, ‘Influence of EC Law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 177.

¹⁶⁷ MAUGERI, ‘Il Regolamento n. 2988/95’, in GRASSO (ed.), *Lotta contro la frode*, pp. 165 et seq.

¹⁶⁸ EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto on European Criminal Policy*, p. 707.

¹⁶⁹ SATZGER, *International and European Criminal Law*, pp. 48 et seq. defines the ‘financial sanctions’ other than fines as those ‘which involve a loss of assets, but are nevertheless not expressly described as fines’, while the ‘other detriments’ are those which imply ‘adverse legal consequences’ other than the loss of assets. GRASSO, ‘Introduzione’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 61 et seq. proposes a similar classification while confirming the punitive character of all these kinds of sanctions, to be perceived as an element of modernity of the European juridical system.

to be a criminal law one. Indeed, according to the case-law of the ECtHR there is a criminal sanction every time there has been ‘a criminal charge pursuant to Article 6 ECHR’. Moreover, a penalty could be considered a criminal sanction ‘in a broader sense’¹⁷⁰, meaning that it will be assumed as a criminal law sanction, when ‘imposed for repressive reasons’ or implying ‘a particularly severe loss of legally protected rights’¹⁷¹. This interpretation of the law would allow administrative penalties to be defined as criminal in a broader sense. As a consequence, the assumption that primary and secondary European law could bring about the introduction of criminal sanctions, in a way, remained, even before the conferral of the competence in criminal matters which would have allowed for the introduction of criminal sanctions in a strict sense was given.

The three requirements for the sanctions, which represent the limits the national legislator must comply with in the implementation of the Convention, have been defined many times in the past¹⁷². Satzger, in particular, has connected the attributes of effectiveness and dissuasiveness to the purpose of the sanction, which must be that of protecting ‘European provisions and interests’ and being ‘suitable’ for this aim, while a sanction is to be considered proportionate when adequate to ‘the goals pursued and [...] the severity of the violation’¹⁷³. The proportionality requirement will be dealt with in paragraph 1.7.1. However also the effectiveness and dissuasiveness must be taken into account as regards their definition by the Court of Justice. In the *Von Colson*, *Factortame I* and *Commission v Germany*¹⁷⁴ cases it indeed provided for a definition of a ‘fully effective’ sanction, while in *Von*

¹⁷⁰ SATZGER, *International and European Criminal Law*, p. 49.

¹⁷¹ *Ibid.*, p. 50.

¹⁷² In recalling the attempts at harmonisation that had been carried out in the past, GRASSO, ‘Introduzione’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 68 et seq. highlights that those attributes have often been interpreted as a boilerplate clause in the past. However, there is no risk of that happening in the Convention because of the reference to a specific duty which makes the requirements binding for the Member States.

¹⁷³ SATZGER, *International and European Criminal Law*, p. 70.

¹⁷⁴ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, April 10th 1984, case C-14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen (Von Colson)*; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, July 19th 1990, case C-213/89, *Factortame and Others (Factortame I)*; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, July 10th 1990, case C-217/88, *Commission v Germany*.

Colson once more, *Harz* and *Dekker*¹⁷⁵ it ruled in relation of the dissuasiveness of the sanction. All those rulings already imposed the duty to introduce national criminal sanctions when needed¹⁷⁶. However, the Convention now makes it explicit as a duty of the Member States.

1.5.2.4. The Qualms about the Convention

There was no actual doubt regarding the definition of each of the three attributes of the penalty. The uneasiness lied, instead, in the possibility that this attempt at harmonising national sanctions through the affirmation of the duty to introduce sanctions having these attributes could prove successful. On the one hand, a first element of complexity derives from the differences of the national legal systems involved. A harmonisation of the national criminal sanctioning systems must first of all take into account the differences among Member States, which concern both the main principles underpinning the system and the way penalties are defined and enforced. Bernardi, in particular, has maintained many reasons¹⁷⁷ are at the root of the differences among national criminal systems, distinguishing among ‘humanitarian’ reasons, technical ones – connected either to the particular purpose recognised to the penalty or to the typical features of the structure of the national legal system –, economical or financial ones, and utilitarian ones – by which he meant the fact that some provisions are introduced in order to simplify the continuation of the trial. The harmonisation of sanctions must also take into account another issue, which lies in the variety of national sanctions referring to the same offence, besides the evident differences in the principles founding the national sanctioning systems¹⁷⁸. As a matter of fact, no two States give the same offence an

¹⁷⁵ Case C-14/83, *Von Colson*; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, April 10th 1984, case C-79/83, *Harz v Deutsche Tradax (Harz)*; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, March 7th 1990, case C-177/88, *Dekker*.

¹⁷⁶ FRANCE, ‘Influence of EC law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 169 et seq. on the way the aforementioned cases introduced that duty.

¹⁷⁷ BERNARDI, ‘Sull’opportunità di una armonizzazione europea delle scelte sanzionatorie nazionali’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 118 et seq.

¹⁷⁸ *Ibid.*, p. 115.

identical amount of ‘disvalue’¹⁷⁹ (Bernardi also talks about ‘social meaning’¹⁸⁰ in this context, while Satzger refers to a ‘social and ethical judgement of unworthiness’¹⁸¹), that is to say the negative quality of the conduct which justifies the punishment of those who carry it out. Even in the field of fraud, which is an offence that all the Member States have in their systems, each State provides for a different sanction according to the ‘disvalue’ they attach to it. Moreover, as previously mentioned, each State has a preference for some types of punishment over others, because of its sensitiveness concerning cultural values and ideological questions¹⁸². Indeed, while Italy values detention, France sees bans as potentially more impactful, while Germany values economic interests first and foremost and therefore puts fines at the centre of their penalty system, and Spain has shown a preference for penalties not involving a loss of assets¹⁸³. On the other hand, a definition of sanctions by the national legislator would prove difficult because of the duty to comply with Community principles¹⁸⁴. An introduction of European criminal norms would indeed impact national laws¹⁸⁵ because the acts are binding and are also to be preferred to national law. Moreover, there could be an indirect impact since the provisions would also influence those national offences which are in no way connected to European interests but for the moment when they are applied to protect them. As for the definition of the penalty itself by the national institutions, the Convention recognises the differences between legal systems as far as to allow the deprivation of liberty, ‘which can give rise to extradition’¹⁸⁶. That however should happen only insofar as the punished conduct constituting fraud involves a minimum amount to be set by each State, and anyway at a sum not exceeding ECU

¹⁷⁹ BARTONE, *Il diritto penale odierno e concreto. Il reato nel suo volto europeo e internazionale*, Padova, 2012, p. 38.

¹⁸⁰ BERNARDI, ‘Sull’opportunità di una armonizzazione europea’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, p. 115.

¹⁸¹ SATZGER, *International and European Criminal Law*, p. 63.

¹⁸² BERNARDI, ‘Sull’opportunità di una armonizzazione europea’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 120 et seq.

¹⁸³ BARTONE, *Il diritto penale odierno e concreto*, pp. 38 et seq.

¹⁸⁴ SICURELLA, *Linee guida*, pp. 90 et seq.

¹⁸⁵ On this topic, see VOGEL, ‘The Impact of EC Sanctions to Protect the EC’s Financial Interests on National Sanctioning Systems’, in GRASSO, SICURELLA (eds.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milano, 2008.

¹⁸⁶ Since the adoption of Council Framework-Decision 2002/584/JHA, also a European Arrest Warrant could be issued, pursuant to Article 2(1) of the Framework-Decision.

50000¹⁸⁷. By contrast, penalties of a different kind may be provided for ‘minor fraud’ insofar as the conduct involves ‘a total amount of less than ECU 4000¹⁸⁸, and does not concern ‘particularly serious circumstances’ under the laws of each Member State¹⁸⁹.

Notwithstanding the original aim of creating a sufficient framework through the introduction of the Convention, these provisions prove the act leaves much to be discussed. Some other points should be considered. The Convention is an act of third pillar, and the definition of the effects of such acts have always been complicated, because the principles belonging to the first pillar are not applicable. From a practical point of view, furthermore, the Convention caused the overlapping of European offences and national offences¹⁹⁰, while never clarifying to a sufficient extent the definition of fraud in Article 1. At the same time, not even the extremely slow ratification period of seven years resulted in a complete transformation practice in the Member States¹⁹¹. Another of the aims the Convention did not fulfil was the overcoming of the principle of assimilation¹⁹², by introducing sanctions applicable to all territories of the Union. As a matter of fact, this purpose was not achieved and the problems connected to the lack of equality in the application of the principle persisted because of that. Indeed, it has been shown the acceptance of the common definition of fraud did not entail the application of the same sanctions in all the Member States.

The arguably biggest issue with the Convention was the restriction of its field and the obvious result of the impossibility to create a framework starting from its provisions. This mirrored that typical European criminal law problem that is the tendency to harmonise criminal offences without dealing with other aspects of the crime that are as relevant as the enumeration of the elements of the offence (i.e. the

¹⁸⁷ Article 2(2) of the Convention.

¹⁸⁸ An amount which, pursuant to Article 2(4), can be altered by the Council acting unanimously.

¹⁸⁹ Article 2(3) of the Convention.

¹⁹⁰ DE FRANCESCO, ‘Le sfide della politica criminale: “integrazione” e sviluppo dei sistemi repressivi, nel quadro dell’internazionalizzazione della tutela penale’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 47-59.

¹⁹¹ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European cooperation*, p. 179.

¹⁹² On the connection between Convention and application of the principle of assimilation, see BACIGALUPO, ‘La tutela degli interessi finanziari’, in GRASSO (ed.), *Lotta contro la frode*, p. 19.

attempt, the liability of legal persons etc.¹⁹³). It should not come as a surprise, therefore, that the Commission and scholars themselves have carried out a variety of projects in the field of criminal law, and the protection of the financial interests in particular, in order to construct a much more detailed framework.

1.5.3. Comparing the *Corpus Iuris*, the Eurocrimes Project and the ‘Manifesto on European Criminal Policy’

In 2000 the initiative of the European Parliament which had brought together, with the funding of the European Commission, a group of scholars under the presidency of Mireille Delmas-Marty produced a revised version of a new *Corpus Iuris*¹⁹⁴ in 39 articles¹⁹⁵. The choice to present the project following the structure of the code is derived from the intention of the scholars involved to give an inkling of coherence and rationality. Indeed, it was not only a cultural statement, rather a need for clarity of the matter¹⁹⁶. It was an instrument through which eight criminal offences – fraud affecting the financial interests of the European Communities, market-rigging, corruption, abuse of office, misappropriation of funds, disclosure of secrets pertaining to one’s office, money laundering and receiving, conspiracy - together with rules concerning the general part of criminal law and sanctions¹⁹⁷ were described in detail. The general part, in particular, is the answer to the possible construction of a system. There was a specific interest in the creation of a criminal law system, yet this would have required the preliminary detection of the general principles underpinning it.

¹⁹³ STRANDBAKKEN, HUSABO, *Harmonization*, p. 16.

¹⁹⁴ DELMAS-MARTY (ed.), *Corpus Iuris; Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union*, Parigi, 1997.

¹⁹⁵ For an overview of the provisions in the *Corpus Iuris*, see SICURELLA, ‘Il *Corpus Iuris* come modello per la definizione di un sistema penale europeo’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 790 et seq.

¹⁹⁶ *Ibid.*, pp. 768 et seq. on the original intention of the scholars involved in the *Corpus Iuris* project.

¹⁹⁷ As both principal penalties in the form of detention and fines, and additional penalties, for instance the publication of the conviction, and further legal consequences such as the eventual confiscation of the instruments used for the offence and its fruits and offences.

The *Corpus Iuris* is not Community law. It is undeniably relevant nonetheless¹⁹⁸. It could represent the basis for a more thorough protection of the financial interests by means of administrative law on Article 280 TEC, but also through conventions pursuant to Article 31 TEU. Indeed, it drove the attempts at adopting first pillar acts in the fields of fraud and environment, even though neither of the two was successful. It was the first instance when the matter was tackled in a detailed way, so much so that the Green Paper refers to it as a source of inspiration for the creation of those new offences which would have improved the effect of cross-border criminal prosecution¹⁹⁹. In line with the *Corpus Iuris*, also the Eurocrimes project²⁰⁰ of 2002 - for which a group of scholars came together to discuss the matter of the harmonisation of criminal law of economics in the European Union under the coordination of Klaus Tiedemann of Friburg University - was finally published.

The project was inspired by the idea of creating a work that could integrate and be used together with the *Corpus Iuris*, and that had been in many ways directly fuelled by the *Corpus Iuris* itself, even though that had been requested by the European institutions, and it had only been dedicated to a specific part of the criminal matter, while the Eurocrimes project dealt with criminal law of economy in general.

Differently from the *Corpus Iuris*, however, it does not deal with sanctions nor there is any part dedicated specifically to procedural rules. However, there are some elements of general law. As a matter of fact, the Eurocrimes project is structured as a code, in the same way as the *Corpus Iuris*, but instead of having the general part following the special part as in the *Corpus Iuris*, the general part introduces the special part dealing with the particular offences. It is not exhaustive, even though there is a greater variety of matters considered, because some parts of

¹⁹⁸ VAN GERVEN, 'Constitutional Conditions for a Public Prosecutor's Office', in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 580 et seq. He mentions the possibility of Member States getting on board with the idea of a centralised European prosecution if an administrative system to fight fraud was created thanks to the *Corpus Iuris*, which would push Member States to later accept a criminal law approach to fight cross-border crimes.

¹⁹⁹ SATZGER, *International and European Criminal Law*, p. 59.

²⁰⁰ On this topic, see FOFFANI, 'L'armonizzazione del diritto penale dell'economia nell'Unione Europea: il progetto "Eurodelitti"', in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 144 et seq.; SATZGER, *International and European Criminal Law*, p. 58.

criminal law already had been dealt with in other acts and it would have been useless and dangerous to tackle them too, while the national legislatures were already trying to deal with those matters and legislations were being harmonised accordingly (for instance, in the field of responsibility of legal persons). In general, however, both acts – the *Corpus Iuris, in primis* – show that the intention of the scholars was the construction of a system of criminal law. Without a general part harmonised at the Union level, there would have been the need of a constant reference²⁰¹ to national legislation in order to implement the special part of the code. The Eurocrimes project has, in this sense, shown the complexity of the achievement of such a purpose.

However, the most relevant part is the one dedicated to the single offences, with each chapter concerning a single area of crime. The interest is therefore to overcome the difficulties that come from the creation of the Internal Market, to strengthen the European Union and support its development, thanks to the fight against transnational criminality.

The project did not intend to present itself as the draft of an act, much like the *Corpus Iuris*, rather as a tool to facilitate the creation of more Union law on the matter and, in particular, the adoption of framework-decisions for the introduction of offences relevant for more than one Member State.

Paragraph 2 of Article III-271 seems to grant the project a legal basis. Indeed, the aim for which new measures harmonising national law can be introduced is the same for which the project was redacted. Before competences in criminal matters were given to the EU, this creation of a European criminal law could not have happened. Indeed, a criminal law cannot exist without a criminal jurisdiction and a criminal procedural law code. Yet this still looked like a utopia. It would have

²⁰¹ See SICURELLA, 'Il *Corpus Iuris*', in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 778 et seq. on the existence of the two levels of legislation that this would have implied, but also the complexity of the creation of a system without the general part accompanying the special one. Sicurella points out that the Green Paper has also shown this complexity to a greater extent. It dealt with the creation of a European prosecution and, as such, the centralisation of the part of the proceedings preceding the trial. Moreover, it foresaw the harmonisation of offences only as a potential achievement, instead of recognising it as an objective to be attained in order to guarantee the creation of a system and the success of the European prosecution.

therefore made more sense to let the States relinquish their criminal law competences and work so that those European offences could be sanctioned²⁰².

Another achievement of the Eurocrimes project lies in the clarification that the European interests in need of protection are not only those specific elements that are typical of the Community, for instance the EU trade marks, but also those fundamental freedoms and ulterior interests that were being recognised by primary law. Also, Sicurella²⁰³ pointed out that the enlargement of the variety of interests to be protected is happening more and more, and that it concerns both those interests which are specifically supranational and those which are simply common. The mentioned interests were both new ones and others which were just then ascending to the supranational level: for example, the transparency of the financial markets was a common interest, yet it could have easily become a supranational interest once a European financial market would have become a reality.

Sicurella²⁰⁴ also finds there is an ulterior purpose to this attempts at codification. Indeed, beside the creation of a supranational system, it could have simplified the harmonisation of criminal law. The *Corpus Iuris* could have been – and could still be – of inspiration for the national legislators. Yet, the fact that none of the projects drawn up by scholars have ever become part of Community law, if not indirectly by being recognised as possible sources of inspiration for future legislation, confirms that those provisions are not binding for the Member States. As a consequence, the *primauté* principle and the duty to implement harmonising acts of Union law would not apply, and a possible misgiving or violation by the national legislator regarding one of the provisions enshrined in any of the projects could not be sanctioned.

Lastly, it should be noted that both the *Corpus Iuris* and the Eurocrimes project are works which aspire to be used in a practical context, even though they were not born with a specific interest for the practical use of criminal law, but they

²⁰² JESCHECK, ‘Nuove prospettive del diritto penale comparato, europeo e internazionale: quale politica criminale per il XII secolo?’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 12 et seq.

²⁰³ SICURELLA, ‘Il *Corpus Iuris* e la definizione di un sistema di tutela penale dei beni giuridici comunitari’, in GRASSO, SICURELLA (eds.), *Il Corpus Iuris 2000. Un modello di tutela penale dei beni giuridici comunitari*, Milano, 2003, pp. 31 et seq.

²⁰⁴ SICURELLA, ‘Il *Corpus Iuris*’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 774-775.

were rather aimed at the creation of a system. By contrast, the Manifesto, another relevant project which was drafted by eleven scholars that came together in the European Criminal Policy Initiative, was specifically aimed at researching the practical implementation of criminal law policies and the way criminal law principles²⁰⁵ present themselves in a practical context, as well as the way how they have been implemented in European and national law²⁰⁶.

1.5.4. The Shift in the Perception of Criminal Law Resulting from the Nice Charter and the Lisbon Treaty

After the Constitutional Treaty could not be adopted, the abolition of the three-pillar structure was proposed once again when drafting the Reform Treaty. The latter, which came to be referred to as the Lisbon Treaty, as a matter of fact, abolished the distinction between the first and the third pillar, while only smoothing the differences with the matters of the ex-second pillar and those which are now competence of the European Union²⁰⁷.

As far as the criminal matter is concerned, the major reforms concerned the ‘abolition of any distinction between the kind of acts that the institutions can adopt’, the ‘application in many cases of the ordinary legislative procedure’, and the ‘extension to the matters of the ex-third-pillar of the competence of the Court of Justice’²⁰⁸.

Among the innovations of the Lisbon Treaty, it should also be recalled the recognition of the value of the EU Charter of Fundamental Rights (CFR). The creation of criminal law must go hand in hand with the recognition and the protection of human rights, as expressed both in the ECHR and the CFR. This is a matter of great importance when we consider that the application of criminal law in

²⁰⁵ The principles listed in the Manifesto are: the requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt, the principle of legality, the principle of subsidiarity, and the principle of coherence.

²⁰⁶ FOFFANI, ‘Il “Manifesto”’, p. 665.

²⁰⁷ DANIELE, *Diritto dell’Unione Europea*, p. 26: a special regime is still applied, regarding those matters, to ‘decision-making procedures, acts that can be adopted, and the almost total absence of competence of the Court of Justice’.

²⁰⁸ *Ibid.*, p. 26.

the national system can only happen if the protection of the rights and freedoms of its citizens are safeguarded. It has been argued that this cannot happen in a criminal law system that does not derive from the State, since that system is not ‘equipped with the [same] protective mechanisms for people’s liberties that States ensure’²⁰⁹. As a consequence, in a supranational context, due to the more urgent need for a repression of transnational conducts infringing human rights norms, and due to the lack of an effective protection of those rights by the national criminal law systems, there could be an increase in the severity of the penalties. However, an opposite opinion has been presented throughout the years based on the positive way in which the Convention and the Charter operate. Indeed, they are to be seen as limits for the creation of criminal law, and also for the implementation of Community law in the Member States, since both acts are to be complied with and applied directly in Member States too²¹⁰. It should also be noted that a recognition of fundamental rights is not only a way of limiting criminal law but could also become the basis of it, even though this could not happen in the EC because it could easily imply an ‘expansion of the criminal protection area, so much as to include behaviours characterized by ideal and cultural negative values’, specifically considering the activism of international institutions²¹¹.

The Charter, adopted in 2000 as a result of the Tampere Council of 1999, was not considered as an autonomous source of law until the Lisbon Treaty came into force. Indeed, beforehand, the Charter could only be used as an ‘interpretative tool’²¹², both by individuals and institutions (while the Court of Justice had allowed for the Charter to be recognised as a binding source of principles when ‘explicitly mentioned in the preamble of the act whose legitimacy is being questioned’²¹³). It was however the new formulation of Article 6(1) TUE, as reformed by the Lisbon Treaty, that gave the text of the Charter the ‘same value as the treaties’. In the field of criminal law, this event is a breaking point for the consideration of Community

²⁰⁹ KAIIFA-GBANDI, ‘The Treaty Establishing a Constitution for Europe’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 182 et seq.

²¹⁰ PALAZZO, ‘European Charter of Fundamental Rights and Criminal Law’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 11 et seq.

²¹¹ *Ibid.*, pp. 18-19.

²¹² DANIELE, *Diritto dell’Unione Europea*, pp. 194 et seq.

²¹³ *Ibid.*, p. 195; and COURT OF JUSTICE OF THE EUROPEAN UNION, June 27th 2006, case C-540/03, *Parliament v Council*, para. 38.

law from a new original point of view. Indeed, the emphasis to human rights up to that point had mostly come from the ECHR, which is however a Convention adopted in the context of the Council of Europe, while the adoption of the Nice Charter marks the first time that human rights were acknowledged as having a fundamental role in Community law²¹⁴. A recognition of those rights as part of primary law would have indeed raised the opportunity to see the criminal offences from a constitutional point of view for the first time²¹⁵.

The importance of the Nice Charter in the context of criminal law is evident once we consider that many of the provisions have an ‘intrinsically penal nature’, i.e. the prohibition of death penalty or inhuman and degrading punishment, while others, even if not criminal law norms in a technical sense, nonetheless ‘inspire rules and regulations having a penal nature’, i.e. the freedoms of assembly, movement or correspondence²¹⁶. Yet, it is also brought about by a more general importance of fundamental rights that is to be found in Article 61 of the Draft Reform Treaty (now Article 3 TEU). Indeed, the creation of an Area of Freedom, Security and Justice ‘with respect for fundamental rights’ could not be achieved without an approximation of criminal laws, when necessary, in which fundamental rights could work both as safeguards and as objects of criminal law²¹⁷. Finally, a reference to the fundamental rights of the person is to be found already in the Preamble²¹⁸ to the Lisbon Treaty as a testament to their importance.

²¹⁴ Indeed, the reason for the adoption of the Charter itself lies in the nature of the ECHR. Being the Convention an international treaty, it would have needed a ratification by the European Union before it could officially become part of European law.

²¹⁵ FOFFANI, ‘Il “Manifesto”’, p. 664.

²¹⁶ PALAZZO, ‘European Charter of Fundamental Rights and Criminal Law’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 6.

²¹⁷ See Articles 31 TEU and 69E and F of the Lisbon Treaty; PALAZZO, ‘European Charter of Fundamental Rights and Criminal Law’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 11 et seq. has come so far as seeing the Charter as a basis for the creation of a European criminal law. On p. 18, he points out that there are some countries in Europe ‘who are sensitive to the idea of a table of value as a basis for substantial legitimation of criminal law’.

²¹⁸ The Preamble of the Lisbon Treaty explicitly mentions the inspiration drawn ‘from the cultural, religious, and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law’.

1.6. The Novelty in the Constitutional and the Reform Treaties

The supposed shift from a Community that recognised the person as a subject of rights instead of one of the means of production of the industry was starting to happen and was one of the main reasons for the drafting of the Constitutional Treaty, which could have brought the Community to resemble more a federal State than an international organisation with economic purposes. However, the Constitution was not introduced, actually for reasons that turned out to be quasi paradoxical. Indeed, the lack of trust²¹⁹ in the Community because of its similarities to an international organisation caused the very treaty that would have made the jump to a more comprehensive union of States, with a much stronger relevance given to the creation of a social and political core of values, to never come into force. The case-law that more than others has cleared the reason for this result was the *Lissabon-Urteil* judgement²²⁰ by the German Constitutional Court about the ratification of the Lisbon treaty. The Court declared the Treaty compatible with the *Grundgesetz* and ruled for an extension of the powers²²¹ of the Bundestag and Bundesrat in European matters as a prerequisite of this ratification. Indeed, in examining the current competences and institutions of the Union, it discussed the issues of European integration and democratic legitimacy of the Union. While this has determined the matter of *primauté* of European law on national law to go back at the centre of the current discussions²²², it should be also pointed out that the ruling has attributed a specific importance to the criminal matter, as a consequence of the introduction of Article 83 TFEU. Indeed, the Court proposed a strict interpretation²²³ of the provisions, and reaffirmed the importance of leaving enough space to the States in the definition of criminal law, being the creation of criminal

²¹⁹ PALAZZO, 'European Charter of Fundamental Rights and Criminal Law' in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 3.

²²⁰ BUNDESVERFASSUNGSGERICHT (BVERFG), June 30th 2009, No 2 BvE 2/2008, *Lissabon-Urteil*.

²²¹ Which happened with the adoption of two acts on the matter by the Bundestag and the Bundesrat, respectively on July 8th and 18th.

²²² The topic will be discussed on chapter 3 of this thesis.

²²³ Case 2 BeV 2/2008, *Lissabon-Urteil*, para. 358.

law the most interfering²²⁴ activity the Union can carry out, as far as its relation with the Member States is concerned²²⁵.

Many are the differences²²⁶ between the two Treaties, beginning with the denomination and the terms used in the texts which show the direction towards the transformation into a State. Moreover, a larger role is attributed to the national Parliaments, which can now also get involved in the European law-making process, the confirmation of the principle of conferral, the reference to the Union as an international organisation, and the fact that the establishment of the Union is achieved by the High Parties rather than by the Treaty itself.

However, while the importance given to the distinction between national and European competences, for instance, shows the persistent Euroscepticism²²⁷ of some contracting Parties without whom the Reform Treaty could not have been approved, the main elements in the Constitution which are relevant to this dissertation have found their home in the Lisbon Treaty nonetheless. In particular, the emphasis on the person became a central part of the Lisbon Treaty, insofar as the recognition of the Nice Charter as part of European law is concerned²²⁸.

However, the main points in common between the two Treaties which deserve a reference in this specific instance are the abolition of the third pillar and the possibility of the creation of a European Criminal Law, as shown by Articles III-270 to III-274²²⁹. The three-pillar structure was indeed overcome, and that choice implied a reorganisation of the functions of the institutions in the fields which had been part of intergovernmental cooperation in the previous decade. Setting aside the matters of the second pillar – since CFSP did not lose some of its peculiarities and it is indeed a field in which the institutions operate differently than how they do in the Community pillar –, the new distribution of functions implied that the Parliament was given the power to co-decide on many matters which were

²²⁴ Ibid., para. 356.

²²⁵ However, there is also an explicit recognition on para. 359 of the need to fight some of the worst forms of criminality characterised also by a cross-border dimension, which allows for a positive approach towards Articles 82 and 83 TFEU, notwithstanding the duty for the European legislator to comply with the limits set out in the same articles.

²²⁶ PIRIS, *Trattato*, pp. 393-394.

²²⁷ Ibid., p. 395.

²²⁸ PALAZZO, 'European Charter of Fundamental Rights and Criminal Law', in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 5.

²²⁹ STRANDBAKKEN, HUSABO, *Harmonization*, pp. 9 et seq.

previously exclusive competence of the Council, while the European Court of Justice acquired a general competence in the field previously governed by the provisions of the third pillar²³⁰.

If from an institutional point of view the Treaty changed the way of operating of the European institutions²³¹, from the point of view of substantive criminal law it was no less than revolutionary, by conferring on the European Union a criminal law competence. This made the introduction of criminal law easier than it was in the past, because of the old obligation to use the instrument of the framework-decision to this purpose. After the new Treaty, unanimity would no longer be required, and the majority principle would instead be applied²³².

Moreover, Article III-145 dealt with the protection of the EU financial interests. It presented the main elements that are now found in Article 83 TFEU, the minimum rules and the use of the directive, as well as the persisting lack of a general competence in criminal matters, as shown by the list of matters to be considered and regulated, together with the lack of a direct power to impose criminal sanctions.

The duty of sincere cooperation of the Member States was kept, and indeed the Lisbon Treaty played a fundamental role through the introduction of Article 4 TEU. This is an article that, also for its collocation in the TEU²³³, is placed at the core of the definition of the relationship between the Union and its Member States. It shows the interest the Union harbours for the protection of the national and constitutional identity and the sovereignty of the States, proven by the choice to dedicate the first paragraph to the confirmation of the delimitation of the competences of the Union and to the recognition that the legislative competences of the Member States are not to be tainted, since that could in fact harm the identity

²³⁰ Although it is to be exercised within the limits of Article 276 TFEU, which safeguards the discretionary power of the police or other enforcement agencies, and Articles 10(1) and following of Protocol 36, which provides for a period of 5 years before the Court can exercise its powers on third pillar acts, unless modified by the new Treaty provisions.

²³¹ GRASSO, *Comunità Europee*, pp. 80 et seq. had already maintained that a criminal law system could not come to life before a change in the balance of powers among the European institutions occurred.

²³² STRANDBAKKEN, HUSABO, *Harmonization*, p. 9; KAIIFA-GBANDI, 'The Treaty Establishing a Constitution for Europe', in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 189.

²³³ It is indeed followed by Article 5 TEU which defines the principles of conferral, subsidiarity and proportionality in their European meaning, previously expressed in Article 5 TEC.

of the State. An explicit reference to the national identity can also be found in paragraph 2 of the article²³⁴. On a more practical note, the effectiveness of criminal law lies in its acceptance by the general public. In this context, Satzger has maintained European law might become unacceptable when entailing a risk for the socio-ethical values of a community²³⁵. It should also be noted that this specific choice came after the Constitutional Treaty was abandoned²³⁶, and it is an ulterior confirmation of the attempt through the Lisbon Treaty to propose the innovations of the Constitutional Treaty, while balancing them with a clear recognition of independence and sovereignty of the Member States. The principle of sincere cooperation in Article 4(3) TEU had previously found its legal basis in Article 10 TEC, whose formulation dates back to the 1957 since it is identical to that of Article 5 TEEC, and which is the expression of the double-faced duty of cooperation and abstention that is typical of the States adhering to an international organisation. The article in force now, however, enlarges the concept by connecting it to the existence of a duty of cooperation both for the Member States and for the Union, which is the testament to the idea still at the foundation of the Constitutional Treaty first and the Lisbon Treaty later, that is to say the idea to attain the purpose of an ‘always closer union among European peoples’²³⁷.

Article 4 TEU is to be recalled when dealing with matters of criminal law and specifically of the protection of the financial interests of the Union since it strengthens some already existing principles, and points out which are the main duties both of the Union and the Member States in their relation with each other. Indeed, without Article 83 TFEU or 325 TFEU effectively introducing a competence in criminal matters, there would not be a gap in the law for the way sensitive matters are to be dealt with. Main principles regulating them already exist, and they would imply a duty of the Member States to protect the interests of the

²³⁴ Differently from paragraph 1, paragraph 2 expressed a concept that could be found in a previous Treaty. RUSSO, ‘Articolo 4 TUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, points out the ‘generic reference to the respect of national identity of its Member States by the Union’ in Article F.1 TEU in the Maastricht Treaty, later reformed by the Amsterdam Treaty before it became the provision now in force.

²³⁵ SATZGER, *International and European Criminal Law*, pp. 64 et seq.

²³⁶ See RUSSO, ‘Articolo 4 TUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 74 for a commentary to the first two paragraphs of Article 4 TEU and how they provide for a duty to protect the identity of the Member States.

²³⁷ *Ibid.*, pp. 78 et seq.

Union and to ensure that the measures necessary in order to achieve the objectives set out in the Treaties are being taken. It should not come as a surprise that paragraph 3 has been found to be an ulterior basis for the principle of assimilation.

It should not be forgotten that the harmonisation brought about by Articles 83 TFEU and 325 TFEU, which introduce competences in matters of substantive criminal law, must be taken into account together with Article 82 TFEU, which, by contrast, deals with the procedural aspects of a harmonisation of criminal law²³⁸. In particular, Article 82 TFEU better defines the way the mutual cooperation has to happen in criminal matters according to the new principles and provisions introduced by the Lisbon Treaty. Article 82 TFEU is particularly relevant now that the European Public Prosecutor has been established and there is therefore a European judge with a discretionary power that can work with the specific aim to facilitate the enforcement of European criminal law.

1.6.1. The New Competences in Criminal Matters Gained by the European Union

Article 83 TFEU follows Article 82 TFEU not only for a reason of mere numerical order, but also because of the concept therein expressed: as a matter of fact, where Article 82 TFEU introduces the principle of mutual recognition in the first part of its first paragraph, Article 83 TFEU refers to a different way of harmonising legislation²³⁹. This happens through the creation of minimum rules and the duty to impose sanctions, the first actual competence in criminal matters recognised to the EU.

It is a revolutionary step that a specific law-making competence was given in this field and that the directive²⁴⁰ is directly implied as the act from which criminal law must come, even just in the form of minimum rules, with the European

²³⁸ Case 2 BvE 2/2008, *Lissabon-Urteil*, para. 360, however, insists on the need for a strict interpretation of the principles expressed in Article 82 TFEU.

²³⁹ SALAZAR, 'Articolo 83 TFUE', in CURTI GIALDINO (ed.), *Codice dell'Unione Europea operativo*, p. 915.

²⁴⁰ BARTONE, *Il diritto penale odierno e concreto*, p. 32.

Parliament and the European Council as the institutions taking decisions on these matters.

