THE PENAL PROTECTION POSIBILITY OF THE EU'S FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW

Ph. D professor **Alexandru Boroi**
„Alexandru Ioan Cuza" Police Academy

Abstract:

The European institutions competence of imposing regulations in the field of criminal law represented a serious problem through time.

The positive effect that community right has over criminal law is represented by the obligation of the member states to apply in practice the harmonization directives which come to complete the common market and the implementation of common policies like agriculture policy. The positive effect is manifesting under the form of measures taken in the area of criminal law by the member states in fulfilling the obligations that drift from community law.

A recent decision of EU Court of Justice comes to clarify the distribution of competence between the first and the third pillar regarding criminal law area.

Regarding the guarantees offered by the community institutions, the actual situation is of a nature to cause concern. The fundament that legitimizes the adoption of criminal law measures on the level of the Member States is given by the national Constitution which stipulates the rights and fundamental liberties and democratic principles for the protection of these.

Key words: penal protection, financial interests, criminal law.

The European institutions competence of imposing regulations in the field of criminal law represented a serious problem through time.

Since the Rome Treaty to the beginning of the 70's, the EU didn't have competence regarding criminal law. The only exceptions were false statement and protecting the nuclear secret[35]. The Schengen Agreements permitted for the first time approaching this topic, but only to forbid the direct intervention of the Communities in this matter[36]. Criminal law is part of the EU competence once the EU treaty appeared and laid down "criminal cooperation" as a common interest issue (art 29 of Amsterdam Treaty")[37]. A criminal penalty is also set forth in the

[35] Art. 194, Euratom Treaty.

[36] H. Habayle, *L'application du Traite sur L'Union Europeenne*, RSC, January-March 1995, p. 34 and the following.

[37] This article stipulates that in order to accomplish the Union' objectives, especially free movement of persons, and without prejudicing the communities' competencies, the member states consider the following fields as common interest matters: fighting against drugs addiction, fighting international

Amsterdam treaty at art 31, alin.e where it is mentioned that "the mutual activities in the area of criminal cooperation aim at adopting measures regarding minimal rules that are to be applied when considering the constitutive elements of crime and the penalties that are to be applied for these" in the area of organized crime, terrorism and drug trafficking[38]. The introduction of criminal penalty in the EU competence needs further provisions.

Initially, the communities, could impose the member states the obligation to sanction certain actions, but not in the criminal law area. Therefore, the states had the obligation to take the required measures to ensure the fulfilment of the obligations from the treaty. With the passing of time, the liberty of the states has diminished. Therefore, the EU Court of Justice estimated in a ruling that the member states had "to watch that the infringement of the community law be punished by basic and procedural conditions similar to those applicable infringements of national law and to ensure that the sanction a binding proportional and discouraging feature[39]. Among other things, choosing the means by the member states started to be limited by the disposal of more and more detailed measures and by a bigger competence area from the communities.

The criminal law influence by judicial instruments started to manifest recently in two ways:

A prime aspect regarding communities influence in the criminal law area is represented by the *neutralizing effect*[40] or *negative*, which is manifested when national criminal sanctions are incompatible with community sanctions. It's about banning taking measures by the member states which can harm the community principles, or the abolition of such measures taken. Therefore, regarding the proportionality principle, the EU Court of Justice has decided that every disproportioned sanction to the nature of the committed cause represents an equivalent measure to a forbidden restrain[41]. For this reason, the fact that a citizen of a member state didn't state his presence to the police on the territory of another member state in a three days term can't be punished with a penalty privative of liberty, which would be a disproportioned penalty[42].

The positive effect that community right has over criminal law is represented by the obligation of the member states to apply in practice the harmonization directives which come to complete the common market and the implementation of common policies like agriculture policy. The positive effect is manifesting under the form of measures taken in the area of criminal law by the member states in fulfilling the obligations that drift from community law.

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fraud, criminal judicial; cooperation, police cooperation against terrorism, illicit drugs trafficking and other forms of international criminality.

[38] Veronique Robert, *La sanction penale au sein de "L'espace de liberte, de securite et de justice*", Agon no. 33, October/December 2001, p. 2.

