Towards a European Criminal Law Code?

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The creation of a European criminal law code is a complex and, to a certain extent unpopular issue. It is complex because it suggests harmonisation of national substantial and procedural criminal law systems and unpopular amongst Member States because indeed harmonisation of criminal law is utterly sensitive, displaying one of the last corners of Member States' sovereignty.

The Lisbon Treaty has provided the European Union (EU) with new competences in the area of judicial cooperation in criminal matters and law enforcement cooperation as this area has now become an area of shared competences with the Member States. Two important questions arise from these new competences. First, does the Treaty on the Functioning of the European Union (TFEU) provide the means for further harmonisation? Second, will this harmonisation lead legislators to create a European Criminal Code and a European Criminal Procedural Code? This article will discuss the issue of harmonisation and then provide elements of answer to the second question through the angle of the possible setting up of a European Public Prosecutor's Office.

Harmonisation[1] of criminal law in the European Union

It is important to stress that the Lisbon Treaty is not the first fundamental legislation providing the possibility to harmonise substantial criminal law. Indeed, all multi-annual programmes (Tampere 1999, The Hague 2004, Stockholm 2009) and the former treaty on the European Union, as amended by the Treaty of Amsterdam, already provided for this possibility and/or objective.

Formally, only substantial harmonisation was possible and only in three particular crime areas: terrorism, organised crime and illicit drug trafficking[2]. No detailed criteria were set out to explain or design a strategic direction to a future harmonisation policy in the area of criminal law. In practice, however, the limitation to substantive law and to these three specific criminal areas was not respected by the Member States. Between 2002 and 2010, at least nine harmonisation instruments were adopted over and above those mentioned above but were also reflected in procedural criminal law[3]. Therefore, it is fair to say that the text of the treaty was not followed strictly. Why was it so? The answer is probably because more crime areas than those officially mentioned deserved attention at a European Union level.

The effect of the various framework decisions adopted[4] was mixed: with framework decisions being obligatory as far as their aims are concerned, all common definitions and penalty ranges adopted had to/should be transposed into national law of all Member States. Those provisions cover an important number of areas. On the other hand, many common standards were felt to be rather non-innovative[5] or were not implemented in a satisfactory way.

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Harmonisation of specific elements of procedural criminal law and of definitions and penalties for a limited number of particularly serious crimes is, since the entry into force of the Lisbon Treaty, detailed in Article 82.2 [procedural law] and in Article 83.1 [substantial law] of the TFEU[6]. Those harmonisation instruments will be adopted in the forms of directives. Unlike regulations, directives are not immediately applicable into the national legal orders, they should indeed be transposed by each Member State, which could leave some flexibility to the Member States in this particular area.

From a 'no criterion' situation before Lisbon we have clearly entered into a new era; namely, an attempt to explain the harmonisation purposes of substantial criminal law:

> 'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas **of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis**. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime[7].'

However, this leaves the sets of criteria referred to above essentially undefined:

a. what are the 'minimum rules concerning the definition of criminal offences and sanctions';
b. the crimes concerned by harmonisation should have (a) a cross-border dimension, (b) a nature, (c) an impact which lead the relevant authorities to propose harmonisation measures or (d) there should be a special need to combat those crimes on a common basis;
c. only 'particularly serious crimes' can be harmonised.

> The phrasing used in Article 83.1 shows that the cross-border element should always exist. On the other hand, the 'nature', the 'impact' or the 'special need to combat them on a common basis' are alternative criteria. As a result, and because other serious crime areas[8] could be recognised as encompassing a cross-border element, the procedure enlarging the list of 'particularly serious crime' stated in Article 83.1 should most probably, in our view, be used in the future. This procedure is not easy to implement though since it combines unanimity of Member States and consent of the European Parliament[9].

It should also be noted that in addition to submitting only a limited number of 'particularly serious crime' areas to harmonisation, the TFEU gives the possibility to Member States to stop negotiations if 'fundamental aspects of (their) criminal justice system' are affected (Article 83.3 TFEU). As a result, a minimum of nine Member States could use enhanced cooperation to adopt those controversial harmonised rules (Article 83.3 TFEU). Nevertheless, the Lisbon Treaty has not gone as far as to propose the use of enhanced cooperation to create codes. As establishing European Codes in this sensitive area would, in our view, consist of more than a mere compilation of European laws, it does not seem likely that the treaty provisions on enhanced cooperation would be used and accommodated to adopt a European Criminal Code.

Nevertheless, will the creation of European codes in the area of criminal law be triggered by other elements and in particular by the establishment of a European Public Prosecutor's Office?

A European Public Prosecutor's Office

In 2001 already, the Commission issued a green paper on the topic and explained how this new body would function[10]. Article 86 (TFEU) allows the Member States for the first time to establish a European Public Prosecutor's Office (the Office). If created, its competence would cover crimes threatening the financial interests of the EU and then, if the European Council and European Parliament so wish[11], it could be expanded to other serious crime areas having a cross-border dimension. The Office would be operating 'from' Eurojust - terminology which continues to raise a number of questions as to the exact importance of Eurojust, as well as the Office ultimately, and also leaves the issue of the coordination of the two bodies unresolved.