Paragraph 1 and 2 introduce a general and a special legislative competence in criminal matters, in line with the double face of criminalisation that had already been expressed by Working Group X of the Convention on the Future of Europe, and which Mitsilegas has referred to as respectively ‘securitised’ and ‘functional criminalisation’²⁴¹. Differently than before, indeed, the Union can regulate those matters by means of a law adopted through the ordinary legislative procedure. The first novelty is in the conferral of the competence itself and the list of matters, already present in the Constitutional Treaty²⁴², which is not exhaustive and could be enlarged by a decision of the Council. If we compare the criminal matters listed in Article 83 TFEU with those listed in ex-Article 29 TEU, there is indeed no difference, while the actual introduction of minimum rules was restricted to organised crime, terrorism, and drugs trafficking in Article 31 TEU (see paragraph 1.4.1). That restriction was justified because of the procedures that would have been used.

The second novelty in Article 83 TFEU lies therefore in the choice of a democratic procedure to tackle these matters, which were dealt with by either convention or framework-decision beforehand. A harmonisation of national laws could therefore have happened, but only within the limits of the third pillar cooperation.

Now, the harmonisation of national laws is possible, yet the limits set in Article 83 TFEU must be complied with. Indeed, the areas listed in the first paragraph all refer to conducts that could become ‘global security threats’²⁴³, whose jeopardising nature would justify the restriction of the fundamental rights and freedoms of the citizen, the freedom of movement in particular, that would result

²⁴¹ MITSILEGAS, *EU Criminal Law After Lisbon. Rights, Trust, and the Transformation of Justice in Europe*, Oxford, 2016, pp. 57 et seq.

²⁴² See KAIAFA-GBANDI, ‘The Treaty Establishing a Constitution for Europe’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 195 et seq. for a commentary to the correspondent provisions in the Constitutional Treaty in comparison with the previous European powers in the criminal field.

²⁴³ MITSILEGAS, *EU Criminal Law After Lisbon*, p. 58 maintains that Article 83(1) TFEU mirrors a ‘securitised criminalisation approach in determining EU competence in substantive criminal law’, meaning that its purpose is to address security threats.

from a criminal charge. The power to harmonise set out in the first paragraph is to be exercised only in the fields therein listed, which refer to general areas of crimes, only relevant insofar as they feature a cross-border dimension²⁴⁴, either because of the ‘nature or impact of those offences’ or because of the ‘special need to combat them on a common basis’²⁴⁵. Furthermore, Mitsilegas specifies that those areas of crime, that arguably determine a larger competence than the list of simple offences would have brought about, are not only relevant in cases of transnational or cross-border criminality. In any case when there is a cross-border dimension or a special need to combat those crimes on a common basis, for instance with terrorism and corruption, such relevance exists even when the crime committed does not have a proper cross-border character. By contrast, more limits are set for the general competence to harmonise national criminal law provisions by means of directives introduced by paragraph 2²⁴⁶, which appears to jeopardise the sovereignty of the States to a greater extent²⁴⁷. This latter competence can be exercised insofar as it is ‘essential’²⁴⁸ (and not merely ‘necessary’, as it would have needed to be if based on ex-Article 29 TEU, third pillar provisions, and the case-law of the Court of Justice, in particular the *Greek Maize* case) for the implementation of a Union policy, it relates to a field that has already been harmonised, and it only introduces minimum rules.

Even though both limits are fundamental, the one that deserves more room is the first one, since the word ‘essential’ needs to be specified. Indeed, the term should be intended in the sense that the implementation of the Union policy in question could not happen without the introduction of that specific criminal provision, and therefore that a provision is not essential each time a different

²⁴⁴ This is a point on which Case 2 BvE 2/2008, *Lissabon-Urteil*, para. 363 specifically insists.

²⁴⁵ MITSILEGAS, *EU Criminal Law After Lisbon*, p. 59.

²⁴⁶ SALAZAR, ‘Articolo 83 TFUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 920: the specific competence introduced by paragraph 2 can already be derived from the *Greek Maize* case, yet Article 83 TFEU helped overcome the limits set in case C-440/05, *Commission v Council*.

²⁴⁷ Case 2 BvE 2/2008, *Lissabon-Urteil*, para. 362 on the necessity for those limiting provisions to be complied with in order to avoid the transformation of Article 83 TFEU into a legitimisation of potentially unlimited competence.

²⁴⁸ See also Article III-271 para. 2 of the Constitutional Treaty; case C-176/03, *Commission v Council*, although dealing with environmental issues.

measure would have resulted in the same effect²⁴⁹. This issue should be seen as an ulterior confirmation of the fact that the European Treaties see criminal law as an *extrema ratio*, to only be used when all other means proves unsuccessful – although it should be recalled that not all criminal law provisions must meet this requirement, being the latter set out only in reference to the general competence of paragraph 2. The requirement of ‘essentiality’ also recalls the proportionality test as defined by case-law²⁵⁰, which introduces the requirements of adequacy, necessity, and proportionality *stricto sensu* before a measure can be deemed proportional. However, no case-law has specifically defined the relation between the essentiality requirement and the proportionality test, therefore it is still unclear whether the two should be seen as related, being the case-law on the matter restricted to administrative sanctions, even though it does provide for arguments both in favour of a ‘strict review of proportionality’ and a ‘lenient review of proportionality’²⁵¹. However, were the case-law to be applied to criminal law, although arguments in favour of the lenient review of proportionality can be found, the essentiality requirement and the desired avoidance of any unnecessary restriction of the freedom of individuals would call for a strict review of proportionality in matters of criminal law²⁵². A future definition by the Court of Justice should anyway consider the effectiveness and the deterrence of existing sanctions compared to criminal ones.

A reasonable fear was that of the destruction of the principle of legality and the *nullum crimen nulla poena sine lege*²⁵³ principle because of the abandonment of the unanimity rule for the discussion of these matters and its replacement with the majority principle of ordinary legislative procedures. This means that the legality of the choice taken by the European institutions is at risk. A decision on as

²⁴⁹ OBERG, ‘Union Regulatory Criminal Law Competence After Lisbon Treaty’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 300.

²⁵⁰ Ibid., p. 301 and pp. 315 et seq. provide for a description of the requirement for criminal sanctions to be proportionate when aimed at implementing a policy. Oberg puts forward competition law as an example of a working European sanctioning system.

²⁵¹ Ibid., pp. 308 at seq.

²⁵² Ibid., pp. 309 et seq.

²⁵³ On this topic, see BERNARDI, ‘“Nullum Crimen, Nulla Poena Sine Lege” Between European Law and National Law’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*; KAIIFA-GBANDI, ‘The Treaty Establishing a Constitution for Europe’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 197 et seq.

sensitive a matter as criminal law requires a clear representativeness of the people by the organs who exercise that power. Once the Union has been given the law-making competence, however, the Member States would evidently be giving it up. The approximation of laws is obviously less intrusive than the direct introduction of provisions that would happen with a regulation, since the former would only introduce minimum rules and objectives to be achieved. The problems existing in the previous versions of the articles, however, are now partially solved by the introduction of the emergency brake²⁵⁴ on paragraph 3, a way through which Member States can hinder the adoption of a directive in the matters listed above²⁵⁵ when they fear it could harm their national criminal law system.

However, the detailed legislation regarding those areas of crime is left to national institutions. Indeed, there is still no competence to introduce directly applicable sanctions, since the power of the Union is restricted to the harmonisation of national legislations through the means of directives. National legislatures still retain an arguably further-reaching discretion to exercise.

In the matters listed in paragraph 2, however, a complex situation could arise. Indeed, the fact that the policy to be implemented on the one hand, and the offences and sanctions on the other refer to two different acts – one about the policy, and a second one harmonising the national criminal law provisions -, could bring about a situation in which Denmark, the UK and Ireland, not having opted-in the adoption of the directive, would not be compelled to adopt those specific measures, while being obliged to comply with and implement the policies set out in the first act nonetheless. This would happen even if they would be felt indispensable for the implementation of such a policy, pursuant to Article 83(2) TFEU²⁵⁶.

²⁵⁴ However, a democratic deficit still exists, as it is evident from the scarce participation of European citizens in the law-making process.

²⁵⁵ On the possible application to Article 325 TFEU, see SATZGER, *International and European Criminal Law*, p. 82.

²⁵⁶ SALAZAR, 'Articolo 83 TFUE', in CURTI GIALDINO (ed.), *Codice dell'Unione Europea operativo*, p. 920.

1.6.2. The Need for Harmonisation of National Laws

Harmonisation of national laws on fraud, both on offences and sanctions²⁵⁷ is governed by Article 83 TFEU and, partially, by Article 325 TFEU. It is to be noted that the directive mentioned in Article 83 TFEU would not just introduce a new offence, but it would also influence the national criminal law on the matter in its general part, since it could imply the introduction of new exemptions, or determine the parameters through which the culpability of the person can be determined²⁵⁸.

It should be noted that a harmonisation in general is complex to achieve because the differences among the national systems are so connected to their core that they could only be overcome with much difficulty. However, there are some aspects²⁵⁹ which could grant the attainment of uniformity: for instance, the process of natural harmonisation that is happening in relation to the cultures of the peoples of Europe and is brought about by the ever-growing globalisation, or else the connection of some offences to the survival of Europe, or even the transnational character of many areas of crime.

Harmonisation therefore seemed - and still seems to be - inevitable for the completion of a 'coherent and consistent'²⁶⁰ European criminal law system to be phased in the following years. Considering the difficulties in achieving it, however, it would be better to recall which are the reasons why the harmonisation of criminal law should be pursued, and what would be the value²⁶¹ of its development. Undeniably, there is a variety of practical reasons²⁶², going from the predictability of the effect of a conduct by an individual working in an international environment to the need to prevent the differences between criminal law systems from bringing about conducts exploiting those differences. It would therefore help filling the gaps in national legislation, in order to grant the citizens the possibility to exercise their

²⁵⁷ Ibid., pp. 914 et seq.

²⁵⁸ BARTONE, *Il diritto penale odierno e concreto*, pp. 33-34.

²⁵⁹ BERNARDI, 'Sull'opportunità di una armonizzazione europea', in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 123 et seq.

²⁶⁰ EUROPEAN COMMISSION, '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', COM(2011) 573 final, p. 4.

²⁶¹ Ibid., p. 5.

²⁶² BERNARDI, 'Sull'opportunità di una armonizzazione europea', in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 134 et seq.

rights of free movement while being guaranteed procedural rights in criminal proceedings²⁶³, and to hinder criminal cross border activities in the meantime²⁶⁴. Moreover, it would greatly facilitate the international cooperation of national law enforcement agencies or else the teamwork of the same²⁶⁵. Apart from those, other juridical reasons would be the mutual recognition of rulings and avoidance of the double jeopardy²⁶⁶. Another class of reasons would be symbolic ones, since it would bring about a more intensive fulfilment of equality and a practical realisation of the Area of Freedom, Security and Justice²⁶⁷. On this matter, Grasso specifically refers to a ‘common sense of justice’²⁶⁸ which can become a reality only when there is no large distinction between the national means of protection.

Before the harmonisation was carried out on the basis of Article 83 TFEU, before the Lisbon Treaty came into force, already many attempts at harmonising the national legislations had been carried out through acts of both the first, in matters of insider trading and environment, and the third pillar, in a larger variety of matters such as terrorism and children’s rights²⁶⁹. Indeed, this is a testament to a value in harmonisation that does not only exist because it is functional to the judicial cooperation, but because it is a valuable in and of itself²⁷⁰.

Only then can mutual trust grow, including not only the trust between the cooperating institutions, but also the one that citizens have towards European institutions²⁷¹. However, the achievement of this uniformity would not warrant a uniformity of standards in the application of those criminal law rules, because of

²⁶³ EUROPEAN COMMISSION, ‘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’, COM(2011) 573 final, p. 5.

²⁶⁴ STRANDBAKKEN, HUSABO, *Harmonization*, pp. 17 et seq.

²⁶⁵ *Ibid.*, pp. 17 et seq.; EUROPEAN COMMISSION, ‘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’, COM(2011) 573 final, p. 5. According to FOFFANI, ‘Il “Manifesto”’, p. 658, harmonisation had for many years the purpose of facilitating the cooperation in criminal matters, even though that implied the recognition of value in harmonisation only insofar as it warranted the realisation of the Area of Freedom Security and Justice.

²⁶⁶ BERNARDI, ‘Sull’opportunità di una armonizzazione europea’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 128 et seq.

²⁶⁷ *Ibid.*, pp. 133 et seq.

²⁶⁸ GRASSO, ‘La Costituzione per l’Europa’, in GRASSO, SICURELLA (eds.), *Lezioni*, p. 692.

²⁶⁹ FOFFANI, ‘Il “Manifesto”’, pp. 660 et seq.

²⁷⁰ GRASSO, ‘La Costituzione per l’Europa’, in GRASSO, SICURELLA (eds.), *Lezioni*, p. 692.

²⁷¹ STRANDBAKKEN, HUSABO, *Harmonization*, pp. 17 et seq.

the cultural and juridical differences between Member States, for instance the extent to which ‘the discretion of the prosecutor or the sentencing practices, as well as the different national orientations provided by scholars’²⁷² is exercised.

The definition of the limits of this competence has also been described by the Draft Council Conclusions of 2009 and the Stockholm Programme. Indeed, in light of the future increase in law-making that would derive from the recognition of an actual criminal law competence, and the incoherence and inconsistency in legislation that this would entail²⁷³, the Council drafted a series of guidelines, maintaining the focus on the ‘assessment of the need for criminal provisions’, inspired by primary law principles such as necessity, *ultima ratio*, proportionality and subsidiarity, with the conduct to be defined clearly²⁷⁴. In this context, the Commission proposed the adoption of a two-step approach²⁷⁵. While subsidiarity and the fundamental human rights enshrined in the Nice Charter and the ECHR have to be complied with generally in all fields of harmonisation, criminal law in particular also requires the European Parliament and Council to take two steps. First, they have to assess whether the necessity is so impellent as to make the harmonisation essential, according to the *ultima ratio* and proportionality principles. Secondly, the concrete measures to be taken should be inspired by the principle of legal certainty, in defining both the criminal conducts and the sanctions, and the principle of proportionality²⁷⁶ of the severity of the sanction to the offence. All the while, the European legislator must rely on ‘clear factual evidence’²⁷⁷ derived from the data coming also from national authorities, in order to guarantee the effective implementation of the harmonised policy. On this matter, the

²⁷² Ibid., pp. 17 et seq.

²⁷³ COUNCIL OF THE EUROPEAN UNION, ‘Draft Council conclusions on model provisions guiding the Council’s criminal law deliberations’, Council document 16542/1/09 REV 1, November 25th 2009, p. 3. Available at: <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016542%202009%20REV%201>>

²⁷⁴ Ibid., p. 4.

²⁷⁵ EUROPEAN COMMISSION, ‘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’, COM(2011) 573 final, pp. 7 et seq.

²⁷⁶ Article 49 CFR.

²⁷⁷ EUROPEAN COMMISSION, ‘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’, COM(2011) 573 final, p. 8.

Council²⁷⁸ had listed, among the other factors to be considered in the adoption of European laws, also the seriousness and frequency of the harmful conduct, as well as the possible impact the European act could have ‘on existing criminal provisions in EU legislation and on different legal systems within the EU’.

1.6.3. Article 325 TFEU: a Legal Basis for the Fight Against Fraud

Where, on the one hand, Article 83 TFEU enlarges the legislative competences of Parliament and Council in the field of criminal law, on the other hand Article 325 TFEU presented itself as the ‘legal basis for the adoption of penal norms against the conducts of fraud affecting the financial interests of the Union’. It is the only article in a section dedicated to the fight against fraud. It has also been referred to, specifically, as the means through which the limits of the competences in Article 83 TFEU could be overcome with the aim to justify the adoption of a criminal law act whose basis was not in that article. Mitsilegas²⁷⁹, in particular, mentions the possibility that criminal law would be based exclusively on Article 325 TFEU, rather than on that provision in combination with Article 83 TFEU, and the stronger obligation that derives from the use of the verb ‘shall’ instead of ‘may’.

It should be noted that differently from Article 83 TFEU, Article 325 TFEU is not subject to the opt-in/out clause, thus a directive – even a directive that has the power to influence national criminal law provisions – that were to be introduced because of it would be applicable in all Member States²⁸⁰. There is, therefore, a clear and common legal basis for the fight against fraud, notwithstanding the one that could nonetheless be related to Article 83 TFEU. Moreover, another main difference with Article 83 TFEU is that Article 325 TFEU does not only introduce a competence, but it also recalls that the protection of the financial interests of the Union is of the utmost importance, and it is the special reason why it needs to be

²⁷⁸ COUNCIL OF THE EUROPEAN UNION, ‘Draft Council conclusions’, Council document 16542/1/09 REV 1, p. 5.

²⁷⁹ MITSILEGAS, *EU Criminal Law After Lisbon*, pp. 65 et seq. On this opinion, see also paragraph 3.3.3.1.

²⁸⁰ SALAZAR, ‘Articolo 83 TFEU’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 920.

put into action by the most effective means that the Union and the States have at their disposal. It also makes Article 325(4) TFEU a *lex specialis*²⁸¹ compared to Article 83(2) TFEU, in the sense that an act which specifically tackles fraud will need to be based on Article 325 TFEU rather than Article 83 TFEU.

The first paragraph of the article introduces a general duty to fight against fraud and other illegal activities affecting those interests. There is also a general requirement for the measures adopted to be dissuasive and effective. This first paragraph is a novelty compared to ex-Article 280 TEC, because the elimination of its last sentence has widened the field of application of the provision²⁸².

The second paragraph is at the core of the provision in that it enshrines once again the principle of assimilation in the particular field of the fight against fraud.

Criminal sanctions can be established now because of the new formulation of paragraph 4. Up to this point there had been a harmonisation in those matters. Venegoni and Vaudano found in the combination of Article 325 TFEU and 83 TFEU the legal basis for the introduction of penal law in order to ensure the effectiveness of Union policies. Therefore Article 325 TFEU might be seen as a way of creating a European criminal law²⁸³. However, there is a specific reference to fraud as the offence which must be fought by the Union, but there is also a mention to corruption and money laundering: it means that harmonisation is needed so that a common definition of the three can be given²⁸⁴. A national definition would not be sufficient to this purpose; instead, the perspective to be used is the European one, and the offence must need to be defined according to that. At that point in time, the only reference to fraud had to be found in the PFI Convention²⁸⁵. Article 1 of the Convention was, therefore, for some time after the Convention came into force, a fundamental basis for the description of fraud.

²⁸¹ MITSILEGAS, *EU Criminal Law After Lisbon*, p. 66.

²⁸² PICOTTI, 'Limiti garantistici delle incriminazioni penali e nuove competenze europee alla luce del Trattato di Lisbona', in GRASSO, PICOTTI, SICURELLA (eds.), *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, Milano, 2011, pp. 207 et seq.

²⁸³ VAUDANO, VENEGONI, 'Articolo 325 TFEU', in CURTI GIALDINO (ed.), *Codice dell'Unione Europea operativo*, p. 2246.

²⁸⁴ *Ibid.*, p. 2247.

²⁸⁵ SATZGER, *International and European Criminal Law*, p. 56.

Although the importance of Article 325 TFEU in the field is still undeniable, the introduction of Directive (EU) 2017/1371 of the European Parliament and of the Council has now provided for a clear framework on the matter.

As far as the implementation of the article is concerned, Article 325(5) TFEU states the duty of the Commission to draw up a yearly report addressed to the European Parliament and the Council, aimed at synthesising the data gathered from the different Member States. The report should present the measures taken by the Commission and the Member States and the respective results. Their aim in implementing Article 325 TFEU is to ‘protect the EU’s financial interests from undue or irregular expenditure and from evasion of customs duties or other levies’ and they shall achieve the objective by means of preventive or investigative actions, corrective mechanisms, repressive measures. Moreover, when a problem or a risk has been identified thanks to the gathered information, ‘recommendations are made to address those issues’²⁸⁶.

1.6.4. Elements of Procedural Law in the Fight Against Fraud

One of the main critiques to the Convention was that its practical use seemed unlikely, since it only provided for a definition of fraudulent conducts and it bound the States to introduce sanctions and to carry out checks without creating an exhaustive framework. Such a framework, which would come to include procedural law provisions besides substantive law ones, was the aim evidently pursued by following acts, for instance the Green Paper and the *Corpus Iuris*. The idea underlying those acts was that the effectiveness of substantive criminal law provisions required a set of rules regarding the powers and functions of the European and national agencies working, either on their own or together pursuant to the principle of sincere cooperation, for the implementation of criminal law and the enforcement of criminal sanctions.

²⁸⁶ EUROPEAN COMMISSION, ‘Report from the Commission to the European Parliament and the Council. Protection of the European Union’s financial interests – Fight against fraud 2016 Annual Report’, COM(2017) 383 final, July 20th 2017.

The relevance of procedural law is therefore proven by the amount of legislation that has dealt with its issues in the past two decades. It should also be recalled that the main provision in primary law on the matter is Article 82 TFEU, whose contents were previously enshrined in Article 31 TEU. Indeed, there has been a regulation of procedural criminal law and the creation of a system even before a harmonisation of substantive criminal law could be attempted. The clear upside of that is the better chance for a protection of individual, national, and, above all, European interests. However, such a system could have also jeopardised the application of the principles of legality and equality. As a matter of fact, lacking a European substantive criminal law, any new or existing office would undeniably be recognised a vast discretion in deciding which law to apply and which interpretation to choose. Donini²⁸⁷, in particular, expressed his doubts on the possibility a system would be established in which the government of the trial was being perceived as more important than the definition of the offences or even the instatement of rules protecting the rights of the citizen before, during and after the trial.

The regulation of the *ne bis in idem* principle is one of the issues that have most frequently shown up in criminal law acts (see paragraph 1.5.2.1.). Its importance derives from the main character of European criminal law, which is that of dealing with illegal conducts featuring a cross-border element. The implication that conflicts of jurisdiction – meaning more than one State having the competence to exercise criminal action on the same case – would occur when the crime involves more than one State and that those conflicts are more and more frequent²⁸⁸ does entail the need for a set of rules on double jeopardy. It should be noted that these provisions are needed part of the European law system because, while an international *ne bis in idem* principle exists, there is still no such thing as a European rule on the matter. As a consequence, scholars have attempted at applying the international principle – instead of national ones whose field of application is usually exclusively restricted to the territory of the State – by a call back to the

²⁸⁷ DONINI, ‘Un nuovo Medioevo penale?’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 86 et seq.

²⁸⁸ This is a consequence both of the increase in the number of crimes because of the creation of European criminal law provisions, and of the change in crime itself. Indeed, an analysis of the structural elements of the crime would show the trend towards the involvement of more than one national system. See DAMATO, DE PASQUALE, PARISI, *Argomenti*, pp. 289 et seq.

Convention of 1987, in combination with Article 54 of the Schengen Convention and Article 50 CFR, notwithstanding the issues raised by the possible interpretations of those two articles. A current definition of the *ne bis in idem* principle is also based now on the Green Paper, Article 82(1) TFEU and Framework-Decision 2009/948/GAI²⁸⁹. The more recent developments²⁹⁰ of the definition of the principle have proven a different approach towards the individual is emerging in international and European law. Indeed, he or she is no more seen as a subject to the jurisdictional power of the State to be exercised to strengthen its sovereignty, but as someone carrying the right to be protected from the risk of having more than one trial held against them. This is a whole new dimension. Amodio pointed out the strain to put the individual and its rights at the centre, which has fuelled the development of modern European proceedings. If national procedural rules are harmonised and national courts work for the same objective, then a proceeding whose phases are held in different States could become a reality²⁹¹. The basis for opinions such as Amodio's is the recognition of the importance of the judicial assistance in the European system. Indeed, the cooperation of the national police forces and courts in cases which present a cross-border element is an essential requirement for a criminal charge to be reached without the same trial to be carried out in different States, and the same individual to be tested and charged in different national courts for the same case.

Already before the Lisbon Treaty clarified some of those aspects, the Constitutional Treaty had attempted a reform of the matter. The 'mutual recognition of judgements and judicial decisions', which is based specifically in the field of judicial assistance, is introduced as a fundamental principle in Article III-270. This principle first originated in the field of free movement of goods, and was later

²⁸⁹ For a description of the principle and its current features, see CALÒ, *Il principio del ne bis in idem nello spazio europeo di giustizia, libertà e sicurezza: tra prospettiva interna ed internazionale*, Università degli studi di Firenze Facoltà di Giurisprudenza, *Master Dissertation in Comparative and Criminal Law*, 2009, pp. 159 et seq.

²⁹⁰ European Convention on the International Validity of Criminal Judgements, The Hague, May 28th 1970, and European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, May 15th 1972.

²⁹¹ AMODIO, *Processo penale, diritto europeo e common law: dal rito inquisitorio al giusto processo*, Milano, 2003, pp. 97-98.

mentioned in the preamble of the act on the EAW²⁹², with a clear distinction from the principle of double criminality²⁹³. Kaiafa-Gbandi highlights, however, the two main risks²⁹⁴ of the introduction of such a principle in connection with the provisions already existing in European law. On the one hand, a ‘dominance of the most punitive criminal legislation’ would be brought about: the obligation to recognise judgements – a general principle of law whose application is therefore not restricted within the limits of the offences listed in Article III-270 paragraph 2 and Article III-271 paragraph 1 – would imply the duty for the executing State to enforce a penalty even in those cases when the sanctioned behaviour does not constitute an offence according to its criminal law system. On the other hand, Article III-270 does not provide for clear rules to be followed as far as the criminal procedure is concerned: it established ‘minimum rules’, while allowing the States to implement the article by providing for a stronger protection. The feared outcome of such a choice together with the application of the principle of mutual recognition is that of a race to the bottom that would in the long term bring the national legislations to the lowest standard level. An ulterior simplification of the matter would not be preferable. By contrast, necessity would call for the introduction of generalised standards²⁹⁵ that would be aimed at guaranteeing a higher level of protection of the fundamental rights both derived from the national constitutions and the ECHR.

1.6.4.1. Eurojust, Europol and the European Public Prosecutor’s Office

In the provisions regarding EU offices, a relevant place is held by Europol and Eurojust already in the Constitutional Treaty, where they both acquired new specific competences, thus strengthening their role in the matter of criminal investigations and prosecutions. Europol was established by the European Union

²⁹² The European Arrest Warrant is among the latest achievements in a field which has always had at its core the use of extradition and its limits, which made the EAW truly necessary.

²⁹³ KAIIFA-GBANDI, ‘The Treaty Establishing a Constitution for Europe’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 190 et seq.

²⁹⁴ *Ibid.*, pp. 192 et seq.

²⁹⁵ *Ibid.*, p. 194.

with Article K.1(8) and (9) of the Maastricht Treaty as ‘a Union-wide system of exchanging information’, but whose full operation²⁹⁶ was only allowed after the Europol Convention²⁹⁷ had been ratified in 1998²⁹⁸. However, the Europol’s competences²⁹⁹ in particular had the imprint of the democratic deficit³⁰⁰, because of the extensions of its powers, but also because of the immunities recognised to its Directors and staff³⁰¹ which could only be lifted by action of the executive power. This last element, which shows a contamination of the jurisdictional power by the executive power, is ‘incompatible with the principles of our legal civilization’ since ‘the administration of pre-trial evidence should be in the hands of justice’³⁰². Eurojust³⁰³ - described in Tampere as a body with ‘the task of facilitating the proper coordination³⁰⁴ of national prosecuting authorities and of supporting criminal investigations in organized crime cases, notably based on Europol’s analysis’³⁰⁵ - was aimed at restricting the power of Europol³⁰⁶. Its interaction with Europol is

²⁹⁶ SATZGER, *International and European Criminal Law*, p. 111: Europol is ‘not (yet) an operational police with executive authority’, being its tasks ‘limited to the enhancement of cooperation between national police authorities and the support for law enforcement within the Member States’.

²⁹⁷ Later the legal basis changed because of a problem of ‘modifiability’ of the Convention. It was to be found in Council Decision 2009/371/JHA until Regulation 2016/794 was adopted and came into force. On this topic, see SATZGER, *International and European Criminal Law*, p. 110.

²⁹⁸ See PIERINI, PASQUA, ‘Police Cooperation in the European Union: An Overview’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 420 et seq. for the history and functions of Europol starting with the Europol Drugs Unit.

²⁹⁹ See Article 4 of the Europol Regulation for a description of the tasks which Europol has to perform, in the field of the fight against the crimes listed in Annex I of the Council Decision.

³⁰⁰ The democratic deficit is usually a problem referred to the composition of the Parliament (see Case 2 BvE 2/2008, *Lissabon-Urteil*, para. 288), but it is actually a problem that comes from the fact that the Union is not a State, even though it sometimes works as one, without however the safeguards of democracy that exist in the State, an institution undeniably closer to the citizens and their interest than the Union is.

³⁰¹ Article 10 (ex-Article 11) of Protocol 7 on the privileges and immunities of the European Union.

³⁰² KAIAFA-GBANDI, ‘The Treaty Establishing a Constitution for Europe’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 201.

³⁰³ Established by Council Decision 2002/187/JHA of February 28th 2002, later amended by Council Decision 2003/659/JHA of June 18th 2003 and Council Decision 2009/426/JHA of December 16th 2008.

³⁰⁴ The coordination has been for the first years since its establishment the main function of Eurojust. Since the Constitutional Treaty, its powers were enlarged and it was given a role that DE AMICIS, ‘Eurojust’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 531 et seq. described as being ‘more propulsive’, even though this could have brought about a clash with the powers of the future EPPO.

³⁰⁵ EUROPEAN COUNCIL, ‘Tampere European Council - 15 and 16 October 1999 - Presidency Conclusions’. Available at: <http://www.europarl.europa.eu/summits/tam_en.htm#<#>> Last updated: 1999.

³⁰⁶ SATZGER, *International and European Criminal Law*, p. 113: Eurojust is an institution ‘often perceived as providing a judicial counter-weight to Europol’.

undeniably strong and has been enhanced by The Hague Programme³⁰⁷. The action of the two is aimed at overcoming the existing issues and gaps in the field of judicial cooperation in criminal matters. However, the ‘problematic aspects’³⁰⁸ of this cooperation remain: for instance, the protection of human rights and a possible violation by Europol, the strengthening of the role of police investigation which could have entailed a weakening of the power of the prosecutor, or else the apparent ‘lack of a division between prevention and repression within Europol’s competences’³⁰⁹. A strengthening of the collaboration between Europol and Eurojust is not deemed to overcome such obstacles, since Eurojust itself shows influences of external power which deny its apparent ‘judicial nature and legitimation’³¹⁰. Therefore, there is no actual control on Europol. The Constitutional Treaty and Lisbon Treaty did not succeed in solving the issue, yet they conferred on the Court of Justice the power to intervene in situations when the legality of the trial was at stake, by means of judicial review³¹¹. The figure that could eventually grant a solution to be found is the European Public Prosecutor.

The establishment of a European prosecutor has gone hand in hand with the idea of the protection of the financial interests of the Communities since the very birth of the concept of its establishment. Indeed, the first references are to be found in the *Corpus Iuris* and the Green Paper. Its powers – introduced in primary law for the first time with the Constitutional Treaty – were going to be first restricted to the field of protection of the financial interests of the Union, and would later come to cover ‘all serious crimes having a cross-border dimension’³¹². The Treaty only provided for some fundamental norms on the matter and left everything else to be defined by law of the Council of Ministers with the consent of the European Parliament given in advance. After the Lisbon Treaty came into force, its legal basis became Article 86 TFUE³¹³.

³⁰⁷ PIERINI, PASQUA, ‘Police Cooperation’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 423.

³⁰⁸ *Ibid.*, pp. 425 et seq.

³⁰⁹ *Ibid.*, p. 427.

³¹⁰ *Ibid.*, p. 428.

³¹¹ KAIAFA-GBANDI, ‘The Treaty Establishing a Constitution for Europe’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 202.

³¹² *Ibid.*, p. 203.

³¹³ On this topic, see VAUDANO, VENEGONI, ‘Articolo 86 TFUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*.

Even though in the criminal field the national system and agencies are reasonably better suited – because of the seat of those institutions, since their closeness to where the crime was committed makes the enquiry and trial easier to be carried out – to the enforcement of criminal law and the adoption of rulings on the matter, some issues should still be considered. First of all, transnational crimes or crimes affecting a European interest can entail conflicts of jurisdiction that would need to be solved, when a rule is in place, before the trial could even start. Secondly, even when there is no conflict of jurisdiction, there is still need for a mutual assistance between agencies that do not share the same procedures nor general principles on which the norms defining their powers are based. The question is, therefore, whether the creation of institutions whose field of action is the whole European territory would be better at ensuring the application of European law³¹⁴. In particular, as far as the financial interests of the Union are concerned, it has been noted in the past, before the European Public Prosecutor's Office had been established, that the attractiveness of fraud and other crimes harming the budget of the Communities had to be found as much in the profit it would entail as in the low risk for the perpetrators to be detected. The lack of a European prosecution meant that national courts had a competence in those matters and that they had to apply both national laws and community rules. The frequent incompatibility of each source of law with the other, however, made the probability the proceeding would not start – or that it would result in an acquittal – quite high³¹⁵.

At the same time, scholars had started enumerating the dangers that a European prosecution could have brought about. For instance, the rule of admissibility of evidence³¹⁶ might have been the cause for an increase of forum shopping³¹⁷, jeopardising the protection of the rights of the tried individual during the proceeding.

³¹⁴ On this topic, see MANACORDA, 'Il P.M. europeo e le questioni aperte di diritto penale sostanziale', *Diritto penale e processo*, 2017, pp. 660 et seq.; DAMATO, DE PASQUALE, PARISI, *Argomenti*, pp. 104 et seq. who specifically refer to a 'European territory'.

³¹⁵ SATZGER, ZIMMERMANN, 'The Protection of EC Financial Interests', in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 171.

³¹⁶ On the topic of evidence and enquiry, see CAMALDO, BANA, *La circolazione della prova nell'Unione Europea e la tutela degli interessi finanziari*, Forlì, 2011.