[39] CJCE September 21st 1989, Commission e/Gerece, 68/88, Rec. CJCE, p. 2979. This measure was then introduced in art. 280 TUE.

[40] Jean Pradel, Geert Corstens, *Droit penal europeen*, Paris, Dalloz, 1999, p. 407.

[41] CJCE December 15th 1976, Donkerwolke, 41/76, Rec. CJCE 1921.

[42] CJCE July 7th 1976, Watson, 118/75, Rec. CJCE 1185.

Although EU can impose harmonization in the area of criminal right, the influence that is exercised over national legislations remains limited due to the insertion of this competence domain, at least at first sight, into the third pillar (judicial and police cooperation in criminal matter).

The inclusion of criminal right within the Maastricht, Amsterdam and Nice pacts into intergovernmental cooperation area would have profound implications regarding implementation of judicial instruments in this field of expertise. In difference from the first pillar where are domains in which the competence of the community organs is exclusive, having as features the elaboration of norms with direct applicability, in the member states as part of the judicial cooperation in criminal matter the decisional process is different. The subsidiary and proportionality principles stipulated in article 5 from EU treaty, which rules the community right in domains that are not under exclusive competence of the communities, are in connection also with judicial and police cooperation in criminal matters. In this way, Communions will act in this domain, in accordance to the subsidiary principle, unless and only the proposed measure cannot be accomplished in a satisfactorily way by the member states and can be better accomplished, in consequence, in comparison with the extent and it's effects, by the Community. In accordance to proportionality principle, an act of the Community will not exceed the necessary means for fulfilling the objectives of the treaty. Therefore, it cannot appeal to disposals of criminal right for settling certain social relations in various domains of activity only in the situation in which harming these relations has an transnational character, and resolving it based on general regulations regarding judicial cooperation is difficult and it doesn't cause effects. Also, is necessary that every other measures susceptible to be taken for settling the situation to be insufficient, imposing the adoption of criminal sanctions.

The decisional procedure as part of the judicial and police cooperation in criminal matter regards the common competence of the community institutions and the member states. The judicial instrument laid at the disposal of the community organs is the framework decision. Another judicial instrument in this area, laid this time at the disposal of the member states is the convention[43]. Both of them show inconvenience regarding the penalty of not abiding the provisions concerning the implementation of disposals which they refer to[44]. Also, the decisional procedure prescribes unanimity for the adoption of these legislative instruments, unanimity which is hard to obtain.

It is noticed, thus, a restrain of the EU action in this area through judicial instruments situated at the disposal of the communities. These instruments don't have a coercion character, couldn't be compared with the action of the member states in the area of criminal law. So, instruments like the statute or directive can't be used for dictating the member states the incrimination of any facts as

[43] According to art. 34 fron the EU Treaty, the Council, may adopt framework decisions in order to harmonize the legislation of the member states. These decisions will be compulsory for the member states but the national authorities will adopt the implementation methods.
[44] The Council may propose to the member states conventions to be adopted.

infringements of the law or to enforce criminal penalties. Though a decision of the EU Court of Justice admitted that, in certain conditions, to put such directive into operation can impose enforcement of criminal penalties[45], this decision remains isolated. In an equal meaning, some authors have qualified as disguised criminal penalties, the administrative sanctions applied within a statute[46], but this opinion is far to be embraced by the doctrine or the jurisprudence of the EU Court of Justice[47].

Article 280 TCE could serve as legislative ground to enforce criminal penalties in the community domain, but this interpretation remains uncertain, especially due to the express reference to criminal law from this article[48]. This reference restrains the community legislator competence in the criminal law area of expertise, this, having the right to incriminate in the area of criminal protection of the financial interests of the EU, but couldn't interfere in the area of applying national criminal law.

Can it be, maybe, that the criminal law is inserted totally in the third pillar, the judicial and police cooperation? Or criminal law provisions can be adopted as part of and with the support of instruments from the first pillar?

A recent decision of EU Court of Justice comes to clarify the distribution of competence between the first and the third pillar regarding criminal law area[49].

