The European Fight against Fraud – The Community’s Competence to Enact Criminal Laws and Its Power to Approximate National Criminal Law by Directives

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Introduction

The European Commission’s 2005 annual report concerning the Protection of the Communities’ financial interests estimates that the total financial impact of irregularities reported in 2005 reached € 1.042 billion. The overall damage is believed to amount to at least 10–20 % of the Community’s budget. According to

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news reports, around 40% of all requests for agricultural subsidies are imperfect; and in countries such as Cyprus (88.9%) and Portugal (77.3%) this number is even exceeded. These vast figures illustrate the Communities' vital interest to fight frauds affecting their budget.\textsuperscript{3} Judicially, this can be achieved in different ways.

Since Member States have transferred sovereign rights to the Communities, making them a supranational organization, the Communities might be entitled to \textit{originally enact criminal laws} on the European plane. As regards to the financial interests, this may possibly be based on Article 280 (4) of the Treaty Establishing the European Community.

Understanding criminal law as a 'core of state sovereignty',\textsuperscript{6} Member States, though, might have avoided conferring such rights in the field of \textit{criminal} law upon the Communities. Then, the Communities, however, may have the power to issue \textit{directives} addressed to Member States, obliging them to criminalize frauds against the Communities' in their own national legislation. The Commission resorted to this option in 2001 and 2002. It submitted a proposal for a directive concerning the protection of the Community's financial interests to the European Parliament.

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\bibitem{2} <http://www.spiegel.de/wirtschaft/0,1518,472872,00.html>.

\bibitem{3} The term 'fraud' is not to be understood in a strict sense. It rather encompasses 'all conducts [...] which adversely affect the Community's financial interests', H.-M. Wolfgang and S. Ullrich, 'Schutz der finanziellen Interessen der Europäischen Gemeinschaften', \textit{Europarecht} (1998), p. 627 (quotation in German).


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and the Council. The view that the Community is entitled to do so has been—at least with respect to environmental criminal law—recently upheld by the European Court of Justice. This judgement has sparked highly controversial debates. During these quick-tempered discussions, the renowned German law professor Roland Hefendehl, for example, spoke of the ‘Bruxelles’ octopus’, which would now begin to ‘ultimately incorporate criminal law’.

Another completely different possibility for Member States to fight frauds is to negotiate international treaties. Member States did, for example, take this option in 1995 when they concluded the so-called Fraud Convention/PIF Convention and added several Protocols to it. In this case Member States do not act within the Communities but rather their actions are ‘merely’ part of the Police and Judicial Cooperation in Criminal Matters (PJCCM) within the European Union. Therefore, these treaties only enter into force upon ratification by the contracting parties. In this context, the Community does not enjoy any means to enforce their implementation; the European Court of Justice has no competences either. Moreover, Member States may, during the implementation process, ‘express reservations and exempt themselves from different regulations causing lacunas again in the intended uniform protection.’ Hence, conventions are somehow less effective and more time-consuming. This has already been seen by the fact that the 1995 Convention was not ratified until 2002.

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13) M. Kaiafa-Gbandi, loc. cit. (Fn. 10), p. 246.

14) P. Schwarzburg and K. Hamdorf, loc. cit., p. 618.
Besides these actions, the Communities are also interested in creating institutional bodies.\textsuperscript{15} In 1988, the Commission established \textit{UCLAF} as a task force\textsuperscript{16} to coordinate the fight against fraud.\textsuperscript{17} After the Commission resigned in March 1999 in the wake of corruption allegations,\textsuperscript{18} it founded \textit{OLAF} as UCLAF’s successor.\textsuperscript{19} OLAF was established as an \textit{independent} body, enjoying full independence as regards its investigations. These investigations also encompass crimes committed within the Communities’ own institutional bodies.\textsuperscript{20} The work of OLAF poses, however, several legal problems. For example, the European Central Bank,\textsuperscript{21} the European Investment Bank\textsuperscript{22} and some European Parliament’s representatives\textsuperscript{23} called upon the European Courts to limit OLAF’s competences for \textit{internal} investigations as far as they themselves are concerned.

Already this brief overview exemplifies the different elements of the European strategy to counter frauds.\textsuperscript{24} This judicially interesting concept deems it – together with the immense practical significance of the subject and the existing controversies – appropriate to examine the matter. This paper will carefully portray, critically analyze and evaluate some of the aforementioned techniques.

Firstly, this requires a short overview of European Union’s legal system, including the Communities, the Common Foreign and Security Policy (CFSP), and the already mentioned PJCCM (2.). After pointing out the legal differences between


\textsuperscript{16} B. Hecker, \textit{op. cit.}, § 4 Rn. 28.


\textsuperscript{18} K. Ambos, \textit{op. cit.}, § 13 Rn. 1; H. Sarzger, \textit{op. cit.}, § 9 Rn. 27.

\textsuperscript{19} K. Ambos, \textit{op. cit.}, § 13 Rn. 2.


\textsuperscript{21} ECJ, Judgement 10.7.2003 – C-11/00 (Commission/ECB).

\textsuperscript{22} ECJ, Judgement 10.7.2003 – C-15/00 (Commission/EIB).

\textsuperscript{23} Court of First Instance, Judgement 26.2.2002 – T 17/00 (Rothley and Others/Parliament).

these fields, the paper will examine whether the Communities have the power to protect their financial interests by enacting criminal laws on the European level (3.) or if – and, if yes, under which conditions – they may only issue directives to Member States (4.). Although an assessment of OLAF’s work would be as interesting as an illustration of the so-called ‘Corpus Juris Project’, these aspects are beyond this paper’s scope.  