³¹⁷ Moreover, SATZGER, ZIMMERMANN, 'From Traditional Models of Judicial Assistance to the Principle of Mutual Recognition: New Developments of the Actual Paradigm of the European Cooperation in Penal Matters', in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European*

1.7. The ‘Budgetary’ Function of the EU and the European Anti-Fraud Office

Before an actual budgetary function³¹⁸ was introduced, the Parliament and Council already exercised a control on the budget of the Communities, laid out by the Commission, having the power of adopting it and overseeing its enforcement, while the Court of Auditors exercised its function of external control in the field. The anti-fraud strategy³¹⁹ of the Commission of 1994 was only the first in a series of strategies and acts implemented by the European institutions, the Commission especially, in order to tackle the ever-growing organised criminality affecting the European budget. Indeed, the protection of the budget has been carried out by both traditional agencies and offices operating exclusively in the field of the fight against fraud, whose action has been paralleled by the development of the European legislation on the matter, and by the attempts at a more intrusive presence in the territory, also together with the national authorities, aimed at tackling the commission of those crimes³²⁰.

It is in line with these measures taken by the European institutions that the Task-Force ‘Anti-Fraud Coordination Unit’ (UCLAF)³²¹ was created as part of the Secretariat-General of the European Commission in 1988 with the explicit purpose of tackling transnational organised fraud working alongside national antifraud departments, and with the peculiarity of involving experts from different backgrounds in the exercise of its powers. In particular, the functions of the UCLAF included the activity of support in the design of measures to be taken in this field by the Council and the Commission – also thanks to the annual reports on the

Cooperation, pp. 358-359, feared this further step, after the overcome of the double criminality in favour of extradition, ‘would completely destroy the balance between prosecution and defence in criminal proceedings’.

³¹⁸ Articles 310 TFEU et seq.

³¹⁹ COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Protecting the financial interests of the Community. The fight against fraud. The Commission’s anti-fraud strategy. Work programme for 1994’, COM(94) 92 final, March 23rd 1994. Available at: <<http://aei.pitt.edu/13094/1/13094.pdf>>

³²⁰ KUHLMANN, ‘Stratégie antifraude de la Commission’, in GRASSO (ed.), *Lotta contro la frode*, pp. 2 et seq.

³²¹ For an overview of the functions and purposes of UCLAF see *ibid.*, pp. 3 et seq.

progress and results of the activity in the fight against fraud addressed to the Parliament and Council –, the activity of control in the European territory with the cooperation of Member States, and the gathering and analysis of information regarding the matter, always with the cooperation of national police services, granting the UCLAF the access and sharing of information. Its activity is to be exercised within the limits of the principles expressed by the Treaties, but also in compliance with the regulations³²² on the matter, and with the PFI Convention, which is an act of the third pillar but refers to the activity of the Commission and, therefore, also to that of an internal office such as UCLAF.

In 1998 a report of the Court of Auditors described the problems with UCLAF and became the reason why, after suspicions of corruption led to the resignation of the Santer Commission, a new anti-fraud body was established in the European Anti-Fraud Office (OLAF from the French ‘Office de la lutte Antifraude’). Differently from UCLAF, OLAF is an institution which is not part of the hierarchical structure of the Commission; instead, it is an independent authority³²³ which can carry out its enquiry also towards the European Commission. As a consequence, both the French National Assembly and the House of Lords have defined OLAF’s status as being ‘hybrid and ambiguous’, specifically because of its power to carry out investigations inside the Commission³²⁴.

Created in 1999 with Commission Decision 1999/352/EC based on Article 280(4) TEC, OLAF has the power of conducting administrative investigations³²⁵,

³²² A distinction should be drawn between those regulations which regard a specific field of action (for instance, Regulation 1319/85 about the fruit and vegetables field) and ‘horizontal’ frame Regulations of the Council nn. 2988/95 and 2185/96.

³²³ It is nonetheless a department of the Commission rather than an institution with a legal personality. Yet, Article 3 Decision 1999/352/EC states no instruction shall either be sought or taken by the Director of the Office ‘from the Commission, any government or any other institution or body’.

³²⁴ MITSILEGAS, *EU Criminal Law*, pp. 213 et seq.

³²⁵ On this topic, see SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 175 et seq.; VAUDANO, VENEGONI, ‘Articolo 325 TFUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, pp. 2249 et seq.; VENEGONI, ‘Il ruolo dell’OLAF nella lotta alla contraffazione’ and HENNE, ‘The Role of OLAF in the fight against the traffic of counterfeit goods with a specific reference to the protection of EU’s financial interests’, in CAMALDO (ed.), *La circolazione e il contrabbando di prodotti contraffatti o pericolosi. La tutela degli interessi finanziari dell’Unione Europea e la protezione dei consumatori*, Torino, 2013, pp. 79 et seq.; BOUTAYEB, *Droit institutionnel de l’Union Européenne. Institutions, ordre juridique, contentieux*, Paris, 2015, pp. 430-439.

both external and internal³²⁶, while its activities are regulated in particular by Council Regulation (EC) 1073/1999, within the limits set out by the general principles of law and the fundamental rights enshrined in the CFR and ECHR³²⁷.

Recital 4 of the Decision presented the ‘need to increase the effectiveness of the fight against fraud’ as the main purpose for the establishment of the Office, although, pursuant to Recital 6 of the Decision and Recital 7 of the Regulation, its action should be further-reaching and generally include ‘all the activities linked with the protection of Community interests from irregular acts likely to lead to administrative or penal proceedings’. As far as those activities are concerned, Article 2 of the Decision lists the general tasks of the Office, beginning with the power of investigation, but also mentioning the responsibility ‘for the preparation of legislative and regulatory initiatives of the Commission with the objective of fraud prevention’ in paragraph 4 and the responsibility for the Commission’s operational activities in paragraph 5.

Being the Commission’s support in cooperating with the Member States also a responsibility of OLAF³²⁸, the importance of its activity should also be connected to the constant involvement of national agencies and offices it guarantees. The Hercule Programme³²⁹, for instance, is a testament to that peculiarity. The Programme started in 2004 with Decision 804/2004/EC and was extended until 2013 by Decision 878/2007/EC. The Hercule III programme (2014-2020) was set up by Regulation (EU) 250/2014 and has applied since January 1st 2014. With the purpose to prevent and combat fraud, corruption and other illegal activities affecting the financial interests of the Union, the programme shall provide annual funding to the institutions or organisations³³⁰ of the participating countries³³¹ carrying out the actions listed in Article 8.

³²⁶ Article 2(1) of Decision 1999/352.

³²⁷ Recital 10 of the Regulation.

³²⁸ Article 2(2) of Decision 1999/352.

³²⁹ EUROPEAN ANTI-FRAUD OFFICE, ‘About the Hercule Programmes’. Available at: <https://ec.europa.eu/anti-fraud/policy/hercule_en> Last updated: September 18th 2017.

³³⁰ Article 6 of Regulation (EU) No 250/2014 of the European Parliament and of the Council of 26 February 2014 establishing a programme to promote activities in the field of the protection of the financial interests of the European Union (Hercule III programme) and repealing Decision No 804/2004/EC, OJ L 84/6.

³³¹ Article 7 of Regulation (EU) 250/2014.

The European Commission strategy of 2011 also reaffirms the role of OLAF in the fight against fraud. Indeed, while the Head of Commission Services must prevent and detect the fraudulent conducts, OLAF should provide them with the assistance necessary for the implementation of the strategies³³².

Moreover, the Fraud Notification System was launched in 2010, which provided the citizens with the opportunity to directly ask OLAF to intervene upon a matter by reporting allegations of either³³³ conducts constituting fraud or other irregularities potentially harming the EU budget or ‘serious misconducts by Members or staff of EU institutions and bodies’³³⁴.

Furthermore, in order to comply with a general requirement of transparency of administrations, OLAF issues annual reports where the activities carried out during the previous year are discussed by showing the numbers regarding the amount of information which was gathered, the investigations both opened and concluded, the recommendations issued, and, in particular, the anti-fraud policies implemented.

The role of OLAF and the importance that this institution has acquired in the past years is a testament to the effort the European Union is putting into creating a system whose coherency will allow for a widespread protection of the European financial interests against all conducts that could affect them. Indeed, the existence of an independent office working with the national agencies as well as the other European institutions with the explicit aim of protecting the financial interests of the Union can arguably be perceived as the confirmation of the core relevance of those interests and the essentiality of an effective protection of the same in order to guarantee the survival of the Union itself.

³³² EUROPEAN COMMISSION, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission anti-fraud strategy’, COM(2011) 376 final, June 24th 2011, pp. 11 et seq.

³³³ It should be noted that the two kinds of allegation match the fields of both external and internal investigation of the Office as detailed in Article 2(1) of the Decision.

³³⁴ EUROPEAN COMMISSION, ‘European Anti-Fraud Office’. Available at: <https://fns.olaf.europa.eu/main_en.htm>

CHAPTER 2

THE DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE FIGHT AGAINST FRAUD TO THE UNION'S FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW

2.1. The General Reasons for an Interest in the Fight Against Fraud after the PFI Convention

The obvious qualms of the Convention brought about a more in-depth discussion on the possibility of a first pillar act dealing with the matter of the criminal law protection of the financial interests of the Union. Setting aside the lack of a competence at that time, it still was evident that a framework in this field could not have come to life without the harmonisation by an act of first pillar, whose direct effects and whose clarity and propensity to detail would have brought about the unification of national legislations. A general framework had been introduced by Regulation (EC, Euratom) 2988/1995 (see paragraph 1.5.1), thanks to the introduction of the definition of 'irregularities' and of that first list of provisions on administrative checks, controls, and sanctions which underpinned the fight against fraud. However, a criminal law intervention was needed and that was what brought about the Convention, which set the duty for the adhering States to introduce offences and appropriate penalties in order to achieve the protection of the financial interests of the Union. Both acts had originated from the need for a uniform legislation and closer cooperation of the Member States aimed at protecting the core interests of the Union¹. The two showed evident misgivings nonetheless. While, on the one hand, the Regulation was an act of first pillar and, as such, directly

¹ On the one hand, the preamble to the Regulation specifies that 'the effectiveness of the combating of fraud against the Communities' financial interests calls for a common set of legal rules to be enacted for all areas covered by Community policies'; on the other, the preamble to the Convention clarifies the purpose of the act, that is to say the need to 'combat together fraud affecting the European Communities' financial interests'.

applicable in the territory of the Member States, it still only introduced administrative penalties, which were evidently not dissimilar to criminal penalties, yet could not be the appropriate response to conducts which were inherently criminal. On the other hand, the Convention introduced criminal law provisions, yet that was an act of third pillar and, therefore, an international law act, with all the differences it implied compared to supranational legislative acts.

Of the two, the Convention, in particular, had been heavily criticised by the States – notwithstanding the contradictions in the reasons for their opposition – to the point that it was not ratified by some Member States before the proposal for a new act had been submitted². Such a proposal came in 2001³ together with the informal submittal of plans for projects of future realisation exemplified by the Green Paper⁴. The 2001 proposal, later⁵ amended by the Commission following the adoption of the Parliament at first reading, had found its legal basis in Article 280(4) TEC. However, once the Lisbon Treaty had come into force, new amendments to the original proposal were called for. The criminal law competence which had been introduced thanks to the Treaty, in particular, elicited the strain for a modern piece of legislation, resulting in the eventual withdrawal⁶ of the 2001 proposal by the Commission on the grounds that its provisions had proven to be obsolete. A new proposal (henceforth ‘the Proposal’) was soon after submitted by the Commission, this time pursuant to Article 325(4) TFEU.

A number of acts, including the Proposal itself, recalled the reasons for a legislation in such a field. The European Committee of the Regions, in 2012⁷, also

² VAUDANO, VENEGONI, ‘Articolo 325 TFEU’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 2248.

³ COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community’s financial interests’, COM(2001) 272 final, August 28th 2001, OJ C 240E.

⁴ The Green Paper was not a legislative act and was therefore not binding for the Member States. Nevertheless, the definitions it included were relevant for the future drawing up of acts in the field of both substantive and procedural criminal law.

⁵ COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Amended proposal for a European Parliament and Council Directive on the criminal-law protection of the Community’s financial interests (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty)’, COM(2002) 577, October 16th 200, OJ C 71E.

⁶ EUROPEAN COMMISSION, ‘Withdrawal of obsolete Commission proposals’, April 16th 2013, OJ C 109/04.

⁷ EUROPEAN COMMITTEE OF THE REGIONS, ‘Opinion of the Committee of the Regions on “Package on protection of the licit economy”’, December 18th 2012, OJ C 391/14, p. 135.

addressed the issue. By dealing with the extent⁸ to which corruption, organised crime and fraud had been affecting the Union and its Member States, the Committee presented its reasons for a new legislative act. In particular, it recalled that the Commission had already pointed out in 2008⁹ that only five signing States up to that point had satisfactorily complied with the provisions in the Convention. In its opinion¹⁰ the Committee of Regions referred to that as one of the shortcomings of EU law in the field of the fight against fraud and corruption. It was indeed clear that the Convention had been incapable of tackling the issue. Furthermore, the fact that crime with a cross-border character had not stopped, but was instead spreading¹¹, caused legislative actions carried out by the Union to become essential.

In 2012 the Commission submitted the proposal for a new Directive (henceforth ‘the Directive’) in the field of the fight against fraud, and it was in reference to that proposal that two additional acts were adopted, that is to say, the Commission working paper constituting the impact assessment of the Proposal and a summary of such assessment¹². One of the issues tackled by the two acts was the further explanation as to why the Directive was needed. The evident necessity that came from the Convention not being successful was therefore better analysed in light of the issues which had kept emerging in relation to the protection of the financial interests of the Union. It should be noted that the Commission often specified that the lack of an effective legislation had entailed both an insufficiency

⁸ Already in its first paragraph, the Opinion of the Committee of the Regions mentions the effects of the illicit economy, as it ‘pushes countries further into debt, holds back government action against the crisis, reduces investment levels, favours the capital flight and saps public confidence in their representatives and institutions’.

⁹ EUROPEAN COMMISSION, ‘Second Report from the Commission - Implementation of the Convention on the protection of the European Communities’ financial interests and its protocols - Article 10 of the Convention’, COM(2008)77, February 14th 2008.

¹⁰ EUROPEAN COMMITTEE OF THE REGIONS, ‘Opinion of the Committee of the Regions on “Package on protection of the licit economy”’, OJ C 391/14, p. 136, paras. 11-12.

¹¹ On the topic of the raise in the number of reported irregularities affecting the EU budget, see EUROPEAN COMMISSION, ‘Report from the Commission to the European Parliament and the Council - Protection of the European Union’s financial interests — Fight against fraud – 2013 Annual Report’, COM(2014) 474 final, July 17th 2014, pp. 8 et seq.

¹² EUROPEAN COMMISSION, ‘Commission Staff Working Paper Impact Assessment (Part I) - Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law’, SWD(2012) 195 final, July 11th 2012; EUROPEAN COMMISSION, ‘Commission Staff Working Document - Executive summary of the Impact Assessment - Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law’, SWD(2012) 196 final, July 11th 2012.

of suitable protection, and a loss of credibility¹³ of EU justice in the fields of the defence of the Union's financial interests in particular and of the fight against crime in general. Indeed, the papers highlighted that the provisions protecting the EU budget did not have a sufficiently deterrent effect. Moreover, the existing norms were not accompanied by an efficient enforcement, as a result of the inability of national institutions to detect crimes, prosecute the perpetrators, and issue a final sentence. Finally, the recovery of the money 'gone astray' was highly unlikely¹⁴.

While, from a procedural point of view, the evident misgivings of EU law were being approached by other acts, such as those which introduced the EPPO and strengthened the role of Eurojust – and, in doing so, took the opportunity to affirm once again the principles of sincere cooperation and mutual recognition of foreign rulings –, the Commission was focused on the creation of efficient provisions and, above all, offences and sanctions which would have prevented cross-border crime to be committed. Substantive criminal law was therefore the perspective selected by the Commission in the working documents accompanying the proposal for a new Directive as well as in the proposal itself.

In enumerating the causes of the inefficiency of EU law in the fight against fraud, the Commission first mentioned the insufficiency in the number of offences already existing in European criminal law and which were specifically addressed to the protection of the European budget. On the one hand, the rules governing the field did not determine with sufficient precision the elements which had to occur for a person to be considered liable of a crime, nor did they clarify how the perpetrator of a cross-border crime could be prosecuted when the crime had been committed abroad. The Convention, indeed, relied heavily on national legislation and the principle of sincere cooperation between States, and set a series of rules which did not however guarantee enough certainty on the matter¹⁵. On the other

¹³ EUROPEAN COMMISSION, 'Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law', COM(2012) 363 final, July 11th 2012, p. 4, also mentions the 'credibility of Union's institutions, bodies, offices and agencies' as far as the protection of the budget of the Union is concerned would drop if its enforcement could not be ensured.

¹⁴ See EUROPEAN COMMISSION, 'Impact Assessment', SWD(2012) 195 final p. 8; EUROPEAN COMMISSION, 'Executive summary of the Impact Assessment', SWD(2012) 196 final p. 3.

¹⁵ See Articles 4 et seq. of the Convention. On the overlapping of European and national offences, see DE FRANCESCO, 'Le sfide della politica criminale', in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 47 et seq.

hand, the existing offences were not enough to cover all the possible criminal conducts which were being committed transnationally. Notwithstanding the introduction of a general definition of fraud, no specific offences had been otherwise created at EU level, while national definitions still proved to be ambiguous or widely diverging and there had not been a coherent implementation of the rules set out by the Convention. As a consequence, there was no such thing as a clear definition of the crimes, whereas the existing provisions which included a definition of offences were not suited to cover all the possible criminal conducts in that field.

Moreover, issues arose also from the applicable sanctions. As with offences, also sanctions diverged¹⁶ from one country to the other (see para. 1.5.2.4.) – implying Union interests would have a dissimilar protection in different countries¹⁷ –, while the general limit set by the Convention was felt to be too low for the type of crimes which affected the, arguably, most relevant interest of the EU, i.e. its budget. As a consequence, inequality in the application of sanctions and lack of deterrence were once again being discussed. The Commission also pointed out that the implementation of its ‘overall strategic approach’¹⁸ regarding the fight against fraud would need to come from the application of concrete measures. The harmonisation of sanctions was thus essential for this aim to be achieved.

Finally, the actual application of criminal law had proven to be difficult due to impediments both of a practical and a juridical nature¹⁹. This in particular refers to the limitations occurring even when the trial had already started, and yet its beginning had been delayed by the complexity of the investigation.

¹⁶ On the topic of the differences between national sanctioning systems, see BERNARDI, ‘Sull’opportunità di una armonizzazione europea’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, pp. 115 et seq.

¹⁷ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, pp. 2 et seq.

¹⁸ *Ibid.*, p. 4.

¹⁹ EUROPEAN COMMISSION, ‘Executive summary of the Impact Assessment’, SWD(2012) 196 final p. 4.

2.2. The Choice to Propose a Legislative Act

Besides the issues emerging from the content of the Convention which made the necessity of a new act impellent, the peculiarities of the matter made it necessary for a legislative act in particular to be adopted.

In the working papers accompanying the proposal for a Directive, the Commission discussed the possible options as to how the new rules could be introduced, and eventually settled on a legislative act. Indeed, the Commission put forward five options²⁰ in order to reach the specific purpose of the protection of the financial interests of the Union.

The first possibility was the ‘retention of the status quo’: the juridical instruments already introduced by the Union and the Member States would have continued to be the chosen way to achieve the objectives of the Union policies. Yet, their implementation would have required to be constantly monitored. The Commission instantly highlighted the obvious inefficiency of such a choice. The aim was to achieve a higher level of protection of the financial interests and an innovation of the previous juridical system. The mere confirmation of the already existing framework together with the monitoring of its implementation was what had been attempted and had turned out to be unsuccessful in the past. Therefore, it could not have been a viable alternative for the fulfilment of the proposed objectives.

A second possibility was that of soft law. The Union would have carried out non-legislative actions, which would have been directly and specifically addressed to potential perpetrators and practitioners with the purpose to ‘raise awareness of relevant provisions’, as well as to ‘facilitate their understanding and application including by an exchange of best practices and case information’. Although this option would have complied with the principles of proportionality and subsidiarity²¹ – since it foresaw the introduction of appropriately severe rules by the Member States themselves while it gave them the power to recover losses of

²⁰ EUROPEAN COMMISSION, ‘Impact Assessment’, SWD(2012) 195 final, pp. 29 et seq.; EUROPEAN COMMISSION, ‘Executive summary of the Impact Assessment’, SWD(2012) 196 final, pp. 5 et seq.

²¹ Both principles are hereby intended as limits to the action of the Union as enshrined in Article 5 TEU.

budget – the policy still could not have guaranteed the right level of efficiency. As a matter of fact, it did not entail the protection by means of criminal law, and the measures thus adopted would not have covered all the possible conducts so much so that a severe enough penalty could have been applied.

The other options all entailed the adoption of a legislative instrument, either one converting the PFI Convention and its protocols into Union law, or one harmonising the criminal law rules of the Member States, or one establishing directly applicable substantive criminal law rules.

Evidently, the third policy option among those listed by the Commission could not have brought about an ‘added value’ of the European action in the field of the fight against fraud. The already existing provisions would have been given a new frame, but they would not have been reformed and improved enough as to create the criminal law system whose existence was being felt more and more needed to strengthen the efficiency of the Union action. As far as this policy option is concerned, the proportionality requirement would have been met. Yet, that was only an additional advantage of a working policy instead of the essential one which could have given the policy an exhaustive strength.

Enforcement of a ruling, recovery of losses and deterrence from criminal conducts were the features the Commission chose to highlight while describing the results connected to the choice of the fourth policy option. Indeed, by introducing broad definitions and leaving it to the Member States to give a more detailed description of the offences and their correspondent sanctions, each State would have been given the legitimation to investigate, prosecute and sanction criminal conducts within the rules of its legal system. Mutual recognition would have therefore become a fundamental principle in order to ensure the prosecution of cross-border crimes. At the same time, the broader definitions combined with ‘more stringent sanction types and levels’, would have increased the likelihood of those provisions to be suitable deterrents of criminal conducts. Once again, this policy option would have met the proportionality requirement, because it would not have gone beyond what was needed to achieve the protection of the financial interests of the Union, while also leaving the Member States enough room to take adequate measures.

Lastly, the Commission pointed out that the fifth policy option would have guaranteed the same level of effectiveness of the previous one and produced comparable results. The difference lay in the impact on national legislation which, in this case, would have been undeniably stronger. Option four consisted in the adoption of a directive. By contrast, option five entailed the adoption of a regulation. Therefore, the European provisions introduced in line with the choice of the latter policy option would have directly applied without the otherwise necessary implementation of the European rules by means of national law, thus implying higher ‘intrusiveness and fundamental rights impact [...] for no noticeably higher positive financial impact’²².

In the end, the clear intention was to adopt a legislative act, which meant the first two options were soon abandoned. That is to say, the idea shared by the European institutions was to overcome the flaws of the already existing instruments and to provide for a more efficient choice, instead of a simple action raising awareness to prevent the commission of crimes. A new legislative act was required. In particular, however, this implied that a specific novelty – that an act merely transposing the provisions already enshrined in the Convention could not have ensured – was needed. A new first pillar act introducing both the definition of offences and elements of general criminal law was the only viable option among the proposed ones.

Such an act would have become binding law for all²³ the Member States, differently from third-pillar acts. Moreover, the matters governed by the new legislative act would undeniably be covered by the competences of the Court of Justice. Already in Article 10 of Protocol 36 of the TFEU there was a mention of the possibility for the Commission to bring a case before the ECJ against a Member State whose conduct had been in violation of a European law provision, even though that rule which the State had not complied with came from a third pillar act, 5 years

²² EUROPEAN COMMISSION, ‘Executive summary of the Impact Assessment’, SWD(2012) 196 final, p. 7.

²³ It should be recalled, however, that Denmark, the UK and Ireland retain the right to opt-in when a legislative act is adopted in this field. On this topic, see para. 1.6.1.; SALAZAR, ‘Articolo 63 TFUE’, in CURTI GIALDINO (ed.), *Codice dell’Unione Europea operativo*, p. 920.

after the Lisbon Treaty had come into force. However²⁴, a more straightforward way of granting a jurisdictional protection of the rules in the Convention would have been to bring them under the first pillar, so that they were obviously covered by the protection of the Court.

On the other hand, a legislative act in this field would have brought forward the argument of the democratic deficit²⁵ of the European Union once again, because the procedure for the adoption of regulations and directives does not require unanimity for such an act to be adopted. This is nonetheless an issue which has been partially overcome by the introduction of the legislative competences now enshrined in art 83 TFEU. The article does not solve the problem of the democratic deficit, but it does allow for a recognition of the power of the Union to act in this field.

Both the fourth and the fifth options were indeed suitable to reach the general and specific objectives set out in the Treaties. There was nevertheless a difference between the two, and it lay in the efficiency of each one, since the fourth one was less intrusive towards the Member States' judicial systems. In order to understand this difference, the Commission compared the features of the two. The main one was the rigidity required by option five and the apparent openness entailed by option four. Option five foresaw the adoption of a regulation which would have defined offences and the criminal system in detail, to such an extent that national legislations would have been compelled to introduce an 'exhaustive definition' of the crimes concerned, together with rigid sanction types and levels, and all other ancillary provisions necessary to the enforcement of the main rules. All those provisions enshrined in a new regulation would have been directly applied in the national system without transposing measures to be needed. On the other hand, option four entailed the adoption of a directive. A directive is a widely different act from a regulation. The difference hereby lay in the rigidity of the European rules, which, when enshrined in a directive, would have only consisted in a minimum definition, notwithstanding the possibility to enlarge such a description of the crime

²⁴ VAUDANO, VENEGONI, 'Articolo 325 TFUE', in CURTI GIALDINO (ed.), *Codice dell'Unione Europea operativo*, p. 2249.

²⁵ On this topic, see FOLLESDAL, HIX, 'Why There is a Democratic Deficit in the EU', pp. 18 et seq.

to ‘go further’ and cover a larger number of conducts. That would however have required the transposition into the national law system by a special State law.

2.3. The Intention of the Adopting Institutions: the Proposal Submitted by the Commission and the Positions of the Council and the European Parliament

In 2001 the Commission adopted the Green Paper. A scholarly act based on the *Corpus Iuris* 2000 (see para. 1.5.3.), its purpose was to identify the main issues to be tackled by future legislation, and to propose solutions for those which had already emerged in the field of the fight against fraud and cross-border crime in general. An actual proposal of the legislative act which felt necessary, however, was only submitted after the Lisbon Treaty came into force and a competence in criminal law for the EU was first recognised.

In the staff documents accompanying the Proposal for the Directive, the Commission enumerated the specific objectives that it was setting to achieve by the adoption of this piece of legislation.

As previously mentioned (see para. 2.1.), the general objective of the protection of the EU budget – thereby exemplified as the prevention and reduction of the loss of money for the EU – was considered together with the ‘credibility’²⁶ of the policy actions taken by the European institutions. In particular, the Lisbon Treaty had recognised a ‘budgetary power’ to the European Parliament, and such a provision came with the confirmation of the necessity for that budget to be protected by the Union²⁷.

‘Deterrence’, ‘enforcement’, and ‘recovery’ were the key concepts put forward by the Commission when discussing the policy options proposing the protection by means of legislation. In coherence with such a description, the accompanying act mentioned those elements first when enumerating the specific

²⁶ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 4.

²⁷ See paragraph 2.4. about the subsidiarity principle and the Union as the better choice for an intervention in the matter of the protection of the EU budget.

objectives²⁸, whose achievement would have been asked of the new piece of legislation. The Directive would have therefore needed to provide for more deterrent provisions in the concerned field, which would have also needed to be better enforced²⁹, while the levels of ‘recovery of EU public money subject to illegal acts’ would have needed to be ‘adequately improved’. The Commission also added that any measure to these purposes needed to comply with the Charter of Fundamental Rights. This reference to fundamental rights might have come to sound as a boilerplate clause. However, criminal law provisions cannot be introduced unless there is a special need for them, pursuant to the principle of subsidiarity and proportionality and the *ultima ratio* principle in particular³⁰. As such, the rights enshrined in the Charter have to be perceived as a limit to the potential excessive recourse to criminal law provisions.

Moreover, in the same instance the Commission set a series of additional specific objectives to be achieved, which, together with the above-mentioned ones, could arguably be connected to the policy aims generally pointed out by the Union in all fields of legislation, notwithstanding the suitability of such aims to criminal law in particular. Those specific objectives were: the meeting of the requirements of ‘equivalence and fairness³¹ of provisions’, the contribution to increase ‘mutual trust between the Member States’ judiciaries’³², and the spread of knowledge and awareness of the provisions in the concerned field ‘among investigators and potential perpetrators’³³.

²⁸ EUROPEAN COMMISSION, ‘Impact Assessment’, SWD(2012) 195 final, p. 28; EUROPEAN COMMISSION, ‘Executive summary of the Impact Assessment’, SWD(2012) 196 final, p. 5.

²⁹ The document also specified on page 5 that this should occur by ‘improving investigation results, including identification of suspects and detection of beneficiaries of illegal transactions’.

³⁰ On this point, see EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, pp. 5 and 8; EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto on European Criminal Policy*, p. 707; FOFFANI, ‘Il “Manifesto sulla politica criminale europea”’, p. 666.

³¹ On the topic of fairness of provisions and penalties, especially in the application of the principle during trial, see TONRY, ‘Fairness, Equality, Proportionality, and Parsimony: Towards a Comprehensive Jurisprudence of Just Punishment’, in BOTTOMS, BOIS-PEDAIN (eds.), *Penal Censure*, Oxford, 2017, Minnesota Legal Studies Research Paper No. 17-04. Available at: <<https://ssrn.com/abstract=2912344>>

³² The increase of mutual trust could also be intended as a direct implication of the need to simplify and support the sincere cooperation between Member States pursuant to Article 4(3) TEU.

³³ This aim could be perceived as a recognition of the preventive value of criminal law provisions.

Lastly, the Commission listed the ‘operational objectives’³⁴ which should have inspired the law introducing a new definition of offences and government of sanctions purposely aimed at the protection of the financial interests of the Union. Those objectives are indeed referred to the Directive in question. However, it could be argued that the requirement of a ‘wide scope’ of the provisions - together with the need to create a large number of offences, to set ‘sanctions types and levels’ sufficient to ensure fairness and proportionality in the protection of the EU budget, and to introduce ‘clear and appropriate flanking rules to facilitate enforcement’ -, all answered to the general necessity for a more ‘equivalent and effective’³⁵ protection of the financial interests of the Union. The Directive was going to represent a step further towards the construction of a criminal law system³⁶, therefore it was aimed at the achievement of those results which would have shown the capability of the Union to protect its interests by effective means of criminal law.

With the Committee on Budgetary Control and the Committee on Civil Liberties, Justice and Home Affairs reporting on the proposal on March 15th 2014, the Parliament submitted its position at first reading³⁷. Once again, the final objective of ensuring ‘effective, proportionate and dissuasive protection of the Union’s financial interests’ was affirmed. It should be noted, however, that the rapporteurs of the involved Committees also referred to some specific objectives which should have been reached by the Directive, such as: the higher degree of consistency of punishment across the EU as a result of the introduction of minimum sanctions; a closer cooperation between Member States and Union institutions; the creation of a framework within which the EPPO could operate (see paragraph

³⁴ EUROPEAN COMMISSION, ‘Impact Assessment’, SWD(2012) 195 final p. 28; EUROPEAN COMMISSION, ‘Executive summary of the Impact Assessment’, SWD(2012) 196 final p. 5.

³⁵ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 2.

³⁶ Indeed, the Proposal does not have to be intended as a mere adaptation to the post-Lisbon age of the provisions already enshrined in the Convention, as pointed out in VENEGONI, ‘Prime brevi note sulla proposta di direttiva della Commissione Europea per la protezione degli interessi finanziari dell’Unione attraverso la legge penale COM(2012) 363 (c.d. direttiva PIF)’, September 5th 2012, p. 5. Available at: < <https://www.penalecontemporaneo.it/d/1656-prime-brevi-note-sulla-proposta-di-direttiva-della-commissione-europea-per-la-protezione-degli-inte>>

³⁷ EUROPEAN PARLIAMENT, ‘Report on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, A7-0251/2014, March 25th 2014. Available at: <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0251&language=EN>>

2.11.). However, it was still deemed essential that the prerogatives of the national systems should be preserved together with the procedural safeguards of the individuals during the criminal proceedings³⁸.

The Council approved its position at first reading³⁹ on April 25th 2017. Its opinion agreed with what had been previously discussed by the Commission and the European Parliament. In particular, the Council maintained once again the purpose of the Directive, being that of providing for an effective protection of the financial interests of the Union. This had to be seen as the ulterior objective, being the immediate aim of the Directive the introduction of minimum rules in the field of the fight against fraud, following the opinion on the legal basis of the Directive previously submitted by the Committee on legal affairs. This opinion, included in the above-mentioned report by the European Parliament, clarified the need for a different legal basis for the act – Article 83(2) TFEU – than the one which had been proposed by the Commission – Article 325(4) TFEU –, and connected it to the direct objective of the Directive, which was that of harmonising national legislations through the introduction of minimum rules.

The purpose already found in the proposal submitted by the Commission is now enshrined by Article 1 of the Directive. Differently from the Convention, the Directive clearly tackles the issue with an indication of the subject matter of the act and, as a direct implication, its purpose. The main objective of the Directive is indeed the establishment of minimum rules in the fight against fraud. Being it a Directive, there is no intention of describing the matter in all its details, since the detailed rules are to be introduced by the single Member States, according to the peculiarities of their criminal law systems. The rules of the Directive therefore define ‘criminal offences and sanctions’ in the field of the fight against fraud. However, in order to open the field of application more than the Convention had previously done, the reported aim is also to combat those ‘other illegal activities’ which affect the Union’s financial interests, that is to say, the budget (see paragraph

³⁸ Those objectives are part of the Explanatory Statement included in EUROPEAN PARLIAMENT, ‘Report on the proposal for a directive’, A7-0251/2014.

³⁹ COUNCIL OF THE EUROPEAN UNION, ‘Statement of the Council’s reasons: Position (EU) No 4/2017 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law’, June 9th 2017, OJ C 184/02, pp. 14-15.