Everything started from the EU commission petition addressed to the EU Court of Justice to nullify the primal decision 2003/80/JHA from 27th of January 2003 regarding the protection of the environment through means of criminal law[50], which provides the obligation for the member states to incriminate and to punish crimes headed against the environment. The motive of this nullifying application was constituted by the legal base which served conceiving the primal decision, the constituent treaty of EU(TUE), Title VI (the judicial and police cooperation in the criminal law area). In this case, the commission sustainers that the enforcement of the provisions from the prime-decision shouldn't have been made based upon the

[45] According to CJCE January 28th 1999, alin. 36, quoted by S. Manacorda, Le droit penal et l\Union europeenne, esquise d\un systeme, RCS, 2000, p. 95. The stipulations the member states must implement in order to avoid any kind of publicity that contains certain characteristics of the cosmetic products is a crime punished with a penalty with discouraging effect.

[46] Rule no. 2988/95 December 18 1995, JOCE 1995, L312/1. See Jean Pradel, Geert Corstens, p. 494. C. Hennau-Hublet, Les sanctions en droit communauitaire; Reflexions d\un penaliste, in La justice penale et l\Europe, sous la direction de F. Tulkens et H. D. Bosly, Bruylant, Bruxelles, 1996, p. 489; for an opposite opinion see M. Delmas-Marty, Union europeene et droit penal, Cah. Droit europeene, 1997, p. 640.

[47] CJCE aff. C 240/90 27 October 1992, RFA/c Commission, C-240/90, Rec. CJCE, p. 5383.

[48] According to art. 280, par. 4, The Council may adopt the necessary measures to fight fraud that influences the financial interests of the European Communities in order to insure a equal protection for the member states.

[49] CJCE aff. C 176/03 13 September 2005, action for annulment of the framework decision 2003/80/JHA-protection of the environment.

[50] JOCE no. L29, march 5 2003, p. 55.

bylaws of the 3rd pillar[51] (Title VI TUE), but based upon the bylaws of the 1st pillar, art. 175 from the European Communities Constitutive Treaty, which stipulates the enforcement of measures on a communitarian level for the protection of the surrounding environment.

The court ruled on cancelling the decision, but not because this contained criminal law provisions, but because the legal basis was established along with the infringement of the 47 art. from the EU Constitutive Treaty[52] in a wrong way in the Title VI from the TUE, instead of the art.175 TCE.

The court decided that, although a general rule, neither the criminal law nor the criminal procedural law are in the Communities competence area, this does not stop the community legislative to enforce certain measures in the criminal law area of the Member States, when the application of some effective, proportional and discouraging penalties constitutes an essential mean in combating some serious crimes against the surrounding environment, considering them necessary for the effective implementation of the community rules established in the domain of the protection of the environment.

Although this decision was taken only regarding a certain law and a certain community policy (the environment), the Court's ruling establishes principles with a general application which do not apply only to that specific community policy, the same arguments being available regarding the other community policies, and also in the area of the four liberties (freedom of travel, freedom of goods, freedom of services and freedom of capital).

The Court's decision clearly establishes that the criminal law does not constitute a community policy, and the Communities actions in this domain is based upon the competence associated to a specific legal basis.

Thus, adequate measures can be adopted based upon the community legislation only on sectorial level and only with the condition of an obvious need to combat some certain deeds that infringe on the completion and implementation of the community legislation. Also, criminal law measures have to ensure the effective application of community policies or the proper functioning of liberties.

The Court does not make any distinction regarding the nature of the criminal law measures that have been adopted. The fundament that justifies the adaptation of criminal law measures through community is the necessity to ensure the abiding of rules and community bylaws. The necessity of adopting criminal law provisions will be established for every case each. From case to case, depending on the necessity, the level of implication of the Communities will be established in the criminal law area, giving at the same, priority to the application in the Member States of the non-criminal horizontal measures. But, where the necessity of implementation of the community legislation demands it, the freedom of the

[51] Environment protection is a community policy and the community institutions are the only ones with competencies.

[52] Art. 47 stipulates the importance of the community legislation in relation with Title VI from the constitutive treaty.

Member States to choose the applicable sanctions can be restrained, and only criminal sanctions can be applied.

Although through the community legislation the enforcement of criminal law measures can be imposed for the required purposes, this fact can be achieved only by complying with two rules: necessity and consistence.