2. The European Union’s Legal System

This chapter will briefly illustrate the fundamental basics of the European Union’s legal system and its historical development as far as relevant for the subject at hand.

The notion of a ‘Common Europe’ can be traced back several centuries. In 1454, Enea Silvio Piccolomini, soon to be Pope Pius II, in his speech ‘Constantinopolitana Clades’ stated ‘nunc vero in Europa, id est in patria, in domo propria’. Nevertheless, it was only in the 20th century that this idea assumed a definite legal form. After the Second World War, the conviction prevailed that Europe should not see any more bellicose conflicts, but rather reclaim its nations’ similarities. The Process of European Unification embarked upon the economic field. In 1951, the Treaty on the European Coal and Steel Community (ECSC) was concluded and a homonymous supranational organization established, upon which Member States conferred some of their sovereign rights. In 1957, this development was
furthered by concluding the 'Treaties of Rome' on the formation of the European Economic Community (EEC) and the European Atomic Energy Community (EAEC). Along with the ECSC, these supranational organizations formed the European Communities.32

Up to the 1990s, several other significant steps were taken, not least of which was a large increase in the number of Member States.33 The most trend-setting evolution occurred in 1992 when the then concluded Maastricht-Treaty led Europe into a 'new dimension'.34 The contracting parties established the European Union (EU). The EU is founded on the three abovementioned European Communities; however, the EEC was renamed the European Community (EC).35 The EU is supplemented by the CFSP and the PJCCM.36 Hence, the EU is based on three pillars.37

The Communities build the first pillar.38 They constitute, in the words of the European Court of Justice in 1962, 'a new legal order of international law',39 being a 'self-contained legal system'.40 They have the competence to originally create rights and duties for individuals. The law becomes 'communitised'. This 'acquis communautaire'41 contains the Treaties on the ECSC, EC and EAEC (so-called primary Community Law) and those acts which the Communities' bodies have

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32) M. Herdegen, op. cit., § 4 Rn. 5.
33) K. Ambos, op. cit., § 9 Rn. 3ff.; M. Herdegen, op. cit., § 4 Rn. 5ff.
34) M. Herdegen, op. cit., § 4 Rn. 10; E. Hughes, loc. cit., p. 361.
35) K. Ambos, op. cit., § 9 Rn. 5; M. Herdegen, op. cit., § 4 Rn. 15.
37) G. Conway, loc. cit., p. 680 Fn. 3 et passim; F. Fink-Hooijer, 'The Common Foreign and Security Policy of the European Union', European Journal of International Law (1994), p. 174. This pillar structure was intended to be abolished by a prospective Constitutional Treaty, M. Kαιάφα-Γχαντί, loc. cit. (Fn. 6), p. 490. However, after referenda failed in France and The Netherlands, the ratification process was stopped. On 21 and 22 June 2007, the Brussels European Council decided to 'convene an Intergovernmental Conference' 'to draw up' a so-called 'Reform Treaty' amending the existing Treaties, see Brussels European Council 21/22 June 2007 Presidency Conclusions, para. 10. "The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned", see Draft IGC Mandate, para. 1.
38) M. Herdegen, op. cit., § 1 Rn. 1ff.
39) ECJ, Judgement 5.2.1963 – C-26/62 (Van Gend en Loos/Administartie der Belastingen), summary 3.
40) ECJ, Judgement 15.7.1964 – 6/64 (Costa/Enel), summary 3; M. Herdegen, op. cit., § 1 Rn. 1ff., § 5 Rn. 1ff.
41) M. Herdegen, op. cit., § 7 Rn. 7, § 9 Rn. 3; R. Streinz, Europarecht (Heidelberg 2005), § 3 Rn. 97.
enacted on the basis of the Treaties (so-called secondary Community Law).\textsuperscript{42} 

In contrast, the CFSP and the PJCCM form the EU’s second (CFSP) and third (PJCCM) pillar. They only concern intergovernmental cooperation.\textsuperscript{43} This cooperation follows the general rules of International Law. If Member States act within the scope of these pillars, their acts do not directly have legal effect with respect to individuals.\textsuperscript{44} 

Although the Maastricht Treaty has been changed by the 1997 Amsterdam Treaty and the 2000 Nice Treaty,\textsuperscript{45} the EU’s structure with its three pillars still remains as it has been portrayed.

These remarks have shown that the legal realization of the Process of European Unification commenced after World War II. It was aimed at avoiding any more conflicts. This was to be achieved by legally tying them closely together, starting with their economies. Focussing on economics and financial interests has, therefore, always been understood as a means and further step to the higher, remoter goal of political integration.\textsuperscript{46} 

The historical notion of this ‘spill-over-effect’\textsuperscript{47} has to be kept in mind when reading the next chapters dealing with the potential powers of the Communities to protect their budget by criminalizing certain conducts. Considering the evolution of the past decades, the founding fathers of the relevant treaties might have meant this field to also lead the way with respect to the development of a common European Criminal Law.

3. The European Communities’ Power to Enact Criminal Law Norms

The Communities are empowered to acts of legislation (‘jurisdiction to prescribe’)\textsuperscript{48} if, and to the extent to which, they act within the authority delegated to them.\textsuperscript{49} This principle of limited authorization/principle of attributed powers (‘compétence d’attributation’) is – with respect to the relevant European Community – laid down in Articles 5 (1), 7 (1) of the Treaty Establishing the European Community

\textsuperscript{42} K. Ambos, op