2.4.) of the Union. The last phrase in Article 1 – ‘in line with the *acquis* of the Union in this field’ – is relevant in that it recalls the efforts already done by the Union in the field of the fight against fraud. Indeed, there is a clear recognition of the already existing means of defence, while also mentioning the need to strengthen such protection. A specific mention is to the *acquis* of the Union in this field, which should be taken into account when defining these matters, and which has been a frequently mentioned as the starting point for the definition of the new rules by the Commission, the European Parliament and the Council.

2.4. Legal Basis for the Directive

The preamble of the Directive clearly mentions Article 83(2) TFEU as the legal basis for the act. However, a certain number of primary law provisions should be recalled to clarify the essential features of the Directive.

The first aspect to take into account from this point of view is that the Directive is an act of first pillar. It has all the typical features of an act of this kind pursuant to Article 288 TFEU: its provisions are binding for the Member States ‘as to the results to be achieved’, yet they do not have direct applicability but in special cases, usually leaving it to the Member States to choose how to implement the Union law provisions⁴⁰. Notwithstanding its differences from a regulation, the same procedure for its adoption needs to be followed by the European institutions. Article 294 TFEU, which governs such procedure, is thus also relevant to recall.

The second aspect to consider is that the Directive must comply with the main principles and fundamental rights expressed in the CFR⁴¹, the ECHR⁴², and the constitutional traditions common to the Member States. The requirement is

⁴⁰ DANIELE, *Diritto dell'Unione Europea*, pp. 183 et seq.

⁴¹ The CFR is now part of European primary law pursuant to Article 6(1) TEU as reformed by the Lisbon Treaty.

⁴² The application of the ECHR is conditioned to its accession by the European Union pursuant to Article 6(2) TEU. The fundamental rights enshrined in its provisions are nevertheless to be complied with since Article 6(3) TEU maintains they ‘shall constitute general principles of Union law’. On this topic, see PECH, GROUSSOT, ‘Fundamental Rights Protection in the EU Post Lisbon Treaty’, June 14th 2010, Foundation Robert Schuman European Issue n. 173, 2010, p. 3. Available at: <<https://www.robert-schuman.eu/en/european-issues/0173-fundamental-rights-protection-in-the-eu-post-lisbon-treaty>>

mentioned in the preamble of the Directive, but would be nonetheless inferred by the recognition of a constitutional value to the above-mentioned fundamental rights.

The third, and last, aspect to be considered is that the Directive, because of its subject-matter, is an act based on Article 83(2) TFEU. The preamble of the Directive starts off by mentioning this article which, it should be recalled, was introduced by the Lisbon Treaty. The criminal competence governed by the second paragraph of Article 83 TFEU could be exercised only within the limits therein expressed. Indeed, the Union was given the power to introduce minimum rules to ensure the effective implementation of a Union policy concerning a field which had already been subject to harmonisation⁴³. An act based on Article 83(2) TFEU could not have, however, reached any further. The Directive complied with such limits in that it was a reaction to the impellent necessity for a clarification of the rules governing the fight against fraud; moreover, both administrative law and criminal law provisions had been introduced in the past, even though none of those acts had been able to cover the whole matter⁴⁴; finally, the new Directive was being presented as suitable to increase the effectiveness of the implementation of the concerned policy. Therefore, arguably no critique could be put forward as far as the legal basis of the act is concerned.

It should be noted, however, that the Proposal originally referred to Article 325(4) TFEU as legal basis for the act. The Commission recalled the first paragraph of Article 325 TFEU, insofar as it stated that all measures generally taken either by the Union or by the Member States to counter fraud should have needed to comply with the provisions enshrined in the rest of the article. By contrast, paragraph 4 was seen as the true legal basis for the Directive since it recognised the competence to take the ‘necessary measures’ for the ‘effective and equivalent protection’ of the financial interests of the Union. Moreover, the Commission maintained – in the explanatory memorandum of the submitted Proposal – that the aim of the Directive would be to ‘act as a deterrent’ to the commission of fraudulent conducts, and that the specific purpose of the article was to ‘protect the single interest which this

⁴³ OBERG, ‘Union Regulatory Criminal Law Competence After Lisbon Treaty’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 320 et seq.

⁴⁴ On the topic of the resort to criminalisation when administrative law provisions are already in force, see paragraph 1.2.

priority policy is about'⁴⁵. The direct implication was that Article 325(4) TFEU was perceived as the most suitable legal basis for the Directive⁴⁶.

As soon as the proposal was submitted, it started being discussed whether a different provision⁴⁷, i.e. Article 83(2) TFEU, would have been more appropriate⁴⁸. In 2014⁴⁹ the Committee of Legal Affairs suggested a change. Among the principles recalled by the Committee, the position of the Court of Justice on the selection of legal basis for a European legislative act – or any other Community measure – is of particular importance. It is indeed maintained that the choice shall 'rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure'⁵⁰.

In order to set on one of the two possible legal bases, the aim and the content of the Directive should be pointed out first. Secondly, it should be discerned which of the two articles could be more suitable. Given that the Directive was aimed at the fight against fraud and contained provisions for this purpose, the Committee focused on deciding which article had to be considered as *lex specialis*. While Article 325(4) TFEU clearly governs the adoption of measures in the field of the fight against fraud, Article 83(2) TFEU could also be seen as *lex specialis* due to the general competence to harmonise criminal law it enshrines. As far as the former provision is concerned, the Committee admitted the new formulation of Article 325(4) TFEU – following the reform introduced by the Lisbon Treaty – hinted at the possibility to choose it as legal basis for the harmonisation of national criminal

⁴⁵ EUROPEAN COMMISSION, 'Proposal for a Directive', COM(2012) 363 final, p. 6.

⁴⁶ See paragraph 3.3.3.1.: Article 325 TFEU would have later been identified in the *Taricco* case as the main provision on which Union legal acts aimed at the fight against fraud should be based.

⁴⁷ On the possibility that Article 86 TFEU could have become the legal basis of the act, because of the competence to adopt regulations in this field that it introduces, see BASILE, 'Brevi note sulla nuova direttiva PIF. Luci e ombre del processo di integrazione UE in materia penale', December 12th 2017, *Diritto Penale Contemporaneo*, n. 12, 2017, pp. 65-66.

⁴⁸ On this topic, see VAUDANO, VENEGONI, 'Articolo 325 TFEU', in CURTI GIALDINO (ed.), *Codice dell'Unione Europea operativo*, pp. 2247 et seq.

⁴⁹ The Opinion of the Committee on the Legal Basis for the Proposal is included in EUROPEAN PARLIAMENT, 'Report on the proposal for a directive', A7-0251/2014.

⁵⁰ COURT OF JUSTICE OF THE EUROPEAN UNION, January 10th 2006, case C-178/03, *Commission v Parliament and Council*, para. 41; COURT OF JUSTICE OF THE EUROPEAN UNION, November 6th 2008, case C-155/07, *Parliament v Council*, para. 34; COURT OF JUSTICE OF THE EUROPEAN UNION, September 8th 2009, case C-411/06, *Commission v Parliament and Council*, para. 45.

laws⁵¹. However, the purpose of Article 83(2) TFEU is the recognition to the Union of the competence to adopt directives. The Committee also argued that the above-mentioned deletion of the last sentence of Article 325(4) TFEU could be in line with the introduction of a specific legal basis for harmonisation of criminal laws in the form of Article 83 TFEU. Many more elements support the thesis that Article 83(2) TFEU is a '*lex specialis*' as regards the conferral of competence for substantive criminal law', according to the Committee. For instance, the mention of specific requirements in the article – the fact that the new harmonising provisions should be 'essential'⁵² rather than merely 'necessary', in particular – and the limits to be complied with when rules are being based on it, are evidence of that. Moreover, the Committee found in the emergency brake in Article 83(3) TFEU another element of support of its position. The emergency brake, according to some interpretations of the article⁵³, could not apply to regulations and directives based on any article other than paragraphs 1 and 2 of Article 83 TFEU. As a consequence, the resort to Article 325(4) TFEU in some cases could be intended as a way to 'circumvent' the application of the emergency brake, and should not be supported. Finally, the Lisbon Treaty chose to deal with the competence to harmonise national legislations specifically in Article 83(2) TFEU. Therefore, any act harmonising national law, while not being based on that article, would affect the coherence of a system which the Treaty had wanted to create.

The Commission and the Council both confirmed the position at first reading of the Parliament, thus abandoning Article 325(4) TFEU and referring to Article 83(2) TFEU from that moment on.

Furthermore, it might be recalled that Article 325 TFEU does present some peculiar elements which could have justified its employment as legal basis of the Directive. On the one hand, it could evidently allow for a larger number of measures

⁵¹ The sentence 'These measures shall not concern the application of national criminal law or the national administration of justice' is not part of the article anymore, thus authorising the Union to adopt measures achieving harmonisation of national laws on the basis of Article 325 TFEU.

⁵² On this topic, see paragraph 1.6.1.; OBERG, 'Union Regulatory Criminal Law Competence After Lisbon Treaty', in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 300 et seq.

⁵³ Yet, some scholars use the method of analogy to apply the emergency brake of Article 83(3) TFEU also to directives based on Articles 33 TFEU and 325 TFEU, given the restriction they impose on national legislators. On this topic, see SATZGER, *International and European Criminal Law*, pp. 81-82.

and actions to be taken in order to reach the specific objective of the fight against fraud⁵⁴, differently from Article 83 TFEU which clarifies the type of act to be adopted. On the other hand, in an innovation to Article 280 TEC, the reformed provision opens up the possibility to sanction any other conduct which, while not being identifiable with fraud in its traditional sense, still negatively impact the budget of the Union⁵⁵. The choice to adopt a directive – in a confirmation of the necessity for a clear and coherent framework in the field of the fight against fraud – had nevertheless made the first element irrelevant. As far as fraud-related conducts are concerned, Article 83(2) TFEU has proven to be suitable for their definition and the introduction of related sanctions, making it an undeniably appropriate legal basis for the content of the Directive.

It should be noted that Article 310(6) TFEU is also relevant, insofar as it upholds the Union's power to take necessary measures to protect the European financial interests and consequently achieve Union policies. It requires the application of a proportionality test between the objective to achieve and the measure to be chosen, even though the simple reference to 'necessity' implies the test will not need to be the strictest one – as it would have happened if the chosen word had instead been 'essential'.

At the basis of the power of the Union to take the necessary measures in this field there is also the principle of subsidiarity⁵⁶, as defined in Article 5 TEU. As a matter of fact, the assets and liabilities which make up the EU budget 'are by nature, placed at EU level'⁵⁷. While the fight against fraud is a responsibility of both the Union and Member States, the financial interests of the Union would normally ensure a better protection if governed by European law rules. In particular, the selection of the measures to be taken would be more efficient and effective when

⁵⁴ It has been argued, indeed, that Article 325 TFEU would have better helped the Union to achieve the expected level of protection from fraudulent conducts. On this opinion, see PARISI, 'Chiari e scuri nella direttiva relativa alla lotta contro la frode che lede gli interessi finanziari dell'Unione', September 4th 2017, *Giurisprudenza Penale Web*, issue 9, p. 4. Available at: <<http://www.giurisprudenzapenale.com/2017/09/04/chiari-scuri-nella-direttiva-relativa-alla-lotta-la-frode-lede-gli-interessi-finanziari-dellunione/>>

⁵⁵ *Ibid.*, p. 7.

⁵⁶ The subsidiarity principle is dealt with by EUROPEAN COMMISSION, 'Impact Assessment', SWD(2012) 195 final, p. 27; EUROPEAN COMMISSION, 'Executive summary of the Impact Assessment', SWD(2012) 196 final, p. 4.

⁵⁷ EUROPEAN COMMISSION, 'Executive summary of the Impact Assessment', SWD(2012) 196 final p. 4.

ensuing from an evaluation carried out at European level, especially because of the experience gained in the years following the entry into force of the Convention and its subsequent implementation. As a consequence, the harmonisation of national legislation – and criminal law legislation above all –, although it could have come to fruition because of the ever-growing uniformity of national legislations, required the direct involvement of the Union.

2.5. The New Definition of ‘Union’s Financial Interests’

Even though the Directive substitutes the Convention for the States bound by it, it does not represent the only act to be considered when dealing with the protection of the financial interests of the Union. Indeed, the fight against fraud has been carried out throughout the years both by means of administrative and criminal law⁵⁸.

Article 14 of the Directive, as a consequence, is a reminder of this reality. In tackling the issue of the ‘interaction with other applicable legal acts of the Union’, it specifically refers to the administrative measures introduced by laws of the Union. As previously mentioned, Regulation (EC, Euratom) 2988/95 governs the powers of investigation of OLAF and it introduces penalties⁵⁹ for the conducts referred to as ‘irregularities’⁶⁰. Other measures are also mentioned in the Regulation and in Union law in general. Moreover, national legislators have adopted additional measures aimed at tackling the fight against fraud in compliance with and pursuant to the obligations set by European provisions. In pointing out the fact that these norms shall be without prejudice to the Directive, the European legislator recognises the existence of a miscellaneous ensemble of punitive provisions, hardly constituting a general framework.

⁵⁸ See paragraph 1.5. On the interplay between administrative and criminal law provisions in this field, see MITSILEGAS, *EU Criminal Law After Lisbon*, pp. 63 et seq.

⁵⁹ See Articles 4 and 5 of the Regulation.

⁶⁰ See Article 1(2) of the Regulation; for a commentary to the definition of ‘irregularity’ and its connection to European sanctions, see MAUGERI, ‘Il Regolamento N. 2988/95’, in GRASSO (ed.), *Lotta contro la frode*, pp. 191 et seq.

Moreover, Article 14 of the Directive maintains that ‘Member States shall ensure that any criminal proceedings initiated on the basis of national provisions implementing this Directive do not unduly affect the proper and effective application of administrative measures, penalties and fines that cannot be equated to criminal proceedings, laid down in Union law or national implementing provisions’. In maintaining so, the Directive elects to protect the implementation of already existing non-criminal provisions when criminal proceedings have started. The rule is in line with the one expressed in the previous paragraph. It is also a confirmation of the duty of Member States to comply with Union law by ensuring that the prosecution and punishment against fraudulent conducts is effectively carried out.

It should be noted that in undertaking the fight against fraud, the Directive chooses to autonomously define the phrase ‘Union’s financial interests’, putting an end to the discussions of the past. Historically (see paragraph 1.1.), the European budget was made up of revenues of the Communities itself and a small amount of expenditures⁶¹. However, the protection of the financial interests of the Union has not been restricted to the protection of the mere budget of the Union for quite some time now. As a matter of fact, the Convention itself already mentioned among the finances to be protected all those which were managed by the Union, although they did not belong to it.

It was the Court of Auditors⁶² which pointed out the necessity for an exhaustive and clear definition of the phrase after the Proposal of the Commission, since the term ‘budget’ as well as ‘revenues’ and ‘expenditures’ were unsuitable to cover all the aspects which needed to be taken into account. The need for the definition of the concept was central to any piece of legislation in the field.

The first element which the Court pointed out was that the term ‘budget’ was not appropriate, since it implied an exclusive reference to ‘revenue and expenditure

⁶¹ SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 170; VENEGONI, ‘La definizione del reato di frode nella legislazione dell’unione dalla convenzione PIF alla proposta di direttiva PIF’, pp. 4-5.

⁶² COURT OF AUDITORS, ‘Opinion No 8/2012 on the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law (pursuant to Article 325 of the Treaty on the Functioning of the European Union)’, December 12th 2012, OJ C 383/01.

covered by, acquired through or due to the Union budget or the budgets of institutions, bodies, offices and agencies established under the Treaties or budgets managed and monitored by them'⁶³. However, such a definition would have excluded those institutions⁶⁴ whose operations are 'mostly financed by their own capital or through income earned through their activities, for instance borrowing and lending', and yet are 'of evident financial interest to the European Union'⁶⁵. The new definition should, therefore, be able to include also the interests of the Union related to those 'assets and liabilities managed by or on behalf of the Union and its institutions, and to all its financial operations, including borrowing and lending activities'.

Interestingly, the Court adapts its definition of 'Union's financial interests' to the existence of two specific offences. The first to be mentioned is the value added tax fraud⁶⁶. While such a conduct would have its biggest impact on the Member State where it is committed, the Court – and the Commission, Parliament and Council in their respective reports and opinions – pointed out that it could bring harm to the financial interests of the Union. What the Court refers to, in particular, is not the European core of the tax, but the impact on the financial interests of the Union a VAT fraud could have, which makes its repression a European issue. Moreover, the typical cross-border dimension of these frauds would require for their prosecution to be carried out at a higher level than the national one. An effective prosecution of the crime, however, would also imply the cooperation between Member States, together with the involvement of supranational institutions.

A second aspect to be considered is that the fraud-related crimes listed in Article 4 of the Directive all refer to public officials. Insofar as the definition of corruption is concerned, however, it is important to highlight that the Court does not doubt they could be seen as conducts affecting the financial interests of the Union. In fact, they are included in the Directive because of their potential negative

⁶³ This is the definition provided by Article 2 of the Proposal.

⁶⁴ The Court lists: the European Central Bank, the European Investment Bank and the European Investment Fund, or in the cases of the European Bank for Reconstruction and Development and the European Stability Mechanism.

⁶⁵ COURT OF AUDITORS, 'Opinion No 8/2012', OJ C 383/01, para. 7.

⁶⁶ *Ibid.*, para. 8.

impact on the budget of the Union. As far as the crime of corruption of officials who are paid by the EU institutions is concerned, however, the Court demanded a clarification of their definition, so that it could be perceived as an ‘automatically contrary to the Union’s financial interests’⁶⁷ offence.

The distinction between ‘financial interests’ and ‘budget’ can be found in the Directive as well. First of all, in introducing its proposal, the Commission explained its preference for the phrase ‘financial interests’ instead of the word ‘budget’, as the former had a ‘wider wording’ which allowed the legislator to refer to ‘all funds managed by or on behalf of the Union’⁶⁸ by a single phrase. Article 1(2) of the Regulation was also recalled as a provision which had previously provided the legislator with such an expression, while Article 310(1) TFEU was mentioned by the Commission in the same instance as one of the rules which referred to the term ‘budget’ in the Treaties and, as a consequence, to a seemingly less wide category. There is therefore a clear and recognised difference between the two expressions, even though both have been used indiscriminately in discussions regarding the matter.

The definition to be preferably taken into account is now the one on Article 2(1) of the final version of the Directive. Article 2, entitled ‘Definitions and scope’⁶⁹, specifies that the reported definition is to be intended as a clarification of the meaning of the phrase in the Directive, when the legislator resorts to it (‘for the purposes of this Directive’). Once again, the definition is a wide one, including ‘all revenues, expenditure and assets covered by, acquired through, or due to the Union budget [or] the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them’. The main innovation compared to the Proposal lies in the expression ‘directly or indirectly’. It represents a clear attempt at covering all possible elements of the budget, even in such cases as those previously listed by the Court of Auditors, when the impact of a loss of budget would be perceived by the

⁶⁷ Ibid., para. 9.

⁶⁸ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 7.

⁶⁹ Article 2 of the Directive also includes a definition of the expression ‘legal person’, necessary because of the parts of the Directive which specifically deal with the offences whose perpetrators are not natural persons, and with the sanctions applicable to them. On this topic, see paragraph 2.8.

Union, even though those assets did not belong to the Union or were not connected to it to the same extent as the actual EU budget.

2.6. An Overview of the Contents of the Directive

The Directive has a specific scope, namely that of protecting the financial interests of the Union through the introduction of minimum rules on the matter⁷⁰, and it achieves the connected aim of reforming the Convention and transferring its provisions into European law. Article 16 indeed provides for a replacement of the Convention and its Protocols which ensues from the adoption of the Directive. Such a replacement occurs for the Member States bound by the Convention, starting from July 5th 2019 – two years after the adoption of the legislative act –, and creates a situation in which its provisions entirely substitute the previous ones. On the other hand, the new provisions enshrined in the Directive, by being part of European law, will be applied to all the Member States of the Union. In the meantime, the Member States, to whom the Directive is addressed⁷¹, will be bound⁷² to the duties and to the minimum rules imposed by the Directive. As for the possibility for some Member States not to opt-in⁷³, Ireland chose to take part in the adoption and application of the Directive, while the UK and Denmark are not part in its adoption and chose not to be subject to its application⁷⁴.

The second paragraph of Article 16 also mentions the consequence that all ‘references to the Convention shall be construed as references to this Directive’ insofar as the States bound by it are concerned. Thus, a bridge from the Convention

⁷⁰ As clarified by Articles 1 and 2 of the Directive.

⁷¹ Article 20 of the Directive states the act ‘is addressed to the Member States in accordance with the Treaties’, that is to say within the limits of applicability of European legislative acts. Pursuant to Article 288 TFEU, the Member States will therefore be bound ‘as to the results to be achieved’, while retaining the freedom to enact the provisions in the Directive as they deem more appropriate.

⁷² Article 19 of the Directive, specifies that the entry into force of the act is on the ‘twentieth day following that of its publication in the *Official Journal of the European Union*’, which happened on July 28th 2017. Following this date, the Member States will have the duty to transpose the provisions into national law, as explained later in this paragraph.

⁷³ DANIELE, *Diritto dell’Unione Europea*, p. 29.

⁷⁴ Recitals 36 to 38 of the Directive specify that such wishes expressed by Ireland, the UK, and Denmark are in accordance with Articles 1 et seq. of Protocol No 21.

to the Directive is drawn, although the field of application of the Directive is wider – yet more clearly defined – than the one of the Convention.

With the intention to create a framework, the Directive introduces both general and special provisions and begins with creating autonomous definitions listed in Article 2. After the confirmation of its *ratio*, the Directive deals with the issue at the core of its adoption, that is to say, the definition of the offences. A definition of the related sanctions, both applicable to legal⁷⁵ and natural persons, follows. It should be recalled that the Directive finds its legal basis in Article 83(2) TFEU, which only allows for the introduction of minimum rules, while leaving it to the Member States to discern whether more severe rules and punishments would be preferable. Therefore, Articles 3 and following all provide for a starting point for a much more detailed regulation of the crimes to be carried out by national legislators. However, differently from the past, the Directive also dedicates some of its articles to the introduction of general criminal law norms following the definition of the offences in Articles 3 and 4.

Title III of the Directive is devoted as a whole to general provisions, which apply to both fraud and other fraud-related criminal offences. In particular, they concern the sanctions and the liability of legal persons, but also other aspects of general criminal law which had not found their place in the Convention, such as the incitement, aiding and abetting, or attempt of the conduct, or also the possible aggravating circumstances of the crime.

Moreover, there is a clear aim to introduce some main principles as far as procedural law is concerned, in the same way as the Convention had done. This part of the Directive, however, takes into account the achievements of Union law and criminal law up until that point as far as the proceedings against perpetrators of crimes with a transnational relevance are concerned.

Lastly, a mention to the main final provisions of the Directive should be made. As for the confirmation of the principles of sincere cooperation of the Member

⁷⁵ The intention to create a framework with ideally no gaps in it is evident when pointing out that the Directive also includes a definition of legal person and deals with the liability of such persons and the sanctions which could be applied to them.

States and the mutual assistance in judicial matters, the Directive dedicates Article 16 to those issues⁷⁶.

In line with the general lack of direct effects of the norms introduced by a directive, Article 17 clarifies the rules regarding the transposition of the act into national law. It should be noted that the European legislator elected to use the word ‘shall’ when referring to the duties imposed on the Member States, thus emphasising the compulsory nature of the rules. By July 5th 2019 the Member States must fulfil the duty to adopt and publish all the criminal and administrative law provisions necessary to comply with the Directive, and ‘immediately communicate the text of those measures to the Commission’. Starting from that date, the Member States will have the duty to apply those measures.

When Member States adopt their measures, those shall either contain a reference to the Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that, for the Member States bound by the Directive, references in existing laws, regulations and administrative provisions to the Convention replaced by this Directive shall be construed as references to the Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

Beside the measures adopted by the Member States in order to transpose the Directive, Article 17(2) also requires all other main provisions adopted in the field covered by the Directive to be communicated to the Commission.

Since the objective of the Union is the increase in efficiency of the prosecution of crimes affecting its financial interests, Article 18 of the Directive sets a series of obligations for the Commission and for the Member States regarding the control over the implementation of the Directive and the achievement of a higher level of protection of the EU’s budget by the Member States. Such obligations imposed on the Commission consist in the submittal of reports to the European Parliament and the Council assessing the results of the implementation of the policies by the Member States, especially: the extent to which those have taken the necessary measures to comply with the European act; and – by taking into

⁷⁶ Also, a reference to OLAF, Eurojust, and the European Public Prosecutor’s Office is placed in this article, the first among the final provisions of the Directive. For the analysis of Article 15, see paragraph 2.10.

account the already submitted report and the statistics on the concerned offences as submitted by Member States pursuant to Article 18(2) – the impact of national law resulting from the implementation of the Directive. The Commission shall therefore submit two reports, one – pursuant to Article 18(3) – analysing such impact on the prevention of fraud to the Union’s financial interests’, and the other – pursuant to Article 18(4) – examining the suitability of the threshold indicated in Article 2(2) regarding serious VAT frauds, the effectiveness of the provisions on limitation periods in Article 12, and the aptitude of the Directive to effectively address cases of procurement fraud.

In line with the purposes of the Directive – which could be recalled as the increase of the deterrence and effectiveness of the enforcement by criminal law authorities of the Member States, and the facilitation of recovery in cases of losses caused by illegal activities affecting the Union’s financial interests⁷⁷ –, if the data gathered by the Commission shows that this effectiveness has not been ensured by the existing provisions, new proposals for legislative acts should be submitted. In this case, the legislator elected to introduce a specific provision foreseeing such a possibility in Article 18(5). According to paragraph 5, therefore, the reports mentioned in the previous paragraphs ‘shall be accompanied, if necessary, by a legislative proposal, which may include a specific provision on procurement fraud’.

2.7. The Offences Drawn Up by the Directive: Fraud, Fraud-Related Offences and VAT Frauds

One of the main achievements of Regulation (EC, Euratom) 2988/95 is to have created the notion of ‘irregularity’⁷⁸. Originally, the intention of the legislator had been to draw up three different categories - fraud, abuse, and irregularity – according to the infringement of European law which each of them implied. The final version of the Regulation only displayed one of the three, that is to say the conduct which had been given the widest definition. An ‘irregularity’ was indeed

⁷⁷ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 11.

⁷⁸ MAUGERI, ‘Il Regolamento N. 2988/95’, in GRASSO (ed.), *Lotta contro la frode*, pp. 192 et seq.

any kind of violation of laws affecting the budget of the Communities. This definition was particularly important as it allowed for a further reaching application of the provisions in the Regulation. Moreover, it put revenues and expenditures of the Communities on the same level, since a conduct affecting either of the two would have been equally sanctioned. Many different conducts affecting the financial interests of the European Communities – now Union – were referred to by the term ‘irregularity’. It is a general concept suitable to include different crimes and illegal conducts, even when they did not have a penal character. Being part of a piece of administrative legislation, indeed, its definition was aimed at the sanctioning of those types of behaviour which did not require a punishment as severe as the one criminal law could have imposed⁷⁹.

In introducing the reason for its Proposal, the Commission specifically referred to the main purpose of an act of this kind, that is to say the need to define fraud as the main offence to fight to protect the budget of the Union. The Directive was also aimed at the identification of other conducts as ‘fraud-related forms of illegal behaviour through which the EU budget is damaged’⁸⁰.

On this topic, while the Convention was essentially dedicated to fraud, the need to also tackle those conducts which similarly affected⁸¹ the budget of the Union entailed the adoption of rules on corruption, both passive and active, and money laundering. The latter found its place also in the Second Protocol of the Convention, while to the former a relevant part of the First Protocol was dedicated.

The particular subject-matter of the Convention, however, implied that soon after its provisions became obsolete, since they only covered a small part of the matter, and it was still required that Member States transferred them into national legislation and into each of their own peculiar systems to guarantee their implementation. New criminal conducts started emerging in the time before the transfer of the Convention into national law, and the need for a legislation which could effectively tackle each of those became impellent. While the proposal for a

⁷⁹ However, in chapter 1 of this thesis – and paragraph 1.5.2.3. in particular – is pointed out that there is at times no evident difference between a criminal and an administrative sanction. Following the interpretation provided by the ECtHR, the difference lies in whether the punishment is connected to a criminal charge.

⁸⁰ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 4.

⁸¹ On the reasons for the sanctioning of other conducts beside fraud, see SOTIS, *Diritto*, p. 74.

Directive in the field of the fight against fraud was being proposed in 2001, the Green Paper was also adopted⁸².

After a confirmation of the preference for harmonisation of substantive criminal law in the field of the fight against fraud, in order to keep in line with the *acquis* on the matter⁸³, the Green Paper stated that the definition of the offences – ‘fraud, corruption and money-laundering in connection with those offences’⁸⁴ – would have followed those already enshrined in the Convention, its Protocols, and the (then new) proposal for a directive. The Green Paper also mentioned a particular approach which the Commission had taken up as its own. As a matter of fact, due to the constant development of the matter, new offences would have needed to be introduced, to ensure that the European Public Prosecutor would have been able to proceed against a larger number of conducts affecting the Communities’ financial interests. In line with the evolution of the provisions part of the third pillar, and of the definitions reported in the *Corpus Iuris*⁸⁵, the Green Paper pointed out that the Commission had proven to be interested in both the development of already existing definitions, and the introduction of new ones. Such offences, for instance, were: market-rigging, conspiracy, abuse of office, and disclosure of secrets pertaining to one’s office⁸⁶.

The Directive is therefore a further step towards the creation of a framework to which different criminalised conducts affecting the financial interests of the Union belong. Its Article 3 thus deals with fraud, while Article 4 introduces other offences similarly harming the Union’s budget and those which are directly or indirectly managed by it. Already Recitals 7 and following of the Directive had mentioned the crimes of money laundering, corruption and misappropriation, but Article 4 provides for an actual definition of the offences.

⁸² It should be recalled that the main scope of the Green Paper was to lay the groundwork for the creation of the European Public Prosecutor. On p. 33, in particular, the definition of criminal conducts and the introduction of substantive criminal law rules is deemed to be functional to the duty the Prosecutor would carry out.

⁸³ COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Green Paper’, COM(2001) 715 final, pp. 33-34.

⁸⁴ *Ibid.*, p. 35.

⁸⁵ For more on the relationship between the *Corpus Iuris* and the Green Paper, see paragraph 1.5.3.; SICURELLA, ‘Il *Corpus Iuris*’, in GRASSO, SICURELLA (eds.), *Lezioni*, pp. 778 et seq.

⁸⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Green Paper’, COM(2001) 715 final, p. 37.

It should be noted that the Directive dedicates a significant part of its provisions to crimes impacting the resources deriving from the Value Added Tax. Notwithstanding the cross-border character of the most harmful tax frauds, the VAT Directive of 2006⁸⁷ did not include any provisions tackling the prosecution and punishment of such conducts, whereas an effort in this direction was asked of the Member States by the Economic and Financial Affairs Council on the following year⁸⁸. As far as the Directive is concerned, the Parliament and the Council had upheld opposite positions on whether a reference to VAT issues should be granted room in the final act. While the Parliament kept supporting the importance of such revenues, the Council had intended for the Directive to not have VAT frauds included in its scope⁸⁹. It was eventually the *Taricco* case⁹⁰ which reminded the institutions of the impact VAT frauds were having on the budget of the Union, and brought about their inclusion in the definition of fraud enshrined in Article 3 of the Directive. In its commentary to Article 2⁹¹, the Commission recalled the connection – which the Court of Justice had previously⁹² highlighted – between the collection of VAT revenues and the Union budget. In particular, the Court had found that a direct link existed between those revenues and the ‘availability to the Union budget of the corresponding Value Added Tax resources’. A loss or reduction of the former would have indeed entailed a similar impact on the latter. As a consequence, a fraud concerning the VAT directly affected the Union’s financial interests and was to be covered by the Directive⁹³.

⁸⁷ Neither the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/01, nor its amendments included punitive provisions. On this topic and the defence of the Union’s financial interests from tax crimes in general, see BELLACOSA, ‘La riforma dei reati tributari nella prospettiva europea’, in DEL VECCHIO, SEVERINO (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti*, Bari, 2016, pp. 338 et seq.

⁸⁸ COUNCIL OF THE EUROPEAN UNION, ‘Press Release – 2836th Council meeting – Employment, Social Policy, Health and Consumer Affairs’, Council document 15698/07 (Press 270), December 4th 2007.

⁸⁹ COUNCIL OF THE EUROPEAN UNION, ‘Proposal for a Directive of the European Council and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law - Progress report/Policy debate’, Council document 9301/16, May 27th 2016, pp. 1-2.

⁹⁰ See chapter 3 of this thesis; COURT OF JUSTICE OF THE EUROPEAN UNION, September 8th 2015, case C-105/14, *Taricco and Others*.

⁹¹ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 8.

⁹² COURT OF JUSTICE OF THE EUROPEAN UNION, November 15th 2011, case C-539/09, *Commission v Germany*, paras. 69 et seq.

⁹³ Before the Commission and the Court clarified their position, however, the ‘resource based on value added tax’ had already been mentioned among those resources constituting the revenues of the European Communities. Therefore, it could have been equally inferred from that scholarly

Already Article 2(1), while defining the financial interest of the Union and the scope of the act, refers to ‘serious offences against the common VAT system’, in such a way as to clarify the relevance of those resources while also restricting the field of application of the Directive when VAT frauds are concerned. The article goes on to specify that the relevant offences affecting VAT resources are those frauds, as defined by Article 3(2)(d) of the Directive, which can be deemed ‘serious’. The Directive is therefore applicable to a VAT fraud when it features such character of ‘seriousness’, that is to say that the conduct must have a cross-border character, and that it must simultaneously involve ‘a total damage of at least EUR 10 000 000’⁹⁴. The definition of the VAT fraud, nevertheless, only points out the main elements a conduct must display for it to be considered a crime to which the sanctions introduced by the Member States, pursuant to the implementation of the Directive, could be applied. No influence on the tax administration of the Member States is therefore to be inferred from the provision, since each country remains autonomous in the development and control of its structure and functioning⁹⁵.