The criminal provisions adopted on a sectorial level based upon the community legislation must be in accordance with complete systematization and the consistence of the criminal law, in general, and the EU legislation, even if these provisions are adopted on the basis of the1st pillar or the 3rd, to ensure the integration and assimilation of these. These provisions must not be fragmented or against other provisions adopted before[53].

The interpretation of the Court decision by the Commission led to the distribution of competence between the 1st and 3rd pillar in the criminal law area, as it follows:

The criminal law provisions necessary for the effective implementation of the community legislation goes in the competence area of the Communities based on the European Community Constitutive Treaty. This leads to the stop of use of the double mechanism (directive or bylaw and ground-decision), which was used very often before the appearance of the Court's ruling. So, in this situation, it is either necessary to adopt a criminal provision for the effective appliance of the community legislation and will be adopted based only on the 1st pillar, or there's no need to go to the criminal law at the Union level, and in this case, the criminal law legislation is not stipulated;

- Criminal law horizontal provisions destined to encourage police and judicial cooperation in a general way, including mutual recognition measures for court decisions, measures based on the disponibility principle, and measures for the harmonization of criminal law provisions regarding the development of a liberty, security and justice space , that aren't linked with community politics implementation or fundamental rights enters the third pillar area of competence, adopted by grounds of TUE Title IV. Also the harmonization of criminal law provisions in some domains stipulated in Title IV (like terrorism, drug trafficking, international fraud etc) enters in the mutual area of competence (of Communities and member states).

Through the European Constitution criminal law provisions sphere that are applied according to community provisions tends to expand in the third

[53] The criminal law provisions from Title VI TUE are the community instrument stipulated in the framework decision. Thus, if the community institutions wanted to regulate a certain field of activity they needed to adopt legal instruments. On the one hand they needed to adopt a regulation or a directive, on the other hand, a framework decision according to the third pillar to establish the incriminated acts and the crimes. For example there has been adopted Directive no. 91/308/ECC, 1991; JOCE no. L 166, 1991; Framework decision no. 2001/500 JHA, 2001; European Parliament Directive no. 2005/35/EC, 2005; JOCE no. L 255, 2005, p. 11, 64; Framework Decision no. 2005/667/JHA, 2005.

pillar, judicial and police cooperation in criminal law. It is true that at the present moment the European Constitution has determined a crisis within the Union, putting under a question mark the possibility of adopting it. The necessity of a coherent legislative ground compilation capable of offering keys to problems that can be raised because of a 27 states integration into a mutual European desideratum that will certainly conduct to adopting it, even if it will be amended for sure.

Thus, the prior stipulations of art. 31 from the treaty that establishes the European Union, including some new elements that consider thoroughly the integration in this area at a European Union level. Also, it is stipulated the minimum mutual rules extent that will be established through community acts (laws and primary laws) in the following areas: mutual admissibility proofs, a person's rights in criminal procedure, the rights of crime victims. These rules can be extended on any other aspect of criminal procedure identified after Council Constitution implementation through a unanimous decision with the European Parliament consultation.

A stipulation with extensive character regarding the provisions of TUE's 31 art. constitutes the establishment, through European ground laws, of a series of crimes and their punishments: serious crimes, with outside border implications, whose combat requires cooperation actions in areas like terrorism, human being trafficking, sexual exploitation, arms and drug trafficking, money laundering, corruption, money forgery, organized crime.

The area list can be extended through decision, adopted unanimously by the Council, with the European Parliament approval.

Between the new factors of great importance introduced in the Constitution can be found art. III-270's alin.3 and 4 and III-271 's alin.3 and 4 provisions, that have eased member states' agreement for the introduction of qualified majority vote in police and judicial cooperation area (criminal law)[54]. It is about a new proceeding through which a state that believes that a European law or a European ground law in judicial and police cooperation area from criminal law infringes some fundamental principle of its criminal law system, this can submit the problem to the European Council having the possibility of stopping the legislative procedure. The text creates the possibility of starting a new intensified cooperation on the basis of the initial project, between states

[54] The new regulation in the field of judicial cooperation requires unanimity in order to adopt legal instruments.

that wish adopting the legislative project, on whose territory the project provisions are applicable[55].