In the Action Plan to the Stockholm Programme[12], the Commission foresees a Communication on this topic in 2013. It is thus somewhat surprising that a future Regulation, providing Eurojust with a new legal frame, will be issued by the Commission in 2012 and that the two questions will apparently be treated separately . This probably also gives an indication as to the caution, and thus absence of ambition, to create a potentially major piece of codification. Indeed, unless there is sufficient and demonstrable political will backing the establishment of the Office, its mandate could remain very limited and Eurojust could then just be asked to support the Office in the field of offences against the Union's financial interests.

Many questions still need to be resolve with regards to this Office. André Klip, in a seminar organised by Eurojust and the Belgian Presidency in 2010 questioned 'on the basis of which definitions should the [Office] act: the definitions of the national criminal law systems or those of the [Office]'s regulations'?[14] If it would act under definition of national laws, no central substantial criminal law code would be needed at European Union level. At most, a short version of a European Criminal Procedural Code would be adopted in order for this new body to operate within a specific legal frame, ensuring coordination with the national judiciaries. It is our view that a European criminal code and a European Procedural criminal Code would need to benefit from a wide support amongst Member States to be created. Yet, the Lisbon Treaty offers the possibility for at least nine Member States to establish enhanced cooperation. Having an Office representing the European Union's interest supported only by a minority of Member States would not, in our view, create the right conditions to launch European Codes (except, potentially, for a short European Procedural Criminal Code to regulate the Office's actions. The procedure of adoption of this code could mirror the procedure used to establish the Office, *i.e.* through enhanced cooperation). On the other hand, the extension of competence of the Office to 'serious crimes having a cross-border dimension' in the future could be instrumental to such a change. This extension does not, indeed, seem to be limited to particularly serious crime areas (as indicated above). When that stage is reached, the development of codes could, realistically, be on the agenda of the European Union.

Notes

[1] The author will use throughout this article the word 'harmonisation' rather than 'approximation'. Although approximation is the terminology mostly used in EU official documents, most specialists have recognised that both terms have the same meaning – see for instance Mitsilegas, V., *EU criminal law*, 2009. Additionally, the author believes that 'harmonisation' serves a clearer objective, 'approximation' being somehow a lukewarm terminology used in particular to soften the impression of Member States but not changing the outcome of the process.

[2] See former Article 31. 1(e) of the Treaty on the European Union.

[3] Council Framework decision concerning the standing of victims in criminal proceedings adopted on 15 March 2001 (2001/220/JHA); Council Framework Decision of 13 June 2002 (2002/475/JHA) on combating terrorism; Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA); Council Framework Decision of 22 December 2003 (2004/68/JHA) on combating the sexual exploitation of children and child pornography; Council Framework Decision of 22 July 2003 (2003/568/JHA) on combating corruption in the private sector; Council Framework Decision of 25 October 2004 (2004/757/JHA) laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking; Council Framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems; Council Framework Decision of 24 October 2008 (2008/841/JHA) on the fight against organised crime; Council Framework Decision of 28 November 2008 (2008/913/JHA) on combating certain forms and expressions of racism and xenophobia by means of criminal law.

[4] Although some other types of instruments – such as directives when the topical area 'belonged' to the first pillar- were also adopted, the normal and formal harmonisation tools under the former third pillar were indeed Framework Decisions.

[5] For instance, on the minimum provisions laid down by Framework decision 2004/757/JHA in the field of illicit drug trafficking, see Report from the Commission of 10 December 2009 COM(2009)669 final stating that Member States specialists 'regard its importance as minor because it has not resulted in many changes to national legislation'.

[6] The brackets have been added by the author.

[7] Part of this paragraph of Article 83 of the TFEU was underlined by the author.

[8] For a list of serious crime areas recognised as such, see Article 2.2 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) and the jurisdiction of Europol and Eurojust in Article 4.1 of the Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) and its Annex.

[9] Article 83.1 TFEU.

[10] Commission 11 December 2001, Green Paper, *Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, COM(2001) 715 final.

[11] A decision shall then amend Article 86.1. It will be adopted 'by unanimity by the European Council after obtaining the consent of the European Parliament and after consulting the Commission' (Article 86.4).

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Delivering an area of freedom, security and justice for Europe's citizens. Action Plan implementing the Stockholm Programme, COM(2010)171 final, 20 April 2010.

[13] The 'Proposal for a Regulation providing Eurojust with powers to initiate investigations and making Eurojust's internal structure more efficient and involving the European Parliament and national parliaments in the evaluation of Eurojust's activities' should, according to the Action Plan of the Stockholm Programme be issued by the Commission in 2012.

[14] Presidency, Eurojust and the Lisbon Treaty: Towards a more effective action. Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 September) Information by the Presidency, 17625/10 REV 1.