2.7.1. The Definition of ‘Fraud’

While the first purpose of the Convention was to introduce a definition of fraud and related penalties, the Directive does not have this specific aim. The idea is the creation of an act which, on the one hand would substitute the Convention, and on the other hand would provide for a framework for the fight against fraud, without impacting the specific rules described in the Regulation.

classification that a fraudulent conduct affecting the VAT revenues would have affected the financial interests of the Union. The Directive was nonetheless essential in that it provided a legal basis for the punishment of this type of fraud. For a mention of the VAT revenues as part of the EU budget, see SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p.170; TONRY, ‘Fairness, Equality, Proportionality, and Parsimony’, in BOTTOMS, BOIS-PEDAIN (eds.), *Penal Censure*. See also VENEGONI, ‘La definizione del reato di frode nella legislazione dell’unione dalla convenzione PIF alla proposta di direttiva PIF’, pp. 11 et seq.

⁹⁴ RONCO, ‘Frodi ‘gravi’ IVA e tutela degli interessi finanziari dell’Unione Europea: quali ricadute nell’ordinamento interno alla luce della Direttiva 2017/1371 del 5 luglio 2017?’, *Archivio Penale* 2017, n. 3, p. 3, has pointed out that it is the viciousness of the conduct together with its transnational element and the crossing of a high threshold which justifies the application of severe sanctions to VAT frauds and the necessity for them to be harmonised at the supranational level.

⁹⁵ Article 2(3) of the Directive explicitly mentions this implication.

Nevertheless, Article 3 remains a core provision of the act. It clarifies the minimum standard⁹⁶ all the Member States must comply with in order to ensure the equivalent and effective protection of the financial interests of the Union. The first paragraph of the article, therefore, binds the Member States to the adoption of the measures they deem ‘necessary’ to this purpose in general, and to the recognition that a fraudulent conduct affecting those interests and ‘committed intentionally’ might ‘constitute a criminal offence’ in particular. Some elements of this norm might be already pointed out. First of all, the legislator elects the auxiliary verb ‘shall’, as a way to confirm the existence of a duty for the States. The provision goes on to mention the need for a proportionality test on the actions taken nationally, which should compare between the severity of the measure and the aim to be achieved. The reference to ‘measures’, on the other hand, confirms the freedom of the States in the choice of the kind of act they can adopt for the fulfilment of the duty⁹⁷. Finally, already in this first paragraph, the article mentions the element of ‘intention’ (see paragraph 2.8.), instead of mere negligence, as a typical feature of the frauds against the Union’s financial interests.

The first paragraph of the article might work by itself in that it includes all the elements defining the specific duty of criminalisation imposed on the Member States. However, the second paragraph is essential since it reports - in arguably similar amount of details than it had been attempted in the past⁹⁸ - the conducts which constitute fraud against the financial interests of the Union. Setting aside the *mens rea* of the crime and the compliance with the principle of guilt⁹⁹ of criminal law which are both summarised by the mention of the intention in the first paragraph, the second one focuses on the definition of the *actus reus*.

As a result of the negotiations between the Parliament and the Council, the second paragraph discerns among different categories of expenditures and

⁹⁶ Pursuant to Article 83(2) TFEU, the Directive sets minimum rules for the purpose of the harmonisation of national laws.

⁹⁷ The provision seems to be aimed at the mere introduction of a legislative act defining a criminal conduct, yet the general duty of the Member States to ensure the equivalent and effective protection of the interests of the Union entails also the building of a whole system which would allow for the perpetrators of such an offence to be prosecuted.

⁹⁸ See paragraph 1.5.2.2. and Article 1 of the Convention. On this topic, see also VENEGONI, ‘La definizione del reato di frode nella legislazione dell’unione dalla convenzione PIF alla proposta di direttiva PIF’, p. 9.

⁹⁹ EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto on European Criminal Policy*, p. 707.

revenues. A first distinction is to be drawn between procurement-related and non-procurement-related expenditures. The Council, indeed, clarified¹⁰⁰ that the concept of ‘procurement’¹⁰¹ was preferable to that of ‘aids’ – which had been part of previous versions of the provisions – since it had already been clearly defined by European law, and it helped categorising the expenditures.

However, the distinction on the basis of the relation to public procurements of the affected expenditures appears to be grounded in methodical reasons rather than in an actual difference between the conducts which can harm either types of expenditures. The main elements of fraud as far as both non-procurement-related expenditures and procurement-related expenditures are concerned are evidently identical. Both fraudulent conducts must constitute of an ‘act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents’, or ‘non-disclosure of information in violation of a specific obligation’, or ‘the misapplication of such funds or assets for purposes other than those for which they were originally granted’. The first two conducts are only relevant, however, insofar as they entail ‘the effect of the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf’. Moreover, additional elements are required for an act or omission to constitute fraud connected to procurement-related expenditures. Indeed, on the one hand, it must have been ‘committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union’s financial interests’; on the other hand, only when the act or omission concerns the misapplication of funds or assets, the conduct is relevant when the Union’s financial interests are damaged. Besides their nature as specific requirements, these elements could be intended as a restriction of the field of application of the Directive. It is

¹⁰⁰ COUNCIL OF THE EUROPEAN UNION, ‘Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interest by means of criminal law (first reading) = Policy Debate/Progress report’, Council document 12686/16, September 30th 2016, p. 18.

¹⁰¹ The ‘public procurement’ is mentioned in the European Commission website as the ‘process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies. Examples include the building of a state school, purchasing furniture for a public prosecutor’s office and contracting cleaning services for a public university’. For further detail on this topic, see EUROPEAN COMMISSION, ‘Public Procurement’. Available at: <https://ec.europa.eu/growth/single-market/public-procurement_en> Last updated: January 2nd 2018.

essential that acts and omissions related to public procurements cause a specific loss or damage to the Union's financial interests for them to constitute an offence. Lacking this element, the criminal sanctions enshrined in Articles 7 and following could not be applied to those who committed such a conduct. However, since the Regulation, which governs the sanctioning of irregularities affecting the financial interests of the Union, is still in force, the conduct could constitute an irregularity pursuant to Article 1(2) of the Regulation, and an administrative sanction could, as a consequence, be applied to it.

The article goes on to distinguish between the revenues which do not arise from VAT own resources, and those which do. On the one hand, the acts or omissions which could constitute fraud, albeit related to revenues, bear a strong resemblance to those mentioned in previous indents of the article. Indeed, they could consist in 'the use or presentation of false, incorrect or incomplete statements or documents', or 'non-disclosure of information in violation of a specific obligation', or 'misapplication of a legally obtained benefit'. All three of the conducts thus defined have to result in 'the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf' for the acts or omissions to constitute fraud. Once again, the legislator points out that there would be no fraud without a damage to a budget belonging to or managed by the Union. On the other hand, conducts defrauding the revenue arising from VAT own resources are different from the ones enumerated above due to the specific interest that the concerned provisions are set to protect, that is to say the VAT resource of the Union's budget. A VAT fraud, therefore, constitutes of an 'act or omission committed in cross-border fraudulent schemes in relation to the use or presentation of false, incorrect or incomplete VAT-related statements or documents', or 'non-disclosure of VAT-related information in violation of a specific obligation', both resulting in the 'diminution of the resources of the Union budget', or 'the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds'.

2.7.2. Fraud-Related Offences: Money Laundering, Corruption, and Misappropriation

The Directive chose to also define those conducts which are fraud-related and which do result in a loss or a damage to the Union's financial interests, even though they do not technically constitute fraud. It should be noted that the Commission in its Proposal pointed out that the main reason for such a choice was to ensure that the same regime of sanctions would apply to all the offences¹⁰².

After fraud, the first offence to be defined in the Directive is money laundering¹⁰³.

Already mentioned in the preamble of the act, it is one of the offences which the Union had been defining and sanctioning up until that point, with national legislators concurrently finding a place for this offence inside their criminal law systems¹⁰⁴. The current definition of money laundering has been part of the European Communities' *acquis* since the adoption of Council Directive 91/308/EEC¹⁰⁵, and was recalled by the Second Protocol of the Convention¹⁰⁶ when introducing a related duty of criminalisation of conducts in the act. In the same terms money laundering was defined by the *Corpus Iuris*, the Green Paper¹⁰⁷ and the first proposal for a directive¹⁰⁸. It was later drawn up in Directive 2005/60/EC¹⁰⁹, in the version which was originally mentioned by the Proposal of

¹⁰² EUROPEAN COMMISSION, 'Proposal for a Directive', COM(2012) 363 final, p. 9.

¹⁰³ EUROPEAN COMMISSION, 'Money Laundering'. Available at: <https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/money-laundering_en> Last updated: January 2nd 2018.

¹⁰⁴ For a comparison of national legislation on money-laundering, see CHODNICKA-JAWORSKA, 'Anti Money Laundering Regulations in Europe - Comparative Analysis', SSRN Electronic Journal, May 2015. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854089>

¹⁰⁵ Third Indent of Article 1 of Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering, OJ L 166.

¹⁰⁶ Article 1(e) of Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, OJ C 221/02.

¹⁰⁷ COMMISSION OF THE EUROPEAN COMMUNITIES, 'Green Paper', COM(2001) 715 final, p. 36.

¹⁰⁸ Article 6 of EUROPEAN COMMISSION, 'Proposal for a directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests', COM(2001) 272 final.

¹⁰⁹ Article 1(2) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309/15.

2012. It was, however, the definition provided for by Directive (EU) 2015/849¹¹⁰ which eventually became the basis for the offence as regulated by the Directive. Money laundering is thereby defined as an intentional conduct consisting in ‘the conversion or transfer of property¹¹¹’, or ‘the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property’, ‘the acquisition, possession or use of property’, or the ‘participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission’ of any of the previously mentioned actions. It is, however, essential that together with the intention in the commission of the crime, the perpetrator also has a knowledge, at the time of receipt, of the criminal origin of the concerned property.

However, the Directive mentions money laundering but does not provide for specific rules, while a deeper interest was being shown by parallel legislation because of the evident harmfulness of a conduct thus defined. It should be noted that the Directive restricts the field of application of the duty it introduces, by specifying in Article 4(1) that the conduct is relevant only insofar as it involves property derived from the criminal offences covered by the Directive itself – fraud, corruption, and misappropriation – rather than any of the offences part of the national criminal law systems where the article is being transposed.

Corruption is the third offence to be defined by the Directive, with Article 4(2) displaying a distinction between passive and active corruption. It should be noted that corruption has been a relevant issue tackled by European and international law throughout the years, because the lack of transparency represented by corruption has always been a transnational problem¹¹². Before the Proposal for

¹¹⁰ Article 1(3) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of 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 Commission Directive 2006/70/EC, OJ L 141/73.

¹¹¹ This act must however be committed with the particular ‘purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person’s action’.

¹¹² On this topic, and the way corruption has been tackled by international and national UK law, see ENGLE, ‘I Get by with a Little Help from My Friends? Understanding the UK Anti-Bribery Statute, by Reference to the OECD Convention, and the Foreign Corrupt Practices Act’, November 3rd 2010, *The International Lawyer American Bar Association*, vol. 44, pp. 1173-1188. Available at SSRN: <<https://ssrn.com/abstract=1702470>>

the Directive was submitted, the First Protocol to the Convention¹¹³ and the Green Paper¹¹⁴ both provided for a general definition of the offence. Concurrently, a step forward was being taken by the Union through the adoption of Framework Decision 2003/568/JHA on combating corruption in the private sector, while actions in the field of corruption were also being taken by the Council of Europe¹¹⁵ and the United Nations¹¹⁶. Yet, it was the establishment of the Stockholm Programme¹¹⁷ of 2009 and the following Communication from the Commission¹¹⁸ of 2011 which pointed out the need to focus on the fight against corruption in both the private and the public sector.

The choice to criminalise conducts which can be identified with corruption is, therefore, in line with the actions which had already been taken at the supranational and international level. However, a definition of ‘corruption’ is complex due to a varied set of reasons. First, the word itself lacks a negative denotation, since it does not naturally and exclusively refer to criminal conducts. Secondly, the European legislator had proven unable to provide for a definition detailed enough to identify all the elements of the crime, and simultaneously wide enough to include all the conducts which ideally should be perceived as corruption¹¹⁹. Because of this issue, the Council of Europe’s conventions had elected to refer to the concept of ‘bribery’, usually considered as the sharing of undue advantages. The Directive, for its part, defines passive and active corruption along the lines already presented in the Green Paper and the Convention. ‘Passive corruption’ and ‘active corruption’ are, therefore, offences committed intentionally

¹¹³ Articles 2 and 3 of Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities’ financial interests, OJ C 313/01.

¹¹⁴ COMMISSION OF THE EUROPEAN COMMUNITIES, ‘Green Paper’, COM(2001) 715 final, December 11th 2001, p. 36.

¹¹⁵ Council of Europe’s Criminal Law Convention on Corruption, January 27th 1999 and Council of Europe’s Civil Law Convention on Corruption, November 4th 1999.

¹¹⁶ United Nation Convention against Corruption (UNCAC), October 31st 2003, and OECD Anti-Bribery Convention, December 17th 1997.

¹¹⁷ EUROPEAN COUNCIL, ‘The Stockholm Programme – An open and secure Europe serving and protecting the citizens’, May 4th 2010, OJ C 115/01.

¹¹⁸ EUROPEAN COMMISSION, ‘Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Fighting corruption in the EU’, COM(2011) 308 final, June 6th 2011, OJ C 264/13.

¹¹⁹ HENNING, ‘Public Corruption: a Comparative Analysis of International Corruption Conventions and United States Law’, *Arizona Journal of International and Comparative Law*, vol. 18, n. 3, 2001, pp. 794 et seq. Available at: <<https://ssrn.com/abstract=298089>>

and constituting respectively of ‘the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union’s financial interests’, or else of ‘the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union’s financial interests’. Contrary to the Convention, it is not necessary any more that the conduct is ‘in breach of official duties’. It is however required that the act or the omission connected to the advantage could bring about a damage to the Union’s financial interests. There is therefore a development of the original definition of corruption as it could previously be found in the Convention¹²⁰.

As with the above-mentioned offences, a definition of misappropriation is provided for in the Directive. It is evident that a novel relevance and impact had been gained by criminal conducts of this kind, since there had not been any description or regulation of misappropriation up until that point¹²¹, despite the general recognition of the importance of the principle of transparency. The reason for the introduction of such an offence is to be connected once again to the necessity to tackle all the conducts affecting or likely to affect the Union’s financial interests, to fill in any gap that had shown up in the *acquis* on the matter, and to prevent any future damage that could come to those interests. In particular, the misappropriation of public funds is an offence which specifically relates to administrations and public officials. The conduct it constitutes of is much like those listed in the definition of ‘fraud’, yet its description covers those types of behaviours which could not specifically constitute fraud in the sense intended by the Directive. Indeed, the Commission refers to it as a ‘conduct by public officials which does not constitute fraud in a stricter sense’¹²². In particular, the Directive defines the crime of

¹²⁰ Articles 2 and 3 of Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities’ financial interests, OJ C 313/01.

¹²¹ Both the Convention and the Green Paper lack an actual definition of ‘misappropriation’, for instance.

¹²² EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 9.

misappropriation as ‘the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union’s financial interests’¹²³, as long as the conduct is committed intentionally. This rule, much as the ones introduced in the previous paragraphs of Article 4, describes the misappropriation in terms which are so general as to allow the national legislation for a swift alteration of their criminal law provisions in order to adapt them to the norms enshrined in the Directive. The national law provision should indeed display some main elements – such as the intention in the commission of the crime, the closeness of the perpetrator to the management of funds of assets, the use of those assets for a purpose which is not their own, and the damage to the Union’s financial interests – but it is left to the national legislator to elect how to ensure the prosecution of the crime.

2.7.3. The Public Official

Generally, corruption and misappropriation are offences typical of the public sector, but it is even more relevant that the conducts characterising those offences only gain relevance for the application of the Directive when they are committed by a particular type of perpetrator. It is the power to manage elements of the budget that would simplify the commission of a crime by an official. The fulfilment of their tasks has to be continuously controlled by the Commission to hinder the spread of damages to the EU budget. Therefore, on the one hand, the Union established offices such as OLAF, which has the designed task to carry out both internal and external investigations; on the other hand, a definition of ‘official’ was introduced in the legislative acts dealing with the protection of the Union’s financial interests. The reason why the introduction of such a definition, in particular, has gained relevance lies in the necessity for impartiality of government official and public officials in general. While bribery or corruption is the highest form of dishonest behaviour to be looked for, it is actually to be considered that the protection of the

¹²³ Article 4(3) of the Directive.

public budget must come after the observance of the general behaviour of the official. It is in light of these observations that a legislation such as the one which has been introduced in many countries regarding the acquisition of gifts by public officials is of relevance. Moreover, other actions have been taken at the supranational level, such as the practical recommendations issued by the European Ombudsman tackling the public official's interactions with interest representatives¹²⁴.

Already deemed necessary by the Union after the adoption of the Convention, a first definition could be found in Article 1 of the First Protocol to the Convention. The Proposal also highlighted the need for a confirmation of that definition, to which Article 4(5) was dedicated, because of the relevance of a definition which would have prevented the submittal of any doubt on the matter, but also due to the replacement of the Convention and its Protocols by the Directive which would have ensued from the adoption of the latter, and which required the Directive to include all the main norms enshrined in the Convention.

The definition in its final form is now to be found in Article 4(4), following an enlargement by the Parliament at first reading of the much narrower description that had been presented in the Proposal. It is of relevance that the new definition refers to Union officials and officials of Member States, but also to officials of a third country, and that it describes each of those roles. Indeed, the Directive is aimed at the protection of the financial interests of the Union whoever the perpetrator of the unlawful conduct is, since the point of the provision is to hinder the effect entailed by an action defrauding the Union's budget or the ones managed by the Union. It should be noted also that Article 4(4) includes a clause which makes the provision defending the Union's interests further-reaching, in that it specifies that a 'public official' for the purposes of the Directive is not just someone whose role is clearly that of an official or a servant, but also any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries. The

¹²⁴ EUROPEAN OMBUDSMAN, 'Practical recommendations for public officials' interaction with interest representatives', Case: SI/7/2016/KR. Available at: <<https://www.ombudsman.europa.eu/en/cases/correspondence.faces;jsessionid=DD2C63C6AFC657CC0D2AB567B97E41B5>>

closeness to the assets of the Union and the harm resulting from the conduct is the focus of the Directive.

However, the main definition is the one which clarifies which of the officials should be relevant as far as the Directive is concerned, thus which of the conducts potentially constituting corruption or misappropriation is actually a crime. First of all, the Staff Regulations of the European Union define the Union official as ‘any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Union by an instrument issued by the Appointing Authority of that institution’¹²⁵. This article should be recalled since the Directive itself mentions the 1968 version of the Staff Regulations as the one which should be referred to when identifying a Union official. A ‘Union official’, pursuant to Article 4(4), is ‘a person who is an official or other servant engaged under contract by the Union, or seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants’. Two types of potential perpetrators are therefore mentioned, the first one being those who are either officials or servants engaged under contract by the Union, and the second one servants seconded to the Union by a different entity. The shared element among the two is indeed the type of tasks assigned to the person to be considered a public official. It is also imposed that ‘members of the Union institutions, bodies, offices and agencies, [...] and the staff of such bodies shall be assimilated to Union officials’. However, the rules on privileges and immunities contained in Protocols No. 3 and No. 7, shall be taken into account when dealing with the criminal liability of such officials, since proceedings against an official who is immune pursuant to those provisions, could not be criminally charged nor prosecuted.

As far as the ‘national official’ is concerned, the European legislator, aware of the differences among national legal systems, elects to leave it to each State legislation to clarify the definition of the term. Whether the perpetrator carries out his functions in a Member State or in a third country, therefore, he will be

¹²⁵ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, June 14th 1962, OJ 45, Article 1a. All recent amendments available at: <[http://eur-lex.europa.eu/eli/reg/1962/31\(1\)/2014-05-01](http://eur-lex.europa.eu/eli/reg/1962/31(1)/2014-05-01)>

considered as an official only if he would be addressed as such according to his national law. An exception is made by the Directive in cases when the proceedings involving the official has been initiated by another Member State. The State ‘shall not be bound to apply the definition’ deriving from a different legal system, but insofar as it is ‘compatible with its national law’. If the definition clashes with the national law of the prosecuting State, it might not be applied.

Finally, Article 4(4) – with the purpose of creating common rules for the Member States – clarifies that a ‘national official’ within the meaning of the Directive would be anyone ‘holding an executive, administrative or judicial office at national, regional or local level’; moreover, even a person ‘holding a legislative office at national, regional or local level shall be assimilated to a national official’.

2.7.4. The *Actus Reus* and the *Mens Rea* of Fraud and Fraud-Related Offences

The definition of an offence always requires both the reference to an objective element and a subjective element¹²⁶. While the former is to be identified with the specific act or series of acts that needs to be completed by the perpetrator for his conduct to constitute an offence, there would be no crime without the subjective element. An administrative irregularity pursuant to Article 1(2) of the Regulation is to be sanctioned regardless of the intention of the person to infringe the concerned provision, thus embracing the concept of liability without fault (*nulla poena sine culpa*). By contrast, a conduct can only constitute a crime when the supposed perpetrator can at least be accused of negligence. Indeed, in accordance with the principle of individual guilt¹²⁷ in its European definition – in line with the CJEU principle that juridical terms require an independent interpretation in order to guarantee the uniformity of application of European law¹²⁸ –, a person can only be held liable of a crime if there is fault to be pointed out in his conduct.

¹²⁶ On this topic, see paragraph 1.5.2.2.

¹²⁷ EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto on European Criminal Policy*, p. 707.

¹²⁸ One of the most recent confirmations of this rule can be found in COURT JUSTICE OF THE EUROPEAN UNION, March 14th 2013, case C-420/11, *Leth*, para. 24. The Court, in this instance, maintained that ‘according to settled case-law, it follows from the need for a uniform application of

However, the European legislator explicitly mentions the intention or *dolus* – which implies a higher awareness of the unlawfulness of the conduct¹²⁹, at least compared to negligence – in the commission of the crime as an essential element in the cases of fraud, corruption, misappropriation and money laundering. The intention is indeed part of the definitions provided for in Article 3(1), and in paragraphs 2 and 3 of Article 4 of the Directive, while the reference to Article 1(3) of Directive (EU) 2015/849 introduces it as a requirement for a conduct to constitute money laundering.

It should be noted that there is no clear distinction of the different types of *dolus* which can constitute fraud or another fraud-related offence in the above-mentioned articles. Therefore, it could be inferred that the fault as intended by the Directive covers not only the direct and indirect intention – when there is a certainty that, because of an act or omission of the perpetrator, a law will be infringed –, but also the *dolus eventualis* – when there is an acceptance of the high probability that the conduct will result in a damage to the protected interest.

On the other hand, as far as the *actus reus* of the crime is concerned, the definitions of the crimes feature a variety of elements. By contrast, a common element shared by all the offences is the commission of a particular act or omission whose result is the actual or potential damage to the Union’s financial interests.

Article 5 takes a stand on the possibility for a conduct to be sanctioned when it diverges slightly from the descriptions in Articles 3 and 4, and yet it retains a similarly harmful effect on the Union’s financial interests. Incitement and aiding and abetting are both mentioned in the first paragraph of the article, as the provision introduces the duty imposed on the Member States to ensure that conducts of this kind are ‘punishable as criminal offences’. The specific objective of the European legislation is to cover each of those conducts which, while not constituting crime in

European Union law that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question’.

¹²⁹ The CJEU has attempted different definitions of the intent in the infringement of a Union law provisions. COURT OF JUSTICE OF THE EUROPEAN UNION, February 27th 2014, case C-396/12, *Van der Ham and Van der Ham-Reijersen van Buuren*, para. 37, states that the ‘intentional non-compliance [...] must be interpreted as meaning that it presupposes an infringement of the rules on cross-compliance by a beneficiary of aid who seeks a state of non-compliance with those rules or who, without seeking such a state, accepts the possibility that it may occur’.

and of itself, can be perceived as ‘participation’¹³⁰ in the crime so much so as to increase the probability of its harmful results.

The second paragraph of Article 5 is dedicated to attempt. The attempt is intended as the commission of part of the conduct. When the behaviour constituting crime is so complex that it is made up of more than one act, the commission of one of such acts – that can reasonably be perceived as being unequivocally aimed at the commission of the crime and the damage of the Union’s financial interests – is deemed to be an attempt to commit the offence, and to constitute an offence in and of itself, even though the damage has not materialised. The Commission introduced this type of crime in the Directive with the intention to cover ‘all forms of preparation’¹³¹ of the above-mentioned offences. However, only fraud and misappropriation are mentioned in Article 5(2). The reason lies in the definition of the offences of corruption and money-laundering. A reference to those crimes is not necessary in Article 5 because paragraphs 1 and 2 of Article 4 already include among the conducts suitable to constitute crime ‘elements of attempt’¹³². For instance, the definition of active corruption also covers all promises or offers to act in an unlawful way. It is evident that the attempt of a promise would be too hard to prove and would rely almost exclusively on the interpretation of a particular conduct, instead of being based on factual elements that emerge from the behaviour of the perpetrator.

2.8. The Minimum Rules on Sanctions

The purpose of the Directive to compel the Member States to warrant the prosecution of fraudulent conducts affecting the Union’s financial interests is achieved through the introduction of minimum rules regarding the type and the severity of the sanctions to apply¹³³. The Directive therefore first defines the offences to introduce into national legislation. Secondly, it enumerates the rules

¹³⁰ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 9.

¹³¹ *Ibid.*, p. 9.

¹³² *Ibid.*, p. 9.

¹³³ A reference to the different levels of sanctions in the Member States can be found in Annex II to EUROPEAN COMMISSION, ‘Impact Assessment’, SWD(2012) 195 final, p. 48.

which each Member State should take into account while drafting the sanctions for each of those offences.

After a reference to the liability of legal persons in Article 6 – relevant due to the need to introduce a rule which would entail the recognition of the liability of those entities for whom a crime is committed by natural persons holding a position of power in the institution or company –, Article 7 describes the minimum rules which shall be taken into account by the Member States when drafting the sanctions related to the offences listed in Articles 3 and 4, and the other conducts mentioned in Article 5.

The first rule to be drawn up is the apparent boilerplate clause which imposes that the sanctions referred to the offences of Articles 3 to 5 and introduced by the Member States are effective, proportionate and dissuasive¹³⁴. The proportionality of the penalty is here to be considered together with the principles of fairness and equality¹³⁵, and with the main objective of the Directive, that is to say the introduction of provisions which would ‘act as a deterrent and afford effective and equivalent protection’¹³⁶ for the Union’s financial interests, pursuant to Article 325 TFEU. Article 7(5), however, points out that the prosecution of a crime committed by a public official ‘shall be without prejudice to the exercise of disciplinary powers by the competent authorities’ against the perpetrator.

In light of the principle of proportionality between the severity of the punishment to the seriousness of the crime, Article 7(2) imposes the duty to ‘ensure that the criminal offences referred to in Articles 3 and 4 are punishable by a maximum penalty which provides for imprisonment’, which is commonly recognised as the most severe type of sanction. Paragraph 3 sets the maximum for such punishment to at least four years of imprisonment. However, the maximum sanction should only apply either when the crimes involve considerable damage or advantage, or when the national legislator deems other circumstances to be serious

¹³⁴ On this topic, see paragraph 1.5.2.3. and case C-68/88, *Commission v Hellenic Republic (Greek Maize)*, para. 24.

¹³⁵ See paragraph 2.3.; EUROPEAN COMMISSION, ‘Impact Assessment’, SWD(2012) 195 final, p. 28; EUROPEAN COMMISSION, ‘Executive summary of the Impact Assessment’, SWD(2012) 196 final, p. 5; TONRY, ‘Fairness, Equality, Proportionality, and Parsimony’, in BOTTOMS, BOIS-PEDAIN (eds.), *Penal Censure*.

¹³⁶ EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 6.

enough to deserve such punishment. Instead of defining the word ‘considerable’ in abstract terms, Article 7(3) sets clear thresholds. Indeed, any of the offences drafted in the Directive, apart from acts or omissions constituting fraud in respect of revenue arising from VAT own resources¹³⁷, shall be ‘presumed to be considerable where the damage or advantage involves more than EUR 100 000’.

It should be recalled that the Directive is aimed at the introduction of minimum rules. Therefore, any provision on sanctions only clarifies which is the most lenient penalty that should be established for each crime, while leaving it to national legislators to introduce more severe penalties when deemed appropriate.

It is of relevance that Article 7(4) also allows the Member States to provide for sanctions other than criminal sanctions, for crimes other than VAT frauds, if the damage or advantage connected to the offence is of less than € 10 000.

The Directive also deals with those possibilities when the perpetrator is a legal person. The legal person is defined in Article 2(1)(b) of the Directive with the aim to avoid any misunderstanding on the application of the provisions related to such persons. No innovative element is however part of the definition, since the meaning of ‘legal person’ as it results from the Directive is identical to the one enshrined in the Second Protocol to the Convention, that is to say an ‘entity having legal personality under the applicable national law, except for States or public bodies in the exercise of State authority and for public international organisations’¹³⁸. The intention of the European legislator is therefore to embrace the traditional concept. Furthermore, the cited provisions confirm the possibility for a legal person to be deemed criminally liable, yet they do not expressly pinpoint this type of liability as the preferred solution to ensure the punishment of frauds, nor they would be enough for the construction of a ‘harmonised regime of corporate liability at EU level’¹³⁹.

¹³⁷ Article 7(3) clarifies that the damage or advantage connected to those types of fraud, insofar as they are considered to be serious pursuant to Article 2(2), ‘shall always be presumed to be considerable’.

¹³⁸ Article 1(d) of the Second Protocol of the Convention on the protection of the European Communities’ financial interests.

¹³⁹ TRANSPARENCY INTERNATIONAL ROMANIA (TI-RO), ‘The preventive role of the judiciary in protecting the financial interest of the European Union. A comparative analysis for improved performance’, Bucharest, 2017, p. 48. Available at: <<https://www.transparency.it/wp-content/uploads/2017/11/preventive-role-of-the-judiciary-in-protecting-the-financial-interest-of-the-EU.pdf>>. The research paper provides for an analysis of the current national regimes, and it puts forward the Italian system as one of its examples.

As a consequence, a larger debate on the matter would still be needed for this purpose.

Article 6 tackles the issue of the liability of such persons for any of the crimes listed in Articles 3 to 5. It is of course a creative interpretation which comes from connecting the natural person actually carrying out the criminal act or omission to the legal person for whose benefit the crime is committed. In order to cover a large number of conducts and to avoid any gaps in the prosecution of such crimes, Article 6(1) declares the conduct of the natural person relevant for the purposes of the Directive both when acting individually and as part of an organ of the legal person. This latter possibility must entail a leading position held within the institution or the company, based on either ‘a power of representation of the legal person’ or ‘an authority to take decisions on behalf of the legal person’ or ‘an authority to exercise control within the legal person’. It covers therefore all those cases when the decision taken by the natural person can be presumed to derive from the legal person itself. Furthermore, since those who have a leading position in a company or an institution also retain a duty to control and supervise their subordinates, an offence committed by any of those persons for the benefit of the legal person shall also entail a liability of the legal person, when the criminal conduct was a result of the lack of control from their superior. Lastly, it should be noted that the recognition of the liability of the legal person does not imply the immunity or the lack of liability for those who actually committed the crime. It is rather foreseen in paragraph 3 that the perpetrators of the crimes could be prosecuted and charged with the commission of the crime when they are recognised as liable.

Because of the features of a legal person, however, the sanctions usually applicable to a natural person are at times not suitable. Therefore, Article 9 clarifies the types of sanctions applicable to the legal person found as liable.

The main requirement in this instance too is that the sanction is ‘effective, proportionate and dissuasive’. As for the types of sanction, the first reference is to both ‘criminal or non-criminal fines’, thus proving the relevance penalties involving a loss of assets still retain in European administrative and criminal law. The other listed sanctions are types of detriments which may or may not display a typical

financial character, but do ultimately either entail a loss of assets for the legal person in the long run, or hinder the practice of ordinary profitable activities¹⁴⁰.

Finally, Article 8 mentions the possibility of an aggravating circumstance to be applied. Pursuant to Article 8, the Member States have the duty to introduce provisions which should ensure that the commission of the crime within a criminal organisation is considered as an aggravating circumstance. This provision concerns all the offences referred to in Article 3, 4 or 5. It is of relevance that the Directive refers to a particular definition of ‘crime committed within a criminal organisation’, namely the one expressed in Framework Decision 2008/841/JHA. Nonetheless, the Directive does not recall a particular set of rules to govern the application of the aggravating circumstances, whereas the article maintains the States have a duty to introduce an effective provision for this purpose. Therefore, it is once again left to the national legislator to elect how to provide for this aggravating circumstance, and to the national judges whether to consider it in their sentences, in accordance with the national legal system¹⁴¹.

2.9. The Provisions Related to the Proceedings

Together with the substantive criminal law provisions and those related to the general aspects of the defined offences, some of the provisions in the Directive tackle the necessary norms to warrant the effective carrying out of all the phases of the proceedings. For this purpose, Articles 10 to 13, applicable to all the offences drawn up in the Directive, deal with these aspects.

Article 10 refers to freezing and confiscation in those cases when there are means connected to the offences which allow for the measure to be applied. Two

¹⁴⁰ Article 9 of the Convention mentions: the exclusion from entitlement to public benefits or aid, the temporary or permanent exclusion from public tender procedures (whose reference is important especially because of the effects that fraud and corruption have been having on tender procedures), the temporary or permanent disqualification from the practice of commercial activities, the placing under judicial supervision, the judicial winding-up, the temporary or permanent closure of establishments which have been used for committing the criminal offence.

¹⁴¹ On this point, Recital 19 of the Directive clarified that ‘Member States are not obliged to provide for the aggravating circumstance where national law provides for the criminal offences as defined in Framework Decision 2008/841/JHA to be punishable as a separate criminal offence and this may lead to more severe sanctions’.

main aspects should be pointed out as far as this provision is concerned. The first one is that the article is aimed at the introduction of a duty for the Member States to take the measures they deem necessary in order to enable the freezing and confiscation of both the instrumentalities – meaning ‘any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences’¹⁴² –, and the proceeds – meaning ‘any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits’¹⁴³ – deriving from any of the criminal offences defined by the Directive. A duty is therefore imposed on the Member States, yet they retain a certain amount of freedom in the application of the rule.