Criminal law sphere of incidence has extended considerable because of a European Court of Community Justice's decision through which it has been admitted the possibility of adopting criminal stipulations on the basis of the first pillar instruments.

The European Court of Justice' decision has been assimilated by the European Commission[56]. Remains to be seen I this decision shall be interpreted in the same way by community legislative institutions (European Council and Parliament). This way shall represent a key moment in community provisions, acknowledging the possibility of adopting laws containing criminal provisions with the help of first pillar instruments. This way at least in theory criminal law provisions can be adopted through the bylaw. The bylaw is the first source of derivative law, having a general sphere and a compulsory character for the member states in all its elements. The primary effect of a bylaw containing criminal provisions would mean indirect penalty imposing with direct applicability in European Union member states[57].

The penalties imposed by community institutions in criminal law can be decided in[58]: direct penalties which suppose a community penalty imposing and its use by the community institutions and indirect penalties, penalties imposed by community institutions, applied by national institutions using national procedure. The first hypothesis consists of the developing from a community criminal law. The second one refers to criminal law harmonization with the community law provisions.

As opposed to the criminal indirect penalties, in certain areas the community institutions which may impose national legislation organization regarding the indictment and the application of direct criminal penalties, the Community's area of competence is practically inexistent in the present regulation.

[55] See art. III-416-III-423, European Constitution.
[56] See the Commission briefing, September 13, 2005, COM 2005 583, Bruxelles, November 23 2005.
[57] Jean Pradel, Geert Corstens, p. 20.
[58] J. Stuyk, C. Denys, *Des sanctions communauitaires*, in La justice et l'europe, Bruylant, Bruxelles, 1996, p. 423.

Truly, if one can imagine that the community legislative can enforce criminal law measures that can be directly applied in member states, there isn't any community institution with the competence of accomplishing this measures and applying the community penalties imposed.

This would imply the existence of a community police with competence through all the member states' territory and the existence of a competent community court that would judge criminal facts committed in any of the member states. Thus: up to now the only step made towards this way is the European Constitution provision of funding a European prosecutor with competence over the entire community territory. Criminal facts will still be judged by the member states national courts, and the appeal in front of the European communities Court of Justice could regard only procedural facts.

Thus, the creation of a criminal community law, which means the constraint of community penalty and its enforcement by the community institutions, cannot be established in the near future. In spite of this, the creation of a general set of rules at a community level within the criminal law, rules applicable by the member states' national instances, could be realized.

Regarding the indirect sanctions a difference can be made between the sanctions with direct applicability in the internal law (adopted through a rule, according to the actual community legislation or through a European law according to the European Constitution) and the ones which need a further action of the member states to enforce the community acts, dispositions which contain penalty stipulations. It is preferred to adopt a direct applicability law, leading to appliance uniformization on the whole community territory. The laws that need further intervention from the member states in order for them to be enforced, have the disadvantage to let at their judgment, even limited, the election of the way and the form of obtaining a result. Thus, if such possibility exists, some member states can elect the appliance of an administrative sanction as opposed to penalty sanctions, or the differentiated establishment of the crime's constitutive elements, in comparison with the community law.

This way the different application of this law can appear in the member states' territory which, concerning border's crimes, may lead to different sanctions applied to the criminals, depending on the crime scene or on the crime's judgment location.

Thus, in case of adopting community laws it would be preferred for these to have direct applicability inside the member states, especially since community institutions can interfere regarding criminal law only if and as long as the proposed action cannot be done satisfactory by the member states and it may be fulfilled better regarding the surface and its effects upon the Community.

For the time being, there is only one decision of the EU Court of Justice, which establishes that laws can be adopted by community institutions in criminal law with the help of the instruments from the first pillar (hereby also including the bylaws).

Community institutions' competence regarding the direct applicability of penalty provisions seems to have place in the European Constitution.

Its provisions come in order to expand the community organs' competence, both by enlarging the crimes' sphere for which it could intervene and regarding the decision of taking and applying its provisions.