The second aspect to be tackled concerns the legislative act which the Member States should use as their legal basis when taking those measures. If they are bound to Directive 2014/42/EU, indeed, they shall act in accordance with the norms enshrined in the act, together with the national measures through which this directive has been transposed in each country.

Article 11 is dedicated to jurisdiction, and already in its first paragraph it introduces the rule to be followed by the Member States to recognise which of the concerned countries has jurisdiction in each case. The provision imposes a quite straightforward criterion, according to which any of the crimes enshrined in Articles 3 to 5 is to be prosecuted in the State either where ‘the criminal offence is committed in whole or in part’ – according to the principle of territoriality –, or of whom the offender is a national¹⁴⁴ – according to the principle of personality. Thus, the Member States have the duty to take those measures necessary to establish their jurisdiction over those crimes. The jurisdiction shall also be established when the perpetrator ‘is subject to the Staff Regulations at the time of the criminal offence’

¹⁴² Article 2 point 3 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127.

¹⁴³ Ibid. point 1.

¹⁴⁴ Paragraph 4 of the article also specifies that in the case when jurisdiction would be established in a State because the perpetrator is one of its nationals, ‘Member States shall take the necessary measures to ensure that the exercise of their jurisdiction is not subject to the condition that a prosecution can be initiated only following a report made by the victim in the place where the criminal offence was committed, or a denunciation from the State of the place where the criminal offence was committed’.

– in an expansion of the scope of the article following the data gathered by OLAF in its operational experience – so as to cover the crimes committed by officials ‘with non-EU nationalities and not on the EU territory (but in delegations)’¹⁴⁵. An exception to the application of this rule can be made ‘only in specific cases or only where specific conditions are fulfilled’. Because of the uncertainty it would entail for the effective protection of the Union’s financial interests, however, the State refraining from establishing its jurisdiction ‘shall inform the Commission thereof’.

The discussions in the Council following the drafting of the position at first reading of the European Parliament brought about further changes in the letter of the article as originally presented in the Proposal. First of all, it abolished the explicit reference to the offences committed using information and communication technology. Pursuant to Article 11(3), a State would also have jurisdiction when those technological means through which the crime is committed are accessed from its territory. This rule, which would nonetheless stem from the principle of territoriality enshrined in Article 11(1)(a) is now mentioned in Recital 20 of the Directive. It should therefore be taken into account by the national legislator when drafting the national transposition act. The second element of innovation of the final text of the Directive is the further extension of the scope of the article which is now to be found in its third paragraph. This provision indeed allows Member States to extend their jurisdiction to criminal offences committed outside their territory when ‘the offender is a habitual resident in [their] territory’, or ‘the criminal offence is committed for the benefit of a legal person established in [their] territory’; or ‘the offender is one of [their] officials who acts in his or her official duty’.

Following Article 11, contrary to the Convention (see paragraph 1.5.2.1.), there is no recollection of the *ne bis in idem* principle. The principle, which is now undoubtedly part of those founding the judicial cooperation between States, is merely mentioned in Recital 17 as ‘the principle of prohibition of being tried or punished twice in criminal proceedings for the same criminal offence’.

Limitation periods have also recently become of relevance after the *Taricco* and *Taricco-bis* cases and the problem of the clash between the protection of the

¹⁴⁵ As explained by the justification to Amendment 34 in EUROPEAN PARLIAMENT, ‘Report on the proposal for a directive’, A7-0251/2014.

Union's financial interests and the compliance with the fundamental rights enshrined in both the CFR and the ECHR. For this reason, the Directive tackles the issue by imposing the duty to provide for such limitations within the limits expressed in Article 12. The set of rules which resulted from the discussions within the Council – vastly different from those originally drafted in the Proposal – begins with a reference to the general scope of limitation periods, that is to say the enablement of 'the investigation, prosecution, trial and judicial decision of criminal offences [...] for a sufficient period of time after the commission of those criminal offences, in order for those [...] to be tackled effectively'. The purpose underlying the provisions is therefore the efficiency in the fulfilment of each of the phases of the proceedings. There is no set number of years for the limitation period, apart from the instances when the fraud or fraud-related offences involve a considerable damage or advantage pursuant to Article 7(3), or the offence is a serious VAT fraud pursuant to Article 2(2). In such cases, the continuance of the proceedings must be enabled 'for a period of at least five years from the time when the offence was committed'. Paragraph 3 of the article, however, allows for the introduction of a shorter limitation period, provided that it is not shorter than three years and that it 'may be interrupted or suspended in the event of specified acts'. The final paragraph of the article is dedicated to the enforcement of a penalty. Indeed, the compliance with the national limitation periods might hinder the enforcement after the trial, which would undermine the effectiveness of the provisions drafted in defence of the Union's interests. Therefore, when the penalty is 'of more than one year of imprisonment', or it regards an offence 'punishable by a maximum sanction of at least four years of imprisonment', its enforcement must be enabled 'for at least five years from the date of the final conviction'.

Lastly, the provision closing (together with Article 14, mentioned in paragraph 2.5.) the title dedicated to the general provisions is Article 13 on the recovery of sums gone astray because of fraudulent conducts, which shall not be hindered by the transposition of the Directive.

2.10. Cooperation Between Member States, OLAF, and Other European Institutions and Offices

The matter of interest for the Union has always been the effectiveness of its system. As a consequence, a Directive combatting fraud would need to be part of a framework where offices and agencies retain extensive powers enabling them to secure the actual protection of the interests dealt with by the provisions enshrined in the legislative act.

The Directive, in this case, takes a step forward by introducing an article which deals with the cooperation between Member States while mentioning OLAF as the office through which the Commission carries out its activity in this field. Article 15 – whose title, ‘Cooperation between the Member States and the Commission (OLAF) and other Union institutions, bodies, offices or agencies’, is self-explanatory –, governs the cooperation between such actors. Its introduction is relevant because the act replaces both the Convention and its Protocols pursuant to Article 16 of the Directive, including the provisions on cooperation enshrined in Articles 6 and following of the Second Protocol. Article 15 of the Directive has however, a larger field of application, since it also applies to the crime of misappropriation, while innovating through the reference to Eurojust and OLAF as the two main offices operating in the support to national authorities in the fight against fraud.

First of all, the Directive deals with the general duty of Member States and European offices¹⁴⁶ to carry out the fight against fraud, exemplified as the ensemble of criminal offences defined in the Directive, i.e. fraud, money-laundering, corruption, and misappropriation. The competences of the Member States and all Union authorities cannot, however, violate the rules ‘on cross-border cooperation and mutual legal assistance in criminal matters’¹⁴⁷, which are already enshrined in

¹⁴⁶ In particular, Article 15 mentions Eurojust, the Commission, and the European Public Prosecutor’s Office.

¹⁴⁷ The phrase ‘mutual legal assistance in criminal matters’ refers to the ‘cooperation between judicial, police and customs authorities within the Union’. Therefore, it concerns all the phases of the criminal proceedings, including the investigation and gathering of evidence, the trial and the issuing of the final decision. A convention in this field was adopted by the EU Council of Ministers on May 29th 2000. On this topic, see also EUROPEAN PARLIAMENT, ‘Fact Sheets on the European

the Treaties – Article 82 TFEU in particular – and in European secondary law. A specific ‘technical and operational assistance’ must be provided by the Commission and Eurojust when necessary to simplify the investigations of national authorities. As a result, the Directive strengthens the role of OLAF and Eurojust in the fight against fraud and provides for a closer connection between the European offices and the national ones. Even though the offences concerned by the Directive have been introduced in order to protect a supranational interest, at this point in time cross-border crime is still investigated by national prosecutors. The European figures are hereby involved because they ease the national authorities into collaborating with each other, and they carry out activities of centralised control and gathering of information, thus simplifying the investigation happening at State level.

Paragraph 2 is focused on the exchange of information. Before the creation of centralised authorities with police or judicial powers, the European Communities had created networks which made it easier for information to be shared between national and supranational offices¹⁴⁸. It is in reference to these networks that Article 15(2) governs the exchange of information. There is no mention of Eurojust or Europol or any other central authority. Instead, the provision allows and, in doing so, compels the national competent authorities in each criminal case regarding one of the offences defined by the Directive to ‘exchange information with the Commission’. This must happen within the limits¹⁴⁹ of the competences of the national authority in question, and with the specific purpose of making it easier to ‘establish the facts and to ensure effective action’ against the above-mentioned criminal offences. Confidentiality and data protection¹⁵⁰ are additional European

Union: Judicial Cooperation in Criminal Matters’. Available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.2.6.html

¹⁴⁸ SATZGER, *International and European Criminal Law*, pp. 110 et seq.

¹⁴⁹ It could be assumed that the ‘limits’ the article refers to come from national law rules.

¹⁵⁰ The protection of data has been one of the main topics discussed in European institutions in the past few years. Eventually, the Commission proposed a comprehensive reform of the first-pillar and third-pillar provisions in existence, which resulted in the adoption of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) and a parallel Directive (Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or

rules which must be complied with by the Commission and the national authorities when the exchange is carried out. Yet, the last period of Article 15(2) allows a Member State to ‘set specific conditions covering the use of information’ when that piece of data is supplied to the Commission, even if it is set to be transferred to another Member State. However, this can only happen when it entails ‘no prejudice to national law on access to information’.

The last provision expressed in Article 15 entails the duty of the Court of Auditors and of the professionals auditing the EU budget¹⁵¹ to report to OLAF and to the competent authorities the commission of one of the crimes defined in the Directive, of which they become aware when carrying out their duties. For this report to be necessary, therefore, it is required that the qualified professional detects the commission of a specific type of crime, only when that occurs during the exercise of its functions.

2.11. The European Public Prosecutor’s Office in Light of Directive (EU) 2017/1371 and the New Developments

In its opinion regarding the policies of the Union and specifically fraud and corruption, the Committee of Regions¹⁵² mentioned the EPPO and referred to its activity as what would have made certain that investigations could ‘be carried out more effectively and reliably’, in the same way as they could have been if they were carried out by a figure resembling that of a national prosecutor. It was therefore a constant idea the one that the EPPO would have simplified and made more efficient the investigation of some crimes characterised by peculiar features such as the cross-border dimension. The increase in the number of crimes, and of serious crimes affecting the interests of the Union in particular, was also making the need for a central prosecution even more impellent. It was not therefore only a theoretical

the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA), OJ L 119.

¹⁵¹ Member States are compelled to implement the provision by introducing a rule in case that the auditor is aware a crime has been committed.

¹⁵² EUROPEAN COMMITTEE OF THE REGIONS, ‘Opinion of the Committee of the Regions on “Package on protection of the licit economy”’, OJ C 391/14, p. 138, paras. 41 et seq.

issue which urged the Union to create the Office, but a practical reason too, that is to say the need for a higher level of efficiency in the prosecution of cross-border crimes. Notwithstanding the strengthening of the cooperation between Member States and national institutions, indeed, coming from the application of both the *ne bis in idem* principle and the principle of mutual recognition of sentences and evidence gathered by national offices, the existence of a centralised office would have simplified the proceedings.

Article 15 also mentions Eurojust and the Public Prosecutor's Office besides the Commission as the bodies which should carry out the fight against the criminal offences affecting the financial interests of the Union. This is relevant as it is one more mention showing the recognition of the EPPO as a body belonging to the specific framework created by the Union with the Regulation, the Directive and the following acts, together with all the other acts which constructed and described the field of action of the European institutions in the field of the fight against fraud.

A regulation¹⁵³ adopted by the Council on October 12th 2017 eventually established the Public Prosecutor's Office, following the adoption of the Directive. A figure that had felt essential up till that point, because of the lack of a criminal law framework and a dire need for a procedural harmonisation so that the proceedings regarding cross-border crime could come to term and have an effective implementation, had to wait for a Directive on the substantial aspects of criminal law before it could become part of the European legal system. While Regulation (EU) 2017/1939 recalls Article 86 TFEU as the legal basis for the creation of the office, it is actually the Directive which represents the essential condition for the act to work. The harmonisation of the national criminal laws is the requirement for the Office to work and at the same time the reason for its existence.

Following a discussion on the contents of the proposal characterised by the establishment of the enhanced cooperation – pursuant to article 20 TEU – by the participating Member States, the European institutions settled on the provisions

¹⁵³ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283. For a comment on the provisions and the influence of the act, see SALAZAR, 'Definitivamente approvato il regolamento istitutivo della procura europea', *Diritto Penale Contemporaneo*, n. 10, 2017. Available at: <https://www.penalecontemporaneo.it/pdf-viewer/?file=%2Fpdf-fascicoli%2FDPC_10_2017.pdf#page=328>

now defining the structure and the competences of the EPPO¹⁵⁴. The office presents a decentralised structure aimed at the involvement and the integration of national authorities. While the competence of national prosecutions has to be exercised within the territory of their State, the investigation and prosecution of cross-border crimes by the EPPO would not be subject to these limits. The competence of the Office would therefore include the carrying out of criminal investigations, together with the prosecution of the perpetrators, from the initiation of the proceedings to the issuing of a judgement. As far as the pre-trial phase is concerned, moreover, it should be noted that the competences and power of OLAF would most probably be impacted due to the activity of the EPPO¹⁵⁵. Indeed, the competence to carry out internal and external controls would not be lost, but the way it will be exercised is doomed to change, because of the parallel existence of an office also aimed at the research of unlawful conducts. However, there will be a main difference between the two, being the EPPO aimed at the discovery of offences, while the investigation of OLAF does not have a criminal character. Cooperative relations shall nonetheless be maintained with OLAF, Eurojust and Europol, especially as far as information exchange is concerned¹⁵⁶.

Notwithstanding the theoretical importance of the step forward in the prosecution of crimes represented by the establishment of a European Prosecutor, Regulation (EU) 2017/1939 is particularly relevant because it limits the competences of the Office to the fight against fraud. The investigations and the prosecutions carried out by the Office shall regard only offences against the Union's

¹⁵⁴ For an analysis regarding the provisions on which the Council and the European Parliament settled, see EUROPEAN PARLIAMENT, 'Recommendation on the draft Council regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO")', A8-0290/2017, September 29th 2017. Available at: <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0290&language=EN>>

¹⁵⁵ EUROPEAN COMMISSION, 'Report from the Commission to the European Parliament and the Council. Evaluation of the application of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999', COM(2017) 589 final, October 2nd 2017, pp. 5 et seq.

¹⁵⁶ For an overview of the explanation of the regulation, see the 'Explanatory Statement' in EUROPEAN PARLIAMENT, 'Recommendation on the draft Council regulation', A8-0290/2017. Available at: <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0290&language=EN>>

financial interests. Being the Directive the first act exhaustively tackling the matter from the point of view of substantive criminal law, its relevance for the fulfilment of the purposes of the European Prosecutor is undeniable.

CHAPTER 3

THE ROLE OF THE COURT OF JUSTICE IN THE PROTECTION OF THE FINANCIAL INTERESTS OF THE UNION

3.1. The Influence of the Case-Law of the CJEU on the Protection of the Union's Financial Interests

Since its foundation in 1952¹, the Court of Justice has played a fundamental role in overseeing the correct application of European law. It could be argued that its activity extended to the point of creating law. Indeed, while directly applicable European law provisions are part of the national legal systems, the uniformity in their application throughout the territory of the Union is guaranteed by the work which the Court of Justice has been carrying out.

While the Court can act in an advisory capacity², the jurisdictional function is its main one. Pursuant to Article 19(1) TUE, the Court of Justice 'shall ensure that in the interpretation and application of the Treaties the law is observed'. This objective is achieved due to the binding effect of its judgements. Moreover, when a request for a preliminary ruling – the procedure which exemplifies the most the existence of a law-making power of the Court – is referred to the Court of Justice, its answer on the matter, as it results from the final judgement, is applicable *erga omnes*. Indeed, while the ruling is addressed to the national judge who referred the question, it has been inferred *a contrario* from Article 267(3) TFEU that the existence of a previous judgement of the CJEU on the same matter 'removes any ground for the obligation to make a reference provided that they adopt that

¹ For a history of the Court, and an analysis of the features which make it dissimilar to other international courts, see TAMM, 'The History of the Court of Justice of the European Union since its Origin' in ROSAS, LEVITS and BOT (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, The Hague, 2013, pp. 9-35.

² For instance, Article 218 TFEU – which deals with the procedure to be followed for the conclusion of an international agreement between the Union and third countries, or international organisations – on paragraph 11 introduces the possibility for a Member State, the European Parliament, the Council, or the Commission to ask the Court of Justice for an advisory opinion on the compliance of the drafted agreement with the Treaties.

interpretation'³. Thus, it would be unreasonable to overlook the abundant case-law of the Court of Justice when analysing a matter belonging to any of the fields of Union law.

The protection of the financial interests of the Union, for instance, has been mainly put into action through legislation, since the very first recognition of its relevance for the survival of the Union in the Seventies. Nevertheless, also the case-law of the Court of Justice had a strong influence on the defence of those interests⁴. Indeed, the lack of substantial legislation on the matter, the uncertainty in the application of the existing provisions, as well as the difficulties in coordinating between administrative and criminal law norms – since they originated from different sources of law – all called for a supranational institution with the power to settle those uncertainties.

Some of the first aspects to be tackled by the Court of First Instance – now General Court – regarded subjects only marginally connected to the protection of the financial interests as they are intended in their current definition. Originally, the main elements of interest were the protection of the Internal Market, and the necessity for this new European market to preserve its competitive character. It should be recalled that the reason for the birth of the Communities was economical, and the policies whose implementation was pursued by the first Member States all concerned the creation of a Common Market. For this purpose, the protection of the budget of the Communities was deemed essential⁵. Therefore, the judgements regarding these aspects have a historical relevance in that they attest the existence of an interest in the field, even though it was fuelled by the need to prevent the spread of concerted practices or abuse of dominant positions of undertakings.

The cases that might be mentioned were specifically related to the setting up of the Common Market⁶. Going through the judgements issued by the Court in those

³ DANIELE, *Diritto dell'Unione Europea*, pp. 391 et seq.; BOUTAYEB, *Droit institutionnel de l'Union Européenne. Institutions, ordre juridique, contentieux*, pp. 671 et seq.; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, May 13th 1981, case C-66/80, *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato*, p. 1204.

⁴ SATZGER, *International and European Criminal Law*, p. 44.

⁵ On this topic, see paragraph 1.1. Indeed, the first fines and penalties which presented features comparable to those of criminal penalties were introduced to tackle infringements of competition law.

⁶ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, November 29th 1956, case C-8/55, *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*.

first few years of activity also makes it evident that the focus of the action of the Communities was on matters of agriculture and fishing, and especially the marketing and sale of products, as well as the funding of the Common Agricultural Policy.

It would however be in the Seventies that the first actual mention of the revenues of the Communities – as a component of the budget financing the implementation of their policies – could be found. The Court starts referring to the Communities’ own resources⁷ in its judgements, thus proving to embrace the definition of the EC budget that was circulating among scholars.

A fundamental step towards the fight against fraud was then represented by the *Greek Maize* case⁸. It dealt with the implementation of agricultural policies, and it immediately became a leading case on the matter of the application of punitive sanctions, aimed at efficiently tackling infringements of the rules defending the financial interests of the Communities. Following the settled case-law⁹ on the application of the principle of assimilation, the *Greek Maize* case was the first instance when the Court gave a clear definition of the duties of the Member States as far as the protection of supranational financial interests was concerned. Indeed, while reassuring the Member States of their right to select the penalties that they would impose to those conducts which had affected the budget of the Communities, the Court ruled that those infringements had to be penalised ‘under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive’¹⁰. It was due to this judgement that the formulation of Article 280 TEC (now Article 325 TFEU) gained its main features. The principle of assimilation was given an exhaustive definition,

⁷ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, May 5th 1977, case C-110/76, *Pretore di Cento v X*.

⁸ On this topic see paragraph 1.3.1.; case C-68/88, *Greek Maize*; MITSILEGAS, *EU Criminal Law After Lisbon*, pp. 74 et seq.

⁹ In particular, see case C-50/76, *Amsterdam Bulb*; case C-265/78, *Ferwerda*; case C-54/81, *Fromme*.

¹⁰ Case C-68/88, *Greek Maize*, para. 25. See also the remarks by SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 176 et seq.

the duties of the Member States were clarified, and the groundwork for the identification of fundamental rules to follow in the fight against fraud was settled.

A second case which deserves to be mentioned is the *Germany v Commission* case¹¹. The extent to which the Council had started issuing regulations which imposed the duty to introduce punitive administrative sanctions in the national legal systems had not been greeted with enthusiasm by some Member States, which went as far as hinting at the lack of a legal basis for such measures. As a consequence, Germany brought an action of annulment of two regulations on agriculture before the CJEU, accusing the Council and the Commission of having introduced provisions for which the EC had no competence.

Furthermore, as far as the activity of the Court in the field of the protection of the budget is concerned, it should be noted that all through the Nineties the Court was often asked to rule on issues connected to the expenses of the EU budget and the definition of the financing of the Union, usually in matters related to the European Social Fund¹².

It is therefore clear that the Maastricht Treaty was inspired by the settled case-law of the Court of Justice when it strengthened the duties of the Member States to carry out appropriate and effective actions in the field of the fight against fraud, while also taking a further step forward towards the creation of a European punitive system.

¹¹ Case C-240/90, *Germany v Commission*. On this topic, see VERVAELE, 'The European Community and Harmonization of the Criminal Law Enforcement of Community Policy: Ignoti nulla cupido?', in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 34, who refers to the case as the landmark judgement which 'cleared up the controversy surrounding the EC's competence to harmonise administrative (punitive) sanctions'.

¹² See, among others: COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FIRST CHAMBER), March 7th 1995, joined cases T-432/93, T-433/93 and T-434/93, *Socurte and Others v Commission*; COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FIRST CHAMBER), December 6th 1994, case T-450/93, *Lisrestal and Others v Commission*.

3.2. The Relevance of the Case-Law of the Court after the Adoption of the Regulation and the Convention

Even before the Lisbon Treaty brought the criminal matters under the jurisdiction of the Court of Justice, as such materialising the possibility of a defence of those interests to be carried out by the supranational judicial institutions, the case-law of the CJEU kept showing an underlying concern for the protection of the financial interests of the Union, with a reference to both administrative law and criminal law provisions. In particular, in the years preceding the entry into force of Regulation (EC, Euratom) 2988/95, a series of cases concerning the grants of financial assistance and the implementation of policies in the field of agriculture were brought before the Court. The adoption of the Regulation, however, brought about a change in the way the CJEU could tackle matters regarding those violations of European law which affected the budget of the Communities. Indeed, the Regulation included a set of rules and general definitions which could be employed by the Court to dispel doubts on the interpretation of European law provisions. It became the main source of reference for the Court as far as the definition of irregularities, penalties, and punitive measures were concerned.

Along this line, the *Conserve Italia v Commission* case¹³ was one of the first instances when the reference to the Regulation was taken for granted. In order to overcome the uncertainty on a definition of penalty, the Court selected the one included by the Regulation – where a penalty is imposed by the Commission for a conduct constituting an irregularity – and applied it as a well-known principle on which its findings had to be based. Afterwards, in the *Sgaravatti Mediterranea v Commission* case¹⁴ the Court also mentioned the Regulation as the legislative act which had confirmed the application of the principle of legality in reference to penalties, by recognising that no penalty could be imposed unless the Community act imposing it predated the commission of the irregularity.

¹³ COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES, October 12th 1999, case T-216/96, *Conserve Italia v Commission*, para. 84.

¹⁴ COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES, September 9th 2002, case T-199/99, *Sgaravatti Mediterranea v Commission*, para. 126.

On the other hand, the adoption of the Convention of 1995, the act properly imposing on the Member States the duty to introduce criminal law provisions to fight the spread of fraudulent conducts, was not accompanied by a recognition of the role of the Court of Justice. A later Protocol¹⁵, however, clarified that the interpretation of the provisions in the Convention and its first Protocol were among the matters whose jurisdiction belonged to the Court, limited to preliminary rulings¹⁶. Indeed, it was within the discretion of the Member States to accept the jurisdiction of the Court, provided that they had submitted a declaration ‘at the time of the signing of this Protocol or at any time thereafter’ in order to have the possibility to refer preliminary ruling questions to the CJEU, pursuant to Article 2 of the Protocol. It is undisputedly relevant also to point out that the recognition of the jurisdiction of the Court on these matters implied the application of the Protocol on the Statute of the CJEU¹⁷, and the Rules of Procedure of the CJEU¹⁸ as formulated by the Court itself, pursuant to Article 3(1) of the Protocol to the Convention. As for the adoption of the Protocol by the Member States, Article 4(1) stated that this had to be carried out by the States ‘in accordance with their respective constitutional requirements’. Moreover, any State becoming a member of the Union was to be allowed the accession to the Protocol, while the accession to the Convention would directly imply the acceptance of the provisions of the Protocol, as provided for respectively in Articles 5 and 6.

The case-law of the CJEU proves that, but for a mere mention in two cases¹⁹ when the provisions of the Convention were recalled for the definition of fraud therein expressed, the Court, in fact, was never asked to intervene on the interpretation of the text of the Convention. It could be argued that the delay in its

¹⁵ Council Act of 29 November 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities’ financial interests, OJ C 151.

¹⁶ Article 1 of the Protocol specifies that the Court ‘shall have jurisdiction, pursuant to the conditions laid down in this Protocol, to give preliminary rulings on the interpretation of the Convention on the protection of the European Communities’ financial interests and the Protocol to that Convention’.

¹⁷ Protocol (No 3) on the Statute of the Court of Justice of the European Union, March 30th 2010, OJ C 83/210.

¹⁸ Rules of Procedure of the Court of Justice, September 29th 2012, OJ L 265.

¹⁹ COURT OF JUSTICE OF THE EUROPEAN UNION, July 10th 2003, case C-11/00, *Commission v ECB*, para. 88; COURT OF JUSTICE OF THE EUROPEAN UNION, July 10th 2003, case C-15/00, *Commission v EIB*, para. 117.

implementation by the national institutions, and the reform of the Treaties, which was achieved soon after, prevented the reference of questions of this kind. Indeed, after the Lisbon Treaty had come into force, the provisions enshrined in the Convention became part of Union law, and the Court implicitly acquired the power to influence criminal law, given that the Lisbon Treaty conferred a general jurisdiction on all the fields of law to the CJEU.

It should be recalled that even after the Lisbon Treaty recognised the protection of the financial interests of the Union as one of the main objectives to be reached by means of national law and Union policies, there was still no legislative system enabling the prosecution of the crimes affecting them. The only standing legislative act was the Convention, which, being an act of the ex-third pillar, was only to be included within the limits of jurisdiction of the Court thanks to Protocol 36 to the TFEU. In listing the transitional provisions to be applied to the institutions of the Union, indeed, the Protocol also specified that there would have been no prejudice to the acts already in force²⁰. Being the Convention one of those acts, it still was to be applied after the entry into force of the Lisbon Treaty, while the matters it covered were brought under the jurisdiction of the Court because of the overreaching power it had been conferred.

A list of the issues which the Court has tackled throughout the years with reference to the protection of the financial interests of the Union should show how relevant its power is on the evolution of European law. For instance, one of the main principles that the legislation in this field has often focused on is the *ne bis in idem* principle²¹. The *ne bis in idem* deserves to be mentioned as one of the principles which are essential to ensure an effective defence of those interests, since it can easily occur that the same individual is being brought before two different courts for the same fact. In the field of the fight against fraud, due to the overlap of legal acts, it can also happen that the same fact might be given different definitions, in

²⁰ Article 9 of Protocol 36 on transitional provisions.

²¹ See paragraph 1.5.2.1. The Convention dedicated Article 7 to the principle. Yet, it had no place in the Directive, because of the general recognition of the principle which had been already acted thanks to Article 4 of Protocol 7 and the case-law of the CJEU on the matter.

particular in administrative and criminal proceedings, and the application of the *ne bis in idem* principle might simplify the identification of the solution to the matter²².

Yet, the main objective remains the protection of the resources of the Union from possible attempts at fraudulent acts, which is attained thanks to a clear definition of those behaviours and the attribution of a proper penalty to each of the administrative violations, i.e. ‘irregularities’ pursuant to Regulation 2988/95, or criminal conducts, i.e. ‘frauds’ pursuant to Article 1 of the Convention, thanks to the developments in the case-law and legislation. Along this line, Picotti²³ had perceived both the relationship between the national courts and the Court of Justice, and the ever-growing harmonisation of national legislations as essential factors to promote the future development of a European criminal law system. The attribution of criminal law competences to the Union – as established by the Lisbon Treaty – has only further validated this theory.

3.3. The *Taricco* Case

The protection of the financial interests of the Union, which had already its own relevance and had been mentioned as ‘fight against fraud’ in Articles 83 TFEU and 325 TFEU, came at the centre of the discussions after the transposition and the implementation of the Convention together with the provisions introduced by the Lisbon Treaty proved to be unsuitable to tackle the amount of cross-border crime which had been affecting the EU budget.

Thus, the relevance of the *Taricco* case²⁴ lies in its ability to make the issue of the fight against fraud the focus of debates within the Union once again. Nonetheless, the defence of the financial interests had concurrently been elicited

²² BELLACOSA, ‘La riforma dei reati tributari nella prospettiva europea’, in DEL VECCHIO, SEVERINO (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti*, pp. 351 et seq.

²³ PICOTTI, ‘Sulle sfide del diritto penale del XXI secolo. Un omaggio all’insegnamento del Professor Hans-Heinrich Jescheck’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale*, p. 101. On the topic of the relevance of the role played by the Court of Justice, see also STORELLI, *Diritto penale comunitario. Profili sostanziali, processuali, collaborazione investigative e giudiziaria*, Torino, 2006, pp. 47-126.

²⁴ COURT OF JUSTICE OF THE EUROPEAN UNION, September 8th 2015, case C-105/14, *Taricco and Others*.

when the Commission submitted a new proposal for a directive in this field. The case gave the Court the possibility to tackle some relevant aspects of the matter, while similar issues were being discussed by the European Parliament and the Council. One of those was the recognition of the harmful effects that the commission of VAT frauds might have on the Union's interests. Tax frauds had been relevant up to that point²⁵, but it was the new case-law and the debates on the definitions to include in the Directive which increased its importance²⁶. While the Directive was being pushed due to the necessity to adapt the Convention to a legal system which now recognised criminal law as one of the competences of the Union, as well as the proven unsuitability of the Convention to adequately tackle those offences, the uncertainty remained over the width of the main definition of fraud to insert in the Directive. The *Taricco* case, being about a carousel fraud, caused the Council to discuss the possibility of the introduction of the VAT frauds among those to be covered by the Directive – eventually reaching an agreement with the Parliament to make them part of the Directive only in those cases when they had had such an impact on the budget of the Union, or rather its financial interests, as to be considered serious.

The case deals with carousel fraud. It is a preliminary ruling of the Court of Justice referred by the judge of the Tribunale di Cuneo. The defendants (Ivo Taricco and others) were brought before the national court because they were 'charged with having established a criminal organisation or having participated as a member in such an organisation in the period from 2005 to 2009'²⁷. The particular focus was on the conspiratorial and organisational character of the conduct carried out by the accused. Such organisation was aimed at the commission of 'various offences in relation to VAT'. In particular, the conduct consisted of the 'creation of shell companies and the use of false documents, by means of which they were able to

²⁵ See BELLACOSA, 'La riforma dei reati tributari nella prospettiva europea', in DEL VECCHIO, SEVERINO (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti*, pp. 279 et seq.

²⁶ On this point, see paragraph 2.7.; COUNCIL OF THE EUROPEAN UNION, 'Proposal for a Directive of the European Council and of the Council on the fight against fraud to the Union's financial interests by means of criminal law - Progress report/Policy debate', Council document 9301/16, May 27th 2016, pp. 1-2.

²⁷ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 25.

acquire goods VAT free'²⁸ and therefore 'procure products at costs below the market price, which it could then sell to its customers, thereby distorting the market'²⁹. These acts were to constitute the crimes of 'producing false invoices and submitting fraudulent VAT returns through the use of false invoices'³⁰, while the conduct in its entirety came to be referred as a 'VAT carousel' fraud³¹.

Once the case was brought before the national judge, the first question to be tackled originated from one of the objections raised by the accused. Indeed, pursuant to Articles 160 and 161 of the Italian Penal Code, the crimes with which the accused were charged – namely, production of false invoices, submittal of fraudulent VAT returns through the use of false invoices, and conspiracy³² – had limitation periods which could not extend beyond 'seven years and six months or, as regards those instigating the conspiracy, eight years and nine months from the date on which the offences were committed'³³, despite the interruption of the limitation period brought about by the issuing of the order fixing the preliminary hearing. Due to the foreseeability that the offences would become time-barred before a judgement could be issued – since all the offences would have become time-barred at the latest on February 8th 2018, while the charges of Mr Anakiev, one of the accused, had been since March 11th 2013 –, there was a definite likelihood that the limitation periods would translate as impunity for those crimes³⁴.

The question which nevertheless the national court referred to the European court was about a much larger cause of worry, and specifically the possibility that the Italian limitation regime, since it regularly brought about the disapplication of European law because of the length of the proceedings already from the preliminary investigation stage, could translate as a *de facto* impunity of many cases, hindering the effective application of European law in Italy³⁵.

²⁸ Case C-105/14, *Taricco and Others*, para. 18.

²⁹ *Ibid.*

³⁰ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 25.

³¹ See also case C-105/14, *Taricco and Others*, para. 19; Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, paras. 26-27.

³² Respectively Articles 2 and 8 of Legislative Decree 74/2000 and Article 416 of the Penal Code.

³³ Case C-105/14, *Taricco and Others*, para. 22.

³⁴ Case C-105/14, *Taricco and Others*, paras. 20 et seq.; Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, paras. 28 et seq.

³⁵ Case C-105/14, *Taricco and Others*, paras. 24 et seq.; Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, paras. 30-31.

The questions submitted by the referring court tackled the interpretation of Articles 101 TFEU, 107 TFEU, 158 of Directive 2006/112/EC, and Article 119 TFEU. Indeed, the issue concerned the possibility that national law could allow for a crime to be time-barred, thus hindering the prosecution of the accused. This would have entailed an infringement of the European rules on competition, and would affect the protection of the Internal Market as a result, both in the sense of allowing for concerted practices and aids granted by the State, and as a violation of the principles underlying the rules on VAT, as well as the principle of sound public finances. The latest amendment to the last subparagraph of Article 160 of the Italian Criminal Code achieved by Law No 251 of 2005 was the provision being brought forward by the Italian court as the one which seemingly breached the above-mentioned Union law provisions.

The national judge referred four questions to the Court requesting a preliminary ruling³⁶. While the answer to a request of this kind is compulsory for the CJEU, the provisions governing the proceedings before the CJEU require for the referred questions not to be irrelevant, that is to say ‘unrelated to the actual facts of the main action or its purpose’, or when ‘the problem is hypothetical’, or when ‘the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it’³⁷. Following the opinion of the Advocate General, the Court ruled in favour of the admissibility of the question, by specifying that the case could not be qualified as hypothetical, nor it could be denied that it referred to actual facts, nor that an answer would be relevant for the case in question and for the future application of the law³⁸. It should be noted that the Advocate General also pointed out that it is within the competence of the Court to consider ‘structural problems alleged to exist in a domestic system of penalties’³⁹, occurrences which the *Berlusconi and Others* and *Åkerberg Fransson* cases are a

³⁶ DANIELE, *Diritto dell’Unione Europea*, pp. 387 et seq.; BOUTAYEB, *Droit institutionnel de l’Union Européenne. Institutions, ordre juridique, contentieux*, pp. 660 et seq.

³⁷ Case C-105/14, *Taricco and Others*, para. 30; on this topic, see also Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, paras. 41 et seq.; BILLIS, ‘The European Court of Justice: a ‘Quasi-Constitutional Court’ in Criminal Matters? The Taricco Judgment and Its Shortcomings’, April 19th 2016, *New Journal of European Criminal Law*, vol. 7, issue 1, 2016, pp. 23-24. Available at: <<https://ssrn.com/abstract=2767102>>

³⁸ Case C-105/14, *Taricco and Others*, para. 32.

³⁹ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 48.

testament to. On the other hand, the Italian Government and Mr Anakiev had remarked that the request would have not been admissible since ‘the general principles of EU law [...] prohibited a deviation from the national provisions on limitation periods at issue’. By contrast, the Advocate General did not find the observation acceptable, and instead encouraged the CJEU ‘to provide some clarification in this regard as part of its substantive response to the questions referred’⁴⁰. An argument of uncertainty was put forward by the Advocate General as regards the relevance of the question to the national proceedings. However, even though the provisions highlighted by the national courts might have appeared to have no bearing on the matters at issue, the irrelevance was not obvious and thus required the CJEU to carry out a proper examination of the substance of the matter⁴¹. The last issue to be mentioned by the Advocate General in analysing the admissibility of the question was the fact that the question had been submitted when the national proceedings were still at early stages, an issue which was understood as having no precluding effect on the admissibility of the preliminary ruling⁴².

Furthermore, since the questions were submitted by the national court in the context of a national proceeding regarding a VAT fraud, in its preliminary remarks the Advocate General found that the national character of the offence did not preclude the judgement of the CJEU. Indeed, even though those issues lay within the ensemble of competences of the Member States, ‘the national authorities are none the less required to exercise their respective powers in accordance with the provisions of EU law’⁴³, especially since those issues had been explicitly recognised in previous instances as falling within the scope of EU law⁴⁴.

⁴⁰ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 49. Nevertheless, the issue was not touched upon by the CJEU, which merely proceeded to tackle the four questions submitted by the national court.

⁴¹ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 50.

⁴² Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 51.

⁴³ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 36; COURT OF JUSTICE OF THE EUROPEAN UNION, December 6th 2011, case C-329/11, *Achughbadian*, para. 33.

⁴⁴ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, paras. 36 et seq.; COURT OF JUSTICE OF THE EUROPEAN UNION, *Åkerberg Fransson*, case C-617/10, paras. 27-28. See also paragraph 3.2.

3.3.1. The Answer to the Third Question

The analysis of the Court starts with an examination of the third question, which doubts whether the national provision in discussion introduced an unforeseen exemption from VAT to the ones listed in Article 158 of Directive 2006/112. Indeed, the request of the national court does not simply connect to the possible infringement of that provision, but it implies that the national rule would also be in violation with EU law in general⁴⁵, since it would hinder the fight against VAT frauds and thus affect the financial interests of the Union. As a consequence, already starting with the first aspects to be touched upon by the judgement, the CJEU, by quoting the reasons stated for the order of reference, relates the issue of the infringement of the specific provision of European law to the possible harm it might entail for one of the core interests of the Union.

The mention of Directive 2006/112 in the question is however to be connected to other principles of European law, as pointed out by the CJEU, namely Article 4(3) TEU and Article 325 TFEU. The connection with the former does indeed recall the duties of the Member States to ‘a general obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory’⁴⁶ and, in the interpretation deriving from the case-law of the CJEU⁴⁷, the duty to fight tax evasion. The latter article to be mentioned is also related to the duty to carry out the fight against fraud by means of national law, yet it is mentioned by the CJEU as a special provision compelling the Member States to provide for an effective defence of the financial interests of the Union while ensuring an equal level of protection for national and European interests⁴⁸. The Court however also recalls the link between the collection of VAT and the EU budget, which implies a loss supported by the budget when there is a reduction in the VAT collected⁴⁹.

⁴⁵ Case C-105/14, *Taricco and Others*, para. 35.

⁴⁶ Case C-105/14, *Taricco and Others*, para. 36.

⁴⁷ Case C-617/10, *Åkerberg Fransson*, para. 25.

⁴⁸ On this topic, see paragraph 1.6.3. The CJEU in paragraph 37 of the *Taricco and Others* case specifies that the obligation is to ‘take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests’.

⁴⁹ Case C-105/14, *Taricco and Others*, para. 38; case C-617/10, *Åkerberg Fransson*, para. 26. On this topic, see also paragraph 2.

A second set of rules to be considered is the definition of fraud and the rules concerning the punishment of such offences, which is recalled by the CJEU in the definition provided for by Article 1 of the Convention, thus inferring its application to VAT frauds, affecting the financial interests of the Union because of their connection to the budget.

Therefore, considering the duty to impose effective penalties and the rules governing fraud, the CJEU deduces that in cases when those frauds are ‘serious’, they should be ‘punishable by criminal penalties which are, in particular, effective and dissuasive’ and ‘the same as those which the Member States adopt in order to combat equally serious cases of fraud affecting their own financial interests’⁵⁰.

While on the following paragraphs the Court goes on to answer the question, it should be pointed out that this definition attempted in the judgement based on a series of primary law and secondary law provisions, as well as case-law, would represent the basis for the future drafting of the articles of the Directive and the norms enshrined in those, not only as far as the general definition of fraud is concerned, but also regarding the particular provisions on serious VAT frauds.

Nonetheless, the Court did not linger on a clarification of this topic, instead preferring to state that it is to the national authorities to ascertain whether a national law provision is suitable to the protection of the European financial interests at issue⁵¹. The incompatibility of the national provisions with the above-mentioned Union law norms should be concluded by the national court. As a matter of fact, in its judgement the Court stated that, if ‘the interruption of the limitation period has the effect that, in a considerable number of cases, the commission of serious fraud will escape criminal punishment, since the offences will usually be time-barred before the criminal penalty laid down by law can be imposed by a final judicial decision’⁵² those provisions could be regarded as lacking effectiveness and dissuasiveness. Given that those features have been deemed essential requirements for the purpose to ensure a successful fight against fraud, a measure which does not present them would be in violation of Union law. Furthermore, the CJEU recalls the application of Article 325(2) TFEU in that it imposes the application of the same

⁵⁰ Case C-105/14, *Taricco and Others*, para. 43.

⁵¹ Case C-105/14, *Taricco and Others*, para. 44.

⁵² Case C-105/14, *Taricco and Others*, para. 47.

measure to crimes affecting the Union's interests as those which would be applied to crimes affecting national interests⁵³.

The obligations imposed by Article 325 TFEU are to be complied with by the Member States. Therefore, when the application of a national provision results in the infringement of Union law, the obligation to prevent and punish fraudulent conducts can become the reason for a disapplication of those national provisions, 'without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure'⁵⁴. On the other hand, the national court must take into account the fundamental rights of the accused, and ensure that the disapplication does not indirectly have the violation of those rights as a consequence. In this instance, the Court found that no violation would come from the disapplication of the provisions on the limitation periods⁵⁵.

In conclusion, the first answer by the Court, given in relation to the third question submitted for a preliminary ruling, was that the provision at issue - i.e. Article 160 of the Italian Penal Code, as amended by Law No 251 of 5 December 2005, read in conjunction with Article 161 of that Code – was indeed 'liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU'. Yet, the likelihood of those harmful effects had to be verified by the national court, since the disapplication could be carried out only insofar as the national rule prevented 'the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union', or provided for 'longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union'⁵⁶.

⁵³ In this instance, no violation of the principle had occurred, as observed at the hearing before the Court by the European Commission and recalled by the Court itself on para. 38 of the judgement.

⁵⁴ Case C-105/14, *Taricco and Others*, para. 49 and case-law cited.

⁵⁵ The right recalled by the CJEU on para. 54 of the judgement is the principle of legality and proportionality of criminal offences and penalties as enshrined in Article 49 of the CFR.

⁵⁶ Both conditions were explicitly mentioned by the CJEU in the ruling.

3.3.2. The Answer to the First, Second, and Fourth Question

The CJEU went on to answer the other questions in the same instance. Indeed, the second aspect to be touched upon by the judgement is the compatibility of the provisions at issue with Articles 101 TFEU, 107 TFEU and 119 TFEU. The former two articles are among those which govern the competition of the undertakings in the Internal Market⁵⁷. They respectively prohibit and sanction ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’⁵⁸, and ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods’⁵⁹. Both articles include an exhaustive list of the instances when the prohibition shall not apply. Any conduct constituting either concerted practice or State aid is an infringement of the provisions. Thus, the Court was asked whether the national provisions on limitation periods at issue represented a violation of European competition law in that they either promoted ‘collusive conduct between undertakings’, or granted certain undertakings ‘favourable tax treatment’.

The Court, following the opinion of the Advocate General, answered the first question negatively, by stating that ‘a potentially inadequate enforcement of national criminal law provisions in relation to VAT does not necessarily promote collusive conduct between undertakings’. Indeed, a conclusion of this kind would be far-fetched due to the reference to criminal law, notwithstanding the duty to apply the regulation on concerted practices and the related penalties as enshrined in the provisions on competition⁶⁰.

⁵⁷ On this topic, see SLAUGHTER AND MAY, ‘An Overview of the EU Competition Rules’, January 2018, pp. 7 et seq.; 17 et seq. Available at: <<http://www.slaughterandmay.com/media/2536650/an-overview-of-the-eu-competition-rules.pdf>>

⁵⁸ Article 101(1) TFEU.

⁵⁹ Article 107(1) TFEU.

⁶⁰ Case C-105/14, *Taricco and Others*, para. 60; Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 60.

On the other hand, the Court also denied the application of Article 107⁶¹ TFEU in this instance as the conduct is a VAT fraud to be governed by the rules constituting the VAT system, which includes the duty to impose effective penalties even of the criminal kind⁶², ‘except in the specific cases in which the rules on limitation periods might eliminate the penal consequences of certain offences’⁶³.

The last aspect to be tackled by the CJEU is the connection between the national provision at issue and Article 119(3) TFEU. In line with the previous remarks, the Court points out the evident lack of a direct link between the rules on limitation periods applicable to VAT frauds and the principle of sound public finances as enshrined in Article 119(3) TFEU. Indeed, the impunity of the perpetrator of a fraudulent conduct is a result of the choice of an ineffective measure to counter fraud and guarantee sound public finances by the national authority. Nonetheless, Advocate General Kokott acknowledged that, while in this context there might not be an infringement of the principle of sound public finances, the importance of an actual debate on ‘whether the finances of the Member State in question, when considered in their entirety, may be described as ‘sound’’ cannot be overlooked. As a matter of fact, there is an evident connection between the protection of the national and European budget and the need to comply with the requirement of ‘soundness’ of the public finances, element to be ‘measured by reference in particular to the provisions and criteria relating to the avoidance of excessive government deficits’⁶⁴. This is however an issue which refers to a different context than the one to which the limitation periods of offences belong. The national rules in the field ‘may exhibit [...] systemic shortcomings’⁶⁵, yet the

⁶¹ Case C-105/14, *Taricco and Others*, paras. 61-62; Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, paras. 61-62.

⁶² However, on the matter of the introduction of criminal sanctions for the effective implementation of Union competition policies, see OBERG, ‘Union Regulatory Criminal Law Competence After Lisbon Treaty’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, pp. 319 et seq.

⁶³ Case C-105/14, *Taricco and Others*, para. 62.

⁶⁴ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 70. In order to put this matter into context, it would be useful to point out that this question is related to the attribution of a budgetary competence to the European Parliament and the fact that the protection of the budget has come to prominence recently because of the necessity to face the crisis which had damaged the finances of a large part of European countries. The mentioned provisions are Articles 310 TFEU et seq. On this topic, see BOUTAYEB, *Droit institutionnel de l’Union Européenne. Institutions, ordre juridique, contentieux*, pp. 430 et seq.

⁶⁵ Opinion of Advocate General Kokott in case C-105/14, *Taricco and Others*, para. 71.

assumption that they would reach the extent to imply an infringement of the principle of sound public finances as enshrined in Article 119(3) TFEU would be undoubtedly far-fetched.

Therefore, none of the articles assumed by the national courts to have been infringed by Article 160 of the Italian Penal Code can be assumed as basis on which to assess the compatibility of the national provision with Union law.

3.3.3. Issues Enlightened by the *Taricco* Case-Law

There is no doubt that the *Taricco* case brought the financial interests of the Union back into focus. The policy debate between the European Parliament and the Council in the context of the adoption of Directive (EU) 2017/1371 are a testament to that. It is however clear from the judgement itself that this case is to be considered merely as a part of the case-law which was contributing to the construction of a criminal law system aimed at the protection of the financial interests of the Union (see paragraph 3.1. and 3.2.).

Nonetheless, the questions referred by the national courts related to a wide array of issues rather than exclusively to the prevention of the criminal conducts affecting the budget of the Union. From this point of view, it is evident that the question to be considered is the third one. The other issues tackled by the CJEU, while they contribute to a clearer definition of the limits of the legal framework regarding the financial interests, are not essential in the context of an analysis on the impunity of the accused. The connection with the survival of the Internal Market through the conservation of its competitive character, as well as the link with the principle of sound public finances are not denied by the Court. Yet, they are considered irrelevant for the case in discussion. Therefore, the norms which might be rightly taken into account while commenting on issues related to the penalties applicable to the perpetrator of a VAT fraud – or any other fraud affecting interests of the Union – are those enshrined in Article 325 TFEU, and its first two paragraphs in particular.

This recognition of Article 325 TFEU arises in the context of a discussion of the Court focused on the necessity to balance the fundamental rights of the individual with the protection of the interests of the Union. It is relevant insofar as it confirms that such interests are essential to the survival of the Union, especially in the current legal framework, where the adoption of the Lisbon Treaty and Article 6 TEU showed that the main focus of the Member States appears to have currently shifted onto the protection of human rights (see paragraph 1.5.4.).

It should be noted that the scholars who have tackled the issue, as well as the Court of Justice in the *Taricco* case itself, proved that the subject must be analysed under different point of views. Indeed, the application of Article 325 TFEU and the disapplication of national provisions that it entails have been interpreted in the *Taricco* case in a way that clashes with tradition, while also confirming certain principles originating in the settled case-law of the CJEU⁶⁶.

One of the aspects which should be pointed out as in keeping with previous judgements of the Court is the relevance that the preliminary ruling procedure has acquired throughout the years. Indeed, the requirements for the admissibility of a case under this procedure are not as stringent as they would be in other procedures. As a consequence, the preliminary ruling is being used more and more to tackle questions with a political – rather than a strictly juridical – character⁶⁷. The *Taricco* case is one of the instances where the Court chose to answer a question which could have arguably been intended as unrelated to the case before the referring court, by ‘reformulating’⁶⁸ the original request of the national judge.

A second one among the aspects touched upon by the Court which recall the settled case-law is the confirmation that the sanctioning regime of VAT irregularities and frauds belongs to the competences of the European Union. It is of interest, as far as the influence the case has exerted on the protection of the financial

⁶⁶ For an overview of the different ‘old’ and ‘new’ topics in the *Taricco* case, see MANES, ‘La “svolta” Taricco e la potenziale “sovversione di sistema”: le ragioni dei controlimiti’, May 6th 2016, pp. 6 et seq. Available at: <<http://www.penalecontemporaneo.it/d/4702-la-svolta-taricco-e-la-potenziale-sovversione-di-sistema-le-ragioni-dei-controlimiti>>

⁶⁷ On this topic, see CAIANELLO, ‘Dum Romae (et Brucsellae) Consulitur... Some Considerations on the Taricco Judgment and Its Consequences at National and European Level’, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 24, issue 1, 2016, pp. 1-17.

⁶⁸ See AMALFITANO, ‘Da una impunità di fatto a una imprescrittibilità di fatto della frode in materia di imposta sul valore aggiunto?’, September 15th 2015, SIDI-BLOG; MANES, ‘La “svolta” Taricco e la potenziale “sovversione di sistema”: le ragioni dei controlimiti’, p. 6.

interests of the Union, to point out the recognition that VAT frauds belong among those offences which affect the interests of the Union and are to be ensured a specific protection⁶⁹. Once again setting aside the historical relevance of the step in the direction of a common taxation policy represented by the adoption of the VAT⁷⁰, from the *Taricco* case it could be once again inferred that the VAT resources are among those constituting elements of the budget of the Union. Therefore, a conduct affecting the collection of the VAT is to be intended as a fraud damaging the financial interests of the Union. However, while the Commission had found and articulated the direct connection between a loss in the collection of the VAT and the reduction of the European budget⁷¹, the *Taricco* judgement merely hints at this connection. Indeed, the European judge takes a step forward in affirming the relevance of VAT frauds by maintaining that the duties of the Member States both include the ‘collection of all the VAT due on their territory’, and the ‘fight against tax evasion’⁷². It should be recalled that the factual recognition of this concept is not pointless, since it predates the policy debate between the European Parliament and the Council regarding the introduction of the definition of VAT fraud in the Directive on the protection of the financial interests of the Union⁷³. Moreover, it directly connects the fight against VAT frauds to a provision of the Treaty, thus ensuring its future recognition as an offence whose impact on the budget of the Union could not be denied by an act of secondary law⁷⁴. It could be argued that it

⁶⁹ Along the same lines, see case C-617/10, *Åkerberg Fransson*.

⁷⁰ THODY, *An Historical Introduction to the European Union*, London, 1997, p.46.

⁷¹ See paragraph 2.7.; EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 8.

⁷² Case C-105/14, *Taricco and Others*, para. 36. See also COURT OF JUSTICE OF THE EUROPEAN UNION, November 15th 2011, case C-539/09, *Commission v Germany*, paras. 69 et seq.; case C-617/10, *Åkerberg Fransson*, para. 25; SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p.170; VENEGONI, ‘La definizione del reato di frode nella legislazione dell’unione dalla convenzione PIF alla proposta di direttiva PIF’, p. 11.

⁷³ Indeed, Article 325 TFEU had been selected by the Commission as the legal basis for its proposal for a directive on the protection of the financial interests of the Union, as Article 280 TEC had been taken into consideration for the previous proposal. However, eventually the European Parliament changed the legal basis to Article 83(2) TFEU. On this point, see chapter 2 of this thesis, the Commission acts cited, and the position of the European Parliament at first reading regarding the Directive.

⁷⁴ PEERS, ‘The Italian Job: the CJEU strengthens criminal law protection of the EU’s finances’, September 22nd 2015. Available at: <<http://eulawanalysis.blogspot.it/2015/09/the-italian-job-cjeu-strengthens.html>>

was thanks to the coherence of the case-law on this issue that the final version of the Directive came to include this specific offence.

Besides these two first issues, the other main ones tackled by the Court in the *Taricco* case all display an innovative character, compared to the way they had been dealt with in the settled case-law. Indeed, the CJEU elects to clarify the role of Article 325 TFEU in relation to the action of preventing and punishing VAT frauds, as such identifying in that article the fundamental norm for the construction of a regime aimed at the fight against fraud. Moreover, by formulating a general rule to be followed by national courts in the event of an apparent infringement of Union law by national provisions, the Court re-evaluates the relationship between national and supranational courts. This opened up once again the historical debate regarding the protection of the core identity of the Member States, and the way the *primauté* principle might be intended after the enlargement of Union law-making competences following the entry into force of the Lisbon Treaty.

3.3.3.1. The Prominence of Article 325 TFEU

The disapplication of a national provision – put forward in paragraph 49 of the judgement as an alternative to its repealing in order to ensure the full effect of Union law – is mentioned in the *Taricco* case as the method to fulfil two specific duties imposed on the Member States by the first and the second paragraph of Article 325 TFEU. Indeed, the obligation to ‘counter illegal activities affecting the financial interests of the European Union through dissuasive and effective measures’, combined with the obligation to take for that purpose the same measures which would be taken to ‘counter fraud affecting their own financial interests’⁷⁵, may bring about the disapplication of a national rule, when the national judge deems it necessary. The relevance of this section of the judgement is in the choice to base the reasoning on Article 325 TFEU, which thus becomes the preferred ‘legal basis for the criminal law protection of the financial interests of the EU’⁷⁶.

⁷⁵ Case C-105/14, *Taricco and Others*, para. 49.

⁷⁶ MANES, ‘La “svolta” Taricco e la potenziale “sovversione di sistema”: le ragioni dei controlimiti’, p. 7.

As a matter of fact, the fight against fraud has been acknowledged as one of the main actions in the field of criminal law to be carried out by the Union for the purpose of the protection of its core interests⁷⁷. While the policy action had been implemented throughout the years by different means, it was the introduction of Articles 83 TFEU and 325 TFEU by the Lisbon Treaty which opened up the possibility to adopt criminal law rules in this field (see paragraph 1.6.1. et seq.). On the one hand, Article 83 TFEU conferred the competence to adopt directives aimed at the harmonisation of national legislations through the establishment of minimum rules in the areas of crime therein identified. On the other hand, Article 325 TFEU imposed on the Union and on the Member States to adopt measures to fight against fraud. The new formulation of the obligation, which was originally expressed in Article 280 TEC, abolishes all limitations as regards the kind of actions which could be taken⁷⁸. There was no reference to a peculiar type of act, thus hinting at the possibility that both directives and regulations could be adopted, nor there was a prohibition to introduce criminal law provisions to achieve the objective of the effective fight against fraud⁷⁹. Moreover, by imposing on the Member States an obligation only ‘as to the result to be achieved’, they would not be subject to ‘any condition regarding application of the rule’⁸⁰. Nonetheless, it should be pointed out that Article 83 TFEU introduces a law-making competence, while Article 325 TFEU imposes an obligation on the Union. Therefore, under the former the European legislator would be recognised a wide discretion in the choice whether to adopt an act in one of the listed areas of crime. By contrast, the obligation enshrined in the latter article would compel the Union to take effective actions to combat fraud⁸¹, although no other restriction on how to fulfil that objective would apply.

⁷⁷ VENEGONI, ‘La definizione del reato di frode nella legislazione dell’Unione dalla convenzione PIF alla proposta di direttiva PIF’, p. 2-3.

⁷⁸ PARISI, ‘Chiari e scuri nella direttiva relativa alla lotta contro la frode che lede gli interessi finanziari dell’Unione’, p. 4.

⁷⁹ PICOTTI, ‘Limiti garantistici delle incriminazioni penali e nuove competenze europee alla luce del Trattato di Lisbona’, in G. GRASSO, L. PICOTTI, R. SICURELLA (eds.), *L’evoluzione del diritto penale nei settori d’interesse europeo alla luce del Trattato di Lisbona*, Milano, 2011, pp. 207 et seq.

⁸⁰ Case C-105/14, *Taricco and Others*, para. 50.

⁸¹ PICOTTI, ‘Le basi giuridiche per l’introduzione di norme penali comuni relative ai reati oggetto di competenza della Procura Europea’, November 13th 2013, pp. 19-20. Available at: <<https://www.penalecontemporaneo.it/d/2634-le-basi-giuridiche-per-l-introduzione-di-norme-penali-comuni-relative-ai-reati-oggetto-della-compet>>

The position of the Court marks the second instance when a preference of Article 325 TFEU over Article 83 TFEU has been expressed. Indeed, the Commission had found in the former the legal basis for its proposal for a directive⁸², and proceeded to identify it as *lex specialis*, since it dealt with the specific matter that the policy was about. The *Taricco* case, by attributing to that same article the role of fundamental provision for the adoption of criminal law measures to protect the financial interests of the Union, allows for a wider acknowledgement of the prominence of Article 325 TFEU among other primary law norms tackling the fight against fraud.

Lastly, it should be remarked that in no part of the case there is any uncertainty on the necessity for the measures adopted in this field to be criminal law provisions. On the contrary, the Court goes so far as to deem criminal penalties ‘essential’⁸³ to fight fraud. It shows the general awareness that the financial interests of the Union call for a criminal law protection⁸⁴. Furthermore, one of the issues which emerged from this case-law, and which has become the focus of debates especially among Italian scholars, is the confirmation of the principle of legality. The attribution to the national judge of a role similar to that played by the legislator, indeed, would endanger the principle of separation of the powers on which modern democracy is based. The disapplication remains an alternative to the repealing of provisions by means of legislation, yet it must necessarily be exercised with caution, so as to maintain the boundaries between the legislative and the jurisdictional power. On the other hand, this matter has become further evidence that provisions as relevant as those resulting in the imposition of a criminal penalty on an individual must be introduced by legislation⁸⁵, either national or

⁸² EUROPEAN COMMISSION, ‘Proposal for a Directive’, COM(2012) 363 final, p. 6.

⁸³ Case C-105/14, *Taricco and Others*, para. 39; BELLACOSA, ‘La riforma dei reati tributari nella prospettiva europea’, in DEL VECCHIO, SEVERINO (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti*, p. 364.

⁸⁴ On the vulnerability of the budget of the Union to criminal conducts, see SATZGER, ZIMMERMANN, ‘The Protection of EC Financial Interests’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, p. 176.

⁸⁵ BELLACOSA, ‘La riforma dei reati tributari nella prospettiva europea’, in DEL VECCHIO, SEVERINO (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti*, pp. 364-365; CUPELLI, ‘Il caso Taricco e i controlimiti della riserva di legge in materia penale’, July 18th 2016, pp. 4-5. Available at: <<http://www.rivistaac.it/il-caso-taricco-e-il-controlimite-della-riserva-di-legge-in-materia-penale.html>>

supranational, while the courts would have the function to interpret it and ensure its correct and coherent application.

3.3.3.2. The Influence of Union Law on National Law

The possibility for national law to be impacted by European law has been a reality since the Seventies⁸⁶. The straightforward way would have been the introduction of provisions directly into the national legal systems by means of regulation. However, as far as criminal law is concerned, the lack of a competence had implied the development of alternative means by which Community law could have a similar impact to the one it was exerting in different fields of law. Indeed, originally it was the duty to comply with principles and provisions in the Treaties which brought about the need to either introduce specific criminal sanctions or to adapt the national legislation by law-making action. Articles 30 and 34 TEEC, prohibiting ‘qualitative restrictions on the import of goods between Member States as well as measures having equivalent effect’, but for the exception in Article 36 TEEC, could be recalled as the first provisions to cause this necessity to be perceived by the Member States⁸⁷. The strongest impact was nonetheless a consequence of the adoption of regulations or directives. The former could end up giving ‘a defence to a criminal charge under a national statute in instances where the two conflict’⁸⁸, the latter could allow ‘an individual accused of a criminal offence incompatible with a directive [to] invoke [it] in order to invalidate the charge’⁸⁹. As far as directives were concerned, it would have been necessary to wait for the limit of implementation to expire before it could be used in a judgement; nonetheless, the Court of Justice had found they might have also been taken into

⁸⁶ VERVAELE, ‘The European Community and Harmonization of the Criminal Law Enforcement of Community Policy: *Ignoti nulla cupido?*’, in CHERIF BASSIOUNI, MILITELLO, SATZGER (eds.), *European Cooperation*, pp. 33 et seq.

⁸⁷ FRANCE, ‘Influence of EC Law’, in ALBRECHT, KLIP (eds.), *Crime, Criminal Law and Criminal Justice*, p. 139.

⁸⁸ *Ibid.*, p. 141; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, July 10th 1984, case C-63/83, *Regina v Kent Kirk (Kirk)*.

⁸⁹ *Ibid.*, p. 142; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, APRIL 5th 1979, case C-148/78, *Pubblico Ministero v Ratti (Ratti)*; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, February 5th 1981, case C-108/80, *Ministère Public v Kugelmann (Kugelmann)*.

account as a mitigating factor in relation to the criminal charge. The decisions of the Commission were among the other acts which could influence national criminal law, in those instances when they were taken on the basis of Articles 85 and 86 TEEC⁹⁰, that is to say when they were adopted to sanction conducts violating competition law rules. However, already in the Eighties a first recognition of the *primauté* principle resulting in the disapplication of national rules can be found. The lack of competence in matters of criminal law did not prevent the influence Community law could exercise on national provisions when the latter were incompatible with the former. This could occur when the non-compliance related to the *actus reus* of the crime, or the *mens rea*, or the penalties, or even rules of criminal procedure⁹¹. The disapplication of national rules by a judge, an arguably frightening result of the *Taricco* case, is, therefore, a direct consequence of the *primauté* principle and a testament to the way Union law is capable to strongly impact national law.

It should also be recalled that the recognition of the direct applicability of primary law provisions dates back to the *Van Gend en Loos* and *Costa v ENEL* cases⁹², when the Court of Justice declared that, given the need for an effective and uniform application of Community law, ‘national courts are bound to apply directly the rules of Community law and [...] that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later’⁹³. Moreover, the Court also specified that Community law rules addressed at the Member States, such as Treaty provisions, are directly applicable and have both a horizontal and a vertical direct effect⁹⁴.

It has been pointed out, however, that a more stringent interpretation of this theory would exclude the recognition of the direct effects for those Treaty provisions which are not as precise as a provision enshrined in a regulation would

⁹⁰ Ibid., p. 143.

⁹¹ Ibid.; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, June 22nd 1989, case C-103/88, *Fratelli Costanzo SpA v Comune di Milano*.

⁹² COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, February 5th 1963, case C-26/62, *Van Gend en Loos / Administratie der Belastingen (Van Gend en Loos)*; Court of Justice of the European Communities, July 15th 1964, case C-6/64, *Flaminio Costa v E.N.E.L. (Costa v ENEL)*

⁹³ Case C-26/62, *Van Gend en Loos*, p. 7.

⁹⁴ Ibid., p. 7 et seq.; DANIELE, *Diritto dell’Unione Europea*, pp. 255 et seq.; MATTIONI, ‘La rilevanza delle norme comunitarie nell’ordinamento italiano’, in PEDRAZZI ET AL. (eds.), *Diritto penale europeo dell’economia*.

be. According to this opinion, the view that connects the duties enshrined in Article 325 TFEU to the national provisions on limitation periods is to be contested. Indeed, the primary law norm is not as clearly defined as it should be to allow for direct effects to be exerted on national law⁹⁵. Thus, it appears there would be no actual ground for the rule on disapplication formulated by the Court in the *Taricco* case.

The CJEU in the *Taricco* case, nonetheless, merely refers to the primary law provision without envisioning a possible opposition to its application in this context. On the contrary, it strengthens the *primauté* principle⁹⁶ by confirming the need to adapt the national legislations to the principles of Union law. In doing so, supranational law manages to impact national law to the extent of abolishing existing rules, while also fuelling the law-making action aimed at creating a legal system in compliance with the fundamental principles of Union law⁹⁷.

The qualms of the case are directly linked to the centrality of Article 325 TFEU in the reasoning of the Court. Indeed, the interpretation of the European law provisions on the fight against fraud – that is to say Article 325 TFEU in combination with the *primauté* principle and the principle of sincere cooperation of the Member States – is peculiar because of the effects it entails. A recognition of the prominence of European law on national law is to be intended, in this instance, as a restriction of the fundamental rights of the accused⁹⁸. The Court, instead of protecting the rights of the individual, chooses to protect the interest which would

⁹⁵ FARAGUNA, PERINI, ‘L’insostenibile imprescrittibilità del reato. La corte d’appello di Milano mette la giurisprudenza “Taricco” alla prova dei controlimiti’, March 30th 2016, *Diritto Penale Contemporaneo*, n. 1, 2016, p. 207, available at: <[http://www.penalecontemporaneo.it/d/4597-1-insostenibile-imprescrittibilita-del-reato-la-corte-d-appello-di-milano-mette-la-giurisprudenza->](http://www.penalecontemporaneo.it/d/4597-1-insostenibile-imprescrittibilita-del-reato-la-corte-d-appello-di-milano-mette-la-giurisprudenza-); BIN, ‘Taricco, una sentenza sbagliata: come venirne fuori?’, July 4th 2016, pp. 3-4, available at: <<http://www.penalecontemporaneo.it/d/4861-taricco-una-sentenza-sbagliata-come-venirne-fuori>>

⁹⁶ For an in-depth description of the ways the principle operates, see BOUTAYEB, *Droit institutionnel de l’Union Européenne. Institutions, ordre juridique, contentieux*, pp. 532-557; SICURELLA, *Linee guida*, pp. 40 et seq. On the possibility to identify four phases in the application of the principle, see STORELLI, *Diritto penale comunitario. Profili sostanziali, processuali, collaborazione investigative e giudiziaria*, pp. 32 et seq.