The provisions from article III-415("Fraud fighting")[59] which take over the provisions of article 280 from TCE, are very interesting, because they present two important differences: there is no referring made to legiferating limitation regarding the application of national criminal law or justice's administration and the legislative instrument put at its disposal is the law or the European ground law. This means that the community legislative institutions gain legislative competence concerning the criminal law, matter which, at least theoretically, is similar to the one belonging to member states(but only in a restrained domain – the one of protecting the UE financial interests).The provision which give the possibility of elaborating a respective European law is very important. This means that the possibility of establishing a source with direct applicability concerning criminal law is stipulated in the Constitution. The European law is governed by the community law's primordially principles towards the national law and its direct application, having as an effect its obligatorily on the member states' territory.

[59] According to art.III-415, The Union and the member states fight fraud and any other illegal activity that influences the financial interests of the Union by measures adopted according to this art. These measures are meant to discourage these activities and to protect the member states. The European legislation establishes the necessary measures to fight fraud and to offer protection for the member states.

Although a unification of penalty provisions in the European judicial space would be beneficial from the point of view of the prevention and punishing transnational crimes and the equal treatment concerning the perpetrator and the crimes' victims, there are some questions regarding the legitimacy of adopting such provisions by the community organs.

This questioning of the legitimacy of the Communities competence in the criminal law domain was primarily founded on two arguments. First, a political one was based on the idea that the criminal law implies the right to punish, which is one of the fundamental attributes of the states sovereignty. The second argument resulted from the community structures functioning, that could not satisfy the democratic exigencies in the area, not having the necessary institutions, like a democratic chosen legislative organ, a European police or a competent criminal law court.[60]

The right to punish is in fact, a fundamental attribute of the states sovereignty. But, with the latest crisis of the national criminal law systems, a great number of states had to adopt new criminal law code to comply with the actual necessities generated by the more and more highlighted orientation to European integration.

Regarding the guarantees offered by the community institutions, the actual situation is of a nature to cause concern. The fundament that legitimizes the adoption of criminal law measures on the level of the Member States is given by the national Constitution[61], which stipulates the rights and fundamental liberties and democratic principles for the protection of these.

On the community level, in the present legislation it's hard to find this fundament. The European communities (and the institutions that represent them) are not signing institutions of the European convention of human rights. The lack of a legal basis in which the fundamental principles to anchor in, principles that govern the criminal law is amplified by the rising possibility of the political power to impose criminal sanctions through judicial community law instruments. Indeed, the growing role of the European Parliament (the only institution whose members are democratically and directly elected in the Member States) in the legislative process can not eliminate this drawback.

The solution for the legitimate offer in the process of adopting provisions with criminal character is found in the European constitution. On the other way, it includes the Fundamental Human rights Chart, in Part I, Title II, specifying the EU obligations to accede at the European convention, in order to protect human rights and fundamental liberties[62]. On the other hand, it specifies the fundamental principles that govern the EU activity, this functioning on the competence giving

[60] U. Sieber, Union europeenne et droit penal europeen, July 1993, p. 258.
[61] See Peter Alexis Albrecht, Stefan Brown, *Deficiencies in the development of European criminal Law*, in the European Law Journal, vol. V, no. 3, 1999, p. 293.
[62] Art. 1-9 from the Constitution.

principle from the Member States. Also, the European Parliament's duty grows in the legislative process. Practically, the council cannot take any important decision without parliament's implication, its opposing conducting to the impossibility of the act adaptation.

The identification of such deficiency regarding the fundament of provision adopting with criminal character on a community level doesn't have to lead to the idea of rejecting a European criminal system, but only to draw an alarm signal for judicial stabilization of legal ground that can offer provision legitimately adopted on a community level.

Even though a future European criminal law code represents a utopia, at the present moment the provisions in the criminal law are heading towards a more and more highlighted harmonization of the EU member states legislations. The community institutions have already obtained legislative competence in this area. The reglementation area, limited at first, has extended very much, lately. Social realities determined by the development of a European space will inevitably lead to the development of directory principles and to the elaboration of provisions for the unification of criminal law legislation in certain sensible domains for the European Union, like the protection of the financial interests of it. From here and to future community criminal law code enforcement is only one step away. Will this step be accomplishable? Everything depends, in this moment, on the faith of the European Constitution.