⁹⁷ On the two effects of the *primauté* principle on national law, see RIZ, ‘Il diritto penale transfrontaliero e il rilevante contributo dato da Hans-Heinrich Jescheck’, in FOFFANI (ed.), *Diritto penale comparato, europeo e internazionale: prospettive per il XXI secolo. Omaggio a Hans-Heinrich Jescheck per il 92° compleanno*, Milano, 2006, pp. 26-32; 39-40.

⁹⁸ On this interpretation, see LUPO, ‘Introduzione al convegno’, in *Atti del convegno “Aspettando la Corte Costituzionale. Il caso Taricco e i rapporti tra diritto penale e diritto europeo”*, Rivista AIC (Associazione Italiana Costituzionalisti), 2016, n. 4, p. 6. In this instance, Luo recalls the *Melloni* case as the one which had already restricted the rights of the accused with reference to the Spanish legal system.

be damaged the most, in comparison to the other: the financial interests have to be ensured an effective protection against all affecting conducts, and this can only be achieved when the national proceedings are structured in a way as to impede the impunity for a crime. The innovative result of the case is therefore not the mere confirmation of a principle which was already part of Union law, but the possibility that the application of the *primauté* principle might bring about the imposition of a more severe regime on the accused, for the reason that the crime he has committed affects an interest of the Union.

3.3.3.3. The Negative Effect on the Rights of the Accused

Before the *Taricco* case, the relationship between the national and the supranational courts was usually intended as one of cooperation aimed at the achievement of a common goal, i.e. ensuring the correct application of Union law throughout the European territory. After the judgement, by formulating the *primauté* principle in more radical terms than it had been in the past, the connection between the courts appears to have changed. A hierarchical structure is set up, where Union law sits at the top and the national judge is in a lower position compared to the Court of Justice. Indeed, the implication of the principle enshrined in the *Taricco* case is that there is a core set of Union law rules – that is to say, those imposing the duty to adopt effective measures aimed at the fight against fraud – which are to be preferred to any other provision, even when the latter is a fundamental principle underpinning the rights of the accused in criminal proceedings⁹⁹. It is the clash between those set of rules, exemplified by the conflict between Article 49 CFR and Article 325 TFEU in particular, that is perceived as the core of the judgement. The Court denies the substantive nature of the limitation periods, thus finding that a disapplication of provisions of that kind would not entail an infringement of the rights of the accused¹⁰⁰. Yet, notwithstanding the irregular

⁹⁹ On the arguably harsh position of the Court, see PEERS, ‘The Italian Job: the CJEU strengthens criminal law protection of the EU’s finances’; BILLIS, ‘The European Court of Justice: a ‘Quasi-Constitutional Court’ in Criminal Matters? The Taricco Judgment and Its Shortcomings’, pp. 22 et seq.; BIN, ‘Taricco, una sentenza sbagliata: come venirne fuori?’.

¹⁰⁰ Case C-105/14, *Taricco and Others*, para. 55.

and unconventional evolution in the application of those provisions, the *ratio* of the rules on limitation periods is to protect the accused before and during the proceedings. Their disapplication would constitute a violation of the principle of the reasonable length of the proceedings, and it would also materialise an infringement of the *nullum crimen nulla poena sine lege* principle¹⁰¹. The elimination of those rules would therefore be undeniably counterproductive for the fairness of the proceedings, especially because of the severity of criminal penalties.

The rights of the individual lose in the battle with the rules protecting the financial interests of the Union, due to the absence of any reference to a method which would warrant the protection of those rights when the judge calls for the disapplication of a national provision.

However, it is interesting to remark that this ruling of the Court appears to be in line with previous ones. As a matter of fact, the *Melloni* judgement¹⁰² can now be recognised as a leading case in which the Court proved unwilling to allow the application of higher guarantees to the rights of the individual than those which emerged from Union law, insofar as the application of the former would have brought about a potential infringement of European law principles. Therefore, it should not surprise that the Court once again opted for an interpretation of the *primauté* principle that had this result in the *Taricco* case¹⁰³.

Furthermore, it might be of interest to recall that the Court is not against the issuing of radical decisions concerning the fundamental rights of the accused when the upside would be a stronger protection of one of its main interests. In a similar fashion to the *Taricco* case, the Court had decided against the application of the principle of the more lenient provision – a rule embraced both by primary law and

¹⁰¹ This would become the main reason why the Italian Constitutional Court would refer a new preliminary ruling question to the Court. On this topic, see paragraph 3.4.

¹⁰² COURT OF JUSTICE OF THE EUROPEAN UNION, February 26th 2013, case C-399/11, *Stefano Melloni v Ministero Fiscal (Melloni)*. See also the commentary to the case in: RUGGERI, ‘La Corte di giustizia e il bilanciamento mancato (a margine della sentenza Melloni)’, *Il Diritto dell’Unione Europea*, vol. 2, 2013, pp. 399 et seq.; DE AMICIS, ‘All’incrocio tra diritti fondamentali, mandato d’arresto europeo e decisioni contumaciali: la Corte di Giustizia e il caso Melloni. Un commento a margine della sentenza Melloni della Corte di Giustizia’, June 7th 2013. Available at: <<https://www.penalecontemporaneo.it/upload/1370462158DE%20AMICIS%202013a.pdf>>

¹⁰³ LUPU, ‘Introduzione al convegno’, Atti del convegno “Aspettando la Corte Costituzionale. Il caso Taricco e i rapporti tra diritto penale e diritto europeo”, *Rivista AIC (Associazione Italiana Costituzionalisti)*, 2016, n. 4, p. 6; CUPELLI, ‘Il caso Taricco e i controlimiti della riserva di legge in materia penale’, July 18th 2016, p. 3, available at: <<http://www.rivistaaic.it/il-caso-taricco-e-il-controlimite-della-riserva-di-legge-in-materia-penale.html>>

by the case-law of the Court of Justice – in the *Niselli* case¹⁰⁴. This regarded the possible application of a national criminal law provision which had been abolished at the time of the proceedings, yet was in force at the time of the commission of the crime. In that instance, the Court had ruled that, at the time of the facts, ‘they could constitute offences under criminal law’. By the formulation of this sentence it could easily be inferred that the conduct might be punished by the national court even though it did not constitute a crime at the time of the ruling. This interpretation would represent a violation of the general criminal law principle of the *lex mitior*, as it would imply an *in malam partem* retroactive application of criminal law rules¹⁰⁵. The criticism against the *Niselli* case, nonetheless, would not have been correctly addressed at the decision in the *Taricco* case, in the view of the Court of Justice, due to the procedural character of the provisions on limitation periods. As a consequence, a rule which governs the proceedings and does not exert any influence on the rights of the accused might be disapplied so as to result in the application of a less positive regime to the accused. It derives that, if the rules on limitation periods were interpreted as substantive criminal law provisions, the judgement of the Court would confer on the national judge the power to impose a more severe penal regime on the accused than the one provided for by national criminal law. The choice of the Court, inspired by the necessity to protect its financial interests, unsettled the Italian courts, to the point that a new preliminary ruling question on the matter was referred to the Court of Justice.

¹⁰⁴ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, November 11th 2004, case C-457/02, *Niselli*. Yet, on this topic, see also COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, May 3rd 2005, joined cases C-387/02, C-391/02, C-403/02, *Berlusconi and Others*; SOTIS, *Diritto*, pp. 109 et seq.; TACCONI, ‘Casenote – Berlusconi at the European Court of Justice – C-387/02’, *German Law Journal*, vol. 07, n. 03, pp. 316 et seq.

¹⁰⁵ On the issues arising from the disapplication of national law *in bonam partem* and *in malam partem*, see RICCARDI, ‘Obblighi di disapplicazione *in malam partem* di fonte euro unitaria tra limiti di attribuzione ‘internazionale’ e controlimiti ‘costituzionali’’, October 4th 2016, in *Atti del convegno ‘Aspettando la Corte Costituzionale. Il caso Taricco e i rapporti tra diritto penale e diritto europeo’*, *Rivista AIC*, n. 4, 2016 <<http://www.rivistaaic.it/atti-del-convegno-aspettando-la-corte-costituzionale-il-caso-taricco-e-i-rapporti-tra-diritto-penale-e-diritto-europeo.html>>

3.4. The *Taricco-bis* Case: Facts and Questions Referred to the Court of Justice

The *Taricco* case fuelled a series of complex arguments in the Italian courts¹⁰⁶. After the CJEU issued its ruling, the Italian Corte di Cassazione (Court of Cassation) and Corte di Appello di Milano (Court of Appeal, Milan) were asked to decide on the matter. Since one of the main points of the *Taricco* case clarified that it lies in the discretion of the national courts to discern when to disapply a national provision due to its non-compliance with Union law, a preliminary step, before a final judgement on the facts could be issued, was to complete this task. The Corte di Cassazione based its first ruling¹⁰⁷ on the CJEU case-law, by finding that Articles 160 and 161 of the Italian Penal Code could not be applied since they allowed the impunity of the perpetrator in a relevant number of cases. On the other hand, the Corte di Appello di Milano referred¹⁰⁸ the case to the Corte Costituzionale (Italian Constitutional Court) asking whether the implementation of the TFEU was to be deemed compliant with the Italian Constitution, given that Article 325 paras. 1 and 2 of the TFEU brought about the disapplication of the above-mentioned national provisions. While a second confirmation of the rules on disapplication of national provisions enshrined in the *Taricco* case came by the Cassazione in a later

¹⁰⁶ On the variety of the interpretations followed by the Italian national courts and on the connection between the rule of law in criminal matters and the principle of the separation of powers, see CUPELLI, 'Il caso Taricco e i controlimiti della riserva di legge in materia penale', pp. 4-5.

¹⁰⁷ CASS. TERZA SEZ. PENALE, judgement of September 15th 2015, n. 2210. For a commentary to the judgement, see ROSSI, 'La Cassazione disapplica gli artt. 160 e 161 c.p. dopo la sentenza Taricco', *Giur. It.*, 2016, n. 4, pp. 965 et seq.

¹⁰⁸ CORTE DI APPELLO DI MILANO SECONDA SEZ. PENALE, order of September 21st 2015, n. 339. For a commentary to the order, see VIGANÒ, 'Prescrizione e reati lesivi degli interessi finanziari dell'UE: la Corte d'Appello di Milano sollecita la Corte Costituzionale ad azionare i "controlimiti"', September 21st 2015. Available at: <<http://www.penalecontemporaneo.it/d/4149-prescrizione-e-reati-lesivi-degli-interessi-finanziari-dell-ue-la-corte-d-appello-di-milano-sollec>>; FARAGUNA, PERINI, 'L'insostenibile imprescrittibilità del reato. La corte d'appello di Milano mette la giurisprudenza "Taricco" alla prova dei controlimiti', March 30th 2016. Available at: <<http://www.penalecontemporaneo.it/d/4597-l-insostenibile-imprescrittibilita-del-reato-la-corte-d-appello-di-milano-mette-la-giurisprudenza->>

judgement¹⁰⁹, a different section of the same Court once again referred its case to the Corte Costituzionale in two different instances¹¹⁰.

The Corte Costituzionale, when asked whether the disapplication of the Italian provisions on limitation periods would be compatible with the fundamental principles of the Italian Constitution¹¹¹, expressed doubts on the compliance of this action with the *nullum crime nulla poena sine lege* principle¹¹², as enshrined in Article 25(2) of the Italian Constitution, Article 49(1) of the CFR and Article 7 of the ECHR. Putting an end to the debate whether those national rules must be attributed a substantive or a procedural character – as a matter of fact, only if they belonged to substantive criminal law, they would be required to comply with Article 25(2) of the Italian Constitution –, the Constitutional Court maintained that Articles 160 and 161 of the Italian Penal Code have a substantive nature, since they have to be taken into account in order to identify the instances when the perpetrator can be punished. Therefore, they must be ‘established by provisions that are precise and

¹⁰⁹ CASS. QUARTA SEZ. PENALE, judgement of January 25th 2016, n. 7914/16. For a commentary to the judgement, see GALLUCCIO, ‘La Cassazione di nuovo alle prese con Taricco: una sentenza cauta, in attesa della pronuncia della Corte Costituzionale’, March 3rd 2016. Available at: <<https://www.penalecontemporaneo.it/d/4512-la-cassazione-di-nuovo-alle-prese-con-taricco-una-sentenza-cauta-in-attesa-della-pronuncia-della-co>>

¹¹⁰ CASS. TERZA SEZ. PENALE, order of March 30th 2016, n. 28346/16; CASS. TERZA SEZ. PENALE, order of August 1st 2016, n. 2/2016.

¹¹¹ The provisions mentioned by the national courts contesting the legality of the disapplication were Articles 3 (equality principle), 11 (limitations applied to sovereignty following the signature of the Treaties), 27(3) (function of the criminal penalty), 25(2) (*nullum crimen nulla poena sine lege* principle), 111(2) (fairness and reasonable length of the proceedings) of the Italian Constitution. Regarding the supposed violation of the articles, see MANES, ‘La “svolta” Taricco e la potenziale “sovversione di sistema”: le ragioni dei controlimiti’, pp. 20 et seq.

¹¹² CORTE COST., order of November 23rd 2016, n. 24/17, para. 3. On this topic, see also: CALVANO, ‘Una questione pregiudiziale al quadrato... O forse al cubo: sull’ordinanza n. 24/2017 della Corte Costituzionale’, *Diritti Umani e Diritto Internazionale*, n. 1, 2017, pp. 301-307; CELOTTO, ‘Caso Taricco: un rinvio pregiudiziale “muscoloso” e costruttivo (una prima lettura sulla ord. N. 24 del 2017 della corte costituzionale)’, *giustamm.it*, n. 2, 2017, available at: <<https://www.giustamm.it/ga/id/2017/2/5377/d>>; DANIELE, ‘La sentenza Taricco torna davanti alla Corte di Giustizia UE: come decideranno i giudici europei?’, in BERNARDI, CUPELLI (eds.), *Il caso Taricco e il dialogo tra le corti. L’ordinanza 24/2017 della Corte Costituzionale*, Napoli, 2017; FAGGIANI, ‘Lo strategico rinvio pregiudiziale della Corte Costituzionale sul caso Taricco’, *Osservatorio costituzionale*, n. 1, 2017, available at: <<http://www.osservatorioaic.it/lo-strategico-rinvio-pregiudiziale-della-corte-costituzionale-sul-caso-taricco.html>>; MANES, ‘La Corte muove e, in tre mosse, dà scacco a “Taricco”’. Note minime all’ordinanza della Corte Costituzionale n. 24 del 2017’, 2017, available at: <https://www.penalecontemporaneo.it/upload/MANES_2017a.pdf>; VIGANÒ, ‘Le parole e i silenzi. Osservazioni sull’ordinanza n. 24/2017 della Corte Costituzionale sul caso Taricco’, March 27th 2017, available at: <<http://www.penalecontemporaneo.it/upload/taricco%20dpc%202017.pdf>>; AMALFITANO, ‘La vicenda Taricco nuovamente al vaglio della Corte di Giustizia: qualche breve riflessione a caldo’, January 29th 2017, available at: <<http://rivista.eurojus.it/la-vicenda-taricco-nuovamente-al-vaglio-della-corte-di-giustizia-qualche-breve-riflessione-a-caldo/>>

are in force at the time when the offence in question was committed'¹¹³. In the same way, the rules expressed in the *Taricco* case – which imply that a penalty could be imposed in cases when the exclusive application of the Italian provisions would result in the impunity of the accused –, must comply with Article 25(2) of the Italian Constitution. Indeed, the individual cannot be punished for a conduct which he or she reasonably assumed that it would not constitute a crime, nor 'a harsher regime of dealing with offences'¹¹⁴ could be retroactively imposed. Thus, it would constitute an infringement of the principle of legality and of the requirement of 'determination'¹¹⁵ to impose a particular penalty which, on the basis of Italian substantive criminal law, would have not otherwise been applied. The Italian Constitutional Court specified that this would require the process of disapplication of the national provisions to meet a requirement of foreseeability.

A second doubt put forward by the referring court concerned the delimitation of the discretionary power of the national courts in disapplying national provisions. The *Taricco* case had not identified any clear limits to this discretion, thus provoking worry with regard to the principle of separation of powers¹¹⁶. The Court of Justice had merely stated on paragraph 58 of the *Taricco* case that the disapplication of national provisions might be chosen when those national rules prevented 'the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union'. No specific criteria for the interpretation of the expression 'significant number' was otherwise provided by the CJEU. It could be argued that, in the Italian legal system, where the case-law of the national courts is not to be intended as a source of law, the judgement had implicitly attributed to the Italian judges a law-making function, which could have been exerted thanks to the prerogative of the disapplication of an uncertain number of criminal law provisions. The only apparent limit to this discretion would be the compliance with the overriding principles of

¹¹³ COURT OF JUSTICE OF THE EUROPEAN UNION, December 5th 2017, case C-42/17, *M.A.S., M.B.*, para. 14.

¹¹⁴ Opinion of Advocate General Bot in case C-42/17, *M.A.S., M.B.*, para. 36.

¹¹⁵ CORTE COST., order n. 24/17, para. 5; Case C-42/17, *M.A.S., M.B.*, para. 15.

¹¹⁶ On this topic, see CUPELLI, 'Il problema della legalità penale. Segnali in controtendenza sulla crisi della riserva di legge', *Giur. Cost.*, 2015, pp. 196 et seq.; CUPELLI, 'Il caso Taricco e i controlimiti della riserva di legge in materia penale', p. 5; MANES, 'La "svolta" Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti', p. 16.

national constitutional law¹¹⁷, and the fundamental rights of the defendant¹¹⁸ which, pursuant to Article 53 of the CFR, would be ensured a higher level of protection by Italian law than the one granted by Article 49(1) CFR and 7 ECHR¹¹⁹. Moreover, the only corollary of the principle of legality tackled by the CJEU had been the non-retroactivity of criminal provisions. No reference was made to the requirement of sufficient precision of the rules on criminal liability, even though the Constitutional Court pointed out that it undeniably belongs to the constitutional traditions common to the Member States, it is to be found in the system of protection constructed by the ECHR, and it is a general principle of EU law¹²⁰. Therefore, since Article 325 TFEU in the interpretation expressed in the *Taricco* case confers on the national judge a power which, when exerted, would infringe the principle of legality and legal certainty, there would be a clash between that provision and Article 49 CFR.

Thus, the Constitutional Court requested the Court of Justice a clarification on the meaning of Article 325 TFEU, so as to allow for its application by the national judge within the limits of the overriding principles of the national legal system. In particular, the referring judge asked whether the application of the first two paragraphs of Article 325 TFEU could entail the disapplication of national criminal law provisions ‘even where there is no sufficiently precise legal basis for such disapplication’. The Constitutional Court also asked whether the Treaty provision had to be interpreted ‘as requiring the criminal court to disapply national legislation on limitation periods [...] even where, in the legal system of the Member State concerned, [they] form part of substantive criminal law and are subject to the principle of the legality of criminal proceedings’. Lastly, it was asked whether the interpretation provided for in the *Taricco* case had to be intended ‘as requiring the criminal court to disapply national legislation on limitation periods [...] even where such disapplication is at variance with the overriding principles of the constitution

¹¹⁷ CORTE COST., order n. 24/17, para. 6.

¹¹⁸ Case C-105/14, *Taricco and Others*, paras. 53 et seq.; CORTE COST., order n. 24/17, para. 7; Case C-42/17, *M.A.S., M.B.*, para. 18.

¹¹⁹ CORTE COST., order n. 24/17, para. 8.

¹²⁰ CORTE COST., order n. 24/17, para. 9; Case C-42/17, *M.A.S., M.B.*, para. 19; COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, December 12th 1996, joined cases C-74/95 and C-129/95, *Criminal Proceedings Against X*.

of the Member State concerned or with the inalienable rights of the individual conferred by the constitution of the Member State’.

3.4.1. The Ruling of the Court and the Innovations Concerning the Protection of the Financial Interests of the Union

The relevance of the case was evident, as, once the doubts on the application of Article 325 TFEU had been dispelled, the Italian Constitutional Court could have immediately referred the case on the legality of the disapplication of national provisions on limitation periods back to the Corte di Cassazione and Corte d’Appello. The Court of Justice did not contest the relevance of the case, instead it allowed for the case to be dealt with under the accelerated procedure¹²¹.

The Court proceeded to deliver an answer¹²² to the three questions put forward by the national court at once, providing for a clarification on the obligations set in Article 325 TFEU, as the Union law provision imposing on the Member States the duty to adopt all the measures necessary for an effective fight of the fraud affecting the financial interests of the Union. The first and the second question were re-formulated by the CJEU before proceeding to their analysis, thus identifying the focus of the national court in whether the duties enshrined in the first two paragraphs¹²³ of Article 325 TFEU had to be complied with even when that would imply an infringement of the *nullum crimen nulla poena sine lege* principle ‘because of the lack of precision of the applicable law or because of the retroactive application of that law’¹²⁴. In this specific instance, the duties expressed by the Articles had to be intended as the obligation to impose effective and deterrent criminal penalties aimed at preventing the commission of VAT frauds¹²⁵.

¹²¹ This procedure can be allowed only when the nature of the case and exceptional circumstances require it to be handled quickly. See Article 23a of the Statute of the Court of Justice of the European Union and Article 105(1) of the Rules of Procedure of the Court.

¹²² The Court tackles the first two questions and, in that instance, manages to provide a complete answer also to the third one, from paragraph 29 to 62 of the judgement.

¹²³ Paragraph 1 imposes the duty to adopt ‘effective and deterrent measures’ for the fight against fraud, while paragraph 2 states the principle of assimilation.

¹²⁴ Case C-42/17, *M.A.S., M.B.*, para. 29.

¹²⁵ Case C-42/17, *M.A.S., M.B.*, paras. 34-35.

The Court went on to specify the principle expressed in the *Taricco* case, thus answering to the third question referred by the national judge. Indeed, it is to the national legislator to ‘ensure that the national rules on limitation in criminal matters do not lead to impunity in a significant number of cases of serious VAT fraud, or are more severe for accused persons in cases of fraud affecting the financial interests of the Member State concerned than in those affecting the financial interests of the European Union’¹²⁶. The Court, however, agrees with the *Taricco* judgement in denying the substantive nature of limitation periods, since it is evident that the extension of a limitation period does not ‘in principle, infringe the principle that offences and penalties must be defined by law’¹²⁷. It is nonetheless necessary to avoid that this could result in an infringement of the rights of the accused – i.e. the principle of legality and the main corollaries of foreseeability, precision and non-retroactivity¹²⁸ –, even when those provide for different standards than the ones deriving from the CFR and Union law.

The original interpretation put forward by the Court in this instance is in a particular delimitation introduced with reference to the duty to disapply national provisions. As a matter of fact, the obligation expressed in the *Taricco* case had caused a series of issues in the national context, because of its apparent clash with the principle of legality and of the separation of powers that the courts had unsuccessfully attempted at resolving. The CJEU in the *Taricco-bis* case acknowledged the existence of a ‘situation of uncertainty [...] as regards the determination of the applicable limitation rules’¹²⁹, thus denying the existence of an obligation to disapply national provisions when that would be the result.

Furthermore, the CJEU tackled the issue of the specific disapplication of provisions concerning limitation periods: it confirmed the opinion of the Italian Constitutional Court, since their disapplication would have determined an infringement of the principle of foreseeability – among others –, given that it would have implied the *in malam partem* retroactive application of a criminal law rule,

¹²⁶ Case C-42/17, *M.A.S., M.B.*, para. 41.

¹²⁷ Case C-42/17, *M.A.S., M.B.*, para. 42 and case C-105/14, *Taricco and Others*, para. 57.

¹²⁸ See Articles 49 and 51(1) CFR, and 7(1) ECHR in combination with 52(3) CFR, as well as the description provided for in case C-42/17, *M.A.S., M.B.*, paras. 52 et seq. and COURT OF JUSTICE OF THE EUROPEAN UNION, March 29th 2012, case C-500/10, *Belvedere Costruzioni*, para. 23.

¹²⁹ Case C-42/17, *M.A.S., M.B.*, para. 59.

that is to say the imposition of a penalty to someone who had perpetrated the crime at a time when he could not assume he would have been punished¹³⁰.

Lastly, the CJEU referred to the corollary of the principle of legality which imposes offences and penalties to be defined by law. If the disapplication might clash with the principle, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied¹³¹, the national court would not be compelled to fulfil the obligation. On the other hand, the national legislator would be asked to take the ‘necessary measures’¹³².

The *Taricco-bis* case is therefore fundamental in that it clarifies the obligation imposed in the *Taricco* case. The duty to disapply the national provisions in contrast with Union law is hereby given a delimitation with the identification of the cases when the disapplication would cease to be compulsory, namely the instances when the principles of foreseeability, precision and non-retroactivity of criminal law would risk to be infringed.

The point of view of the Court is nonetheless similar to the one emerging from the previous case. Indeed, the influence that this judgement will be able to exert on the autonomy of national courts has an impact on the way the CJEU is going to be perceived, no more an administrative judge, but a constitutional one¹³³. This point of view is also confirmed by the role conferred on the primary law provisions, now constitutional rules¹³⁴ arguably placed on a higher hierarchical level than national constitutional norms.

It should be remarked that this latest judgement of the Court never denies the issues which had been at the core of the *Taricco* case: the recognition of Article 325 TFEU as main provision on which the measures taken in the field of the fight against fraud shall be based. On the contrary, from the lack of a debate on the matter

¹³⁰ Case C-42/17, *M.A.S., M.B.*, para. 60.

¹³¹ COURT OF JUSTICE OF THE EUROPEAN UNION, July 10th 2014, *Impresa Pizzarotti*, case C-213/13, paras. 58-59.

¹³² Case C-42/17, *M.A.S., M.B.*, paras. 41, 42 and 61.

¹³³ ROSSI, ‘A New Inter-Institutional Balance: Supranational vs. Intergovernmental Method After the Lisbon Treaty’, in *Global Jean Monnet - ECSA WORLD Conference. The European Union after the Treaty of Lisbon, 25-26 May 2010, Brussels*, p. 10.

¹³⁴ On the identification of the Treaties with a constitution, see BIN, ‘Aspettando Godot, leggiamo Yves Bot’, November 20th 2017. Available at: <<https://www.penalecontemporaneo.it/d/5722-taricco-aspettando-godot-leggiamo-yves-bot>>

it could be inferred that the acknowledgement acted in the previous case must be taken as undisputable confirmation for any future reference.

CONCLUSIONS

What transpires from the analysis that has been carried out up until this point is the general consideration of the aspects that are central as far as the protection of the budget of the Union is concerned.

It is clear that the full efficiency in achieving the highest possible level of defence of those financial interests has to go hand in hand with the creation of a European criminal law system. Indeed, until there will not be such a thing as a set of general rules repurposed in a way as to build a clear framework for the fight against conducts affecting the interests of the Union, that level of defence could not become a reality. Yet, the history of European criminal law proves that this aim has only recently become the reason underlying the attempts at reform of the legal system of the EU.

In the past, the interventions tackled single issues which had been found in dire need of a regulation. As a consequence, many were the sanctions introduced, besides general prohibitions of conducts. These two ways of dealing with crime converged in the Regulation and the Convention, where the focus is indeed represented by definitions of sanctionable acts and enumeration of applicable penalties. It appeared that a framework, while potentially desired by the legislator, could not be seen as attainable.

However, once the first provisions of procedural law were introduced, and the idea of the establishment of a European public prosecutor was clearly defined, the creation of a general system of criminal law became a more alluring concept. The evolution of crime had resulted in the spread of conducts which were not contained within a single State any more, thus proving that only an office capable to exert its power throughout the territory of the Union could have efficiently tackled the prosecution of those offences. This implied that the criminal law which he would have applied had to transcend the existing borders. At least since the adoption of the Green Paper of 2001, therefore, one of the main drives in the action of the European legislator has been the goal to create a foundation for the work of

a future European prosecutor. Furthermore, since the most impactful crimes were those fraudulent conducts that harmed the budget of the Union, a large part of that *in nuce* system had to be dedicated to crimes affecting the financial interests of the Union. The action of the European legislator was, as a consequence, channelled into the creation of a criminal law which had at its core the fight against fraud, arguably its very reason of being.

The creation of a framework would have been unattainable, however, without a set of rules on which it could hinge. A second aspect to be considered is, therefore, the selection of the main provision founding the part of the criminal law system concerning the fight against fraud. On this point, the debate has spanned decades, until the CJEU in the *Taricco* case settled on Article 325 TFEU. This primary law provision finds its origin in Article 280 TEC, which already had the function to enumerate the obligations on the Communities and the Member States in the field of the fight against fraud. Its recognition by the CJEU, however, came in a moment when Article 83 TFEU had introduced a criminal law competence of the Union in that same field. Therefore, the choice of Article 325 TFEU is a testament to the intention to proceed in line with the tradition of the Communities, founded on the cooperation between the supranational entity and the national governments, and the recognition upon the Member States in regard to the selection of the best means to ensure the protection of an interest. The other issues tackled by the CJEU in the *Taricco* case, as a matter of fact, do not deny this general concept.

It was nonetheless a consequence of that case the definition of the *primauté* principle under a different light, which was deemed peculiarly dangerous by the Italian courts involved in that instance. An aspect which needs to be kept in mind when dealing with European criminal law and the field of the fight against fraud is the delicate balance between the conservation of the national identities and the need for the supranational entity to carry out effective policy actions in that field. Both elements are the reason for the existence of the principles of subsidiarity, conferral and proportionality in primary law. The progressive strengthening of the role of the Union is, nevertheless, a further detail characterising the developments of the criminal law aimed at the financial interests of the Union.

A final aspect deserves to be kept in mind, that is to say the enlargement of the European definition of fraud, and the concurrent introduction of fraud-related offences in the Directive. It is a clear consequence of the other above-mentioned elements, in particular the need to build a framework in order to more efficiently combat fraud. It is also explained by pointing out that the main legal acts in this field, namely the PFI Convention and the Directive, can only oblige the Member States in wider terms, while the rules detailing the regulation of the matter must be adopted by the national legislators.

The reality displaying a combination of these aspects is one where the chaos is only apparent and contingent, and it originates from the overlapping of legal acts in the past decades. Nonetheless, the adoption of this number of acts is to be related to the constant development of the Union, as an entity striving to achieve its main objective, that is to say the harmonisation of the national legislations of its Member States to the extent that, in the fields where the Union has a law-making competence, there would be complete homogeneity of regimes. Thus, an overview of the regulation in this context would prove the undisputable coherence of the *ratio* underlying the different acts of the Union. It could be argued that when a stringent regime is replaced by a more lenient one, the explanation would lie in a new interpretation of the traditional core objectives of the Union, or their adaptation to some specific innovation that had occurred in modern society.

In the field of the fight against fraud, this objective would be the creation of a framework with the widest possible applicability. Those acts are nevertheless susceptible to change and innovation, because of the necessity to attain the most efficient protection of the financial interests of the Union. As a matter of fact, the framework as it appears today, while remarkable in its achievements, is also evidently far from being definitely set. Indeed, a series of modifications can be expected.

The *Taricco-bis* case is a testament to this constant evolution of the framework. In the previous case, the CJEU had re-defined the duty of disapplication of national rules when incompatible with a primary law rule such as Article 325 TFEU. In the context of the new judgement, however, the Court had allowed the national judge to avoid the disapplication, when it would entail a situation of

uncertainty in the application of national law. An originally radical position was thus softened because of the recognition of the need to guarantee a certain level of discretion to the national judges, while also complying with the principle of legality.

On the other hand, as already mentioned, the Directive is proof of the increasing importance that the financial interests of the Union and their protection by means of criminal law have been acquiring. It is a fundamental instrument and piece of evidence in such a context, yet it is not the only main reform which has been carried out by the Union. At this point, at least the regulation of October 12th 2017 establishing the European Public Prosecutor's Office should be recalled. However, none of these two legal acts, even though they provide a temporarily exhaustive response to the need for a first attempt at a framework for the fight against fraud, are going to represent the last instance in which the substantive and procedural criminal law aimed at the protection of the financial interests of the Union is dealt with.

In particular, as far as the Directive is concerned, already a series of qualms have been identified by scholars. It is of interest that, besides the traditional difficulties in the transposition of a directive in the national legal system, still the incapability of a European act to provide for an exhaustive regulation of criminal matters is one of the aspects to be remarked¹. Therefore, the Directive might prove to be suitable for the aim to combat fraud, but without a framework acting as background for its implementation, it would not be as fruitful as expected.

Lastly, as for the role the Directive might play with regard to national legal systems, it should be recalled that the act imposes minimum rules pursuant to Article 83(2) TFEU. Thus, each national legislature would be compelled to ensure compliance with the standards therein expressed, yet they would also be allowed to provide for a higher level of protection. The Italian legal system, for one, would not be excessively impacted by the new definitions of offences, since there are evident similarities between those and the ones enshrined in the Italian Penal Code. On the other hand, the reference to serious VAT frauds in combination with the norms on criminal liability of legal persons in the Directive would entail the applicability of

¹ BASILE, 'Brevi note sulla nuova direttiva PIF. Luci e ombre del processo di integrazione UE in materia penale', December 12th 2017, *Diritto Penale Contemporaneo*, n. 12, 2017, pp. 71-73.

criminal sanctions to legal persons for the commission of VAT frauds². Italian legislation does not yet include a regime of this kind³; on the contrary, it has often been argued that its establishment would have been unreasonable due to the peculiarities of tax crimes. Those remarks can now be refused because of the provisions enshrined in the Directive, even if only insofar as VAT frauds are concerned. Therefore, it could be assumed that a future debate in the field would not regard the introduction of criminal offences and penalties, but it would instead hinge on the compliance of the new norms with the *ne bis in idem* and *ultima ratio* principles.

² On this topic, see RONCO, 'Frodi 'gravi' IVA e tutela degli interessi finanziari dell'Unione Europea: quali ricadute nell'ordinamento interno alla luce della Direttiva 2017/1371 del 5 luglio 2017?', *Archivio Penale* 2017, n. 3, pp. 8-9.

³ On the debate concerning the liability of legal persons for tax crimes, see BELLACOSA, 'La riforma dei reati tributari nella prospettiva europea', in DEL VECCHIO, SEVERINO (eds.), *Tutela degli investimenti tra integrazione dei mercati e concorrenza di ordinamenti*, pp. 370-371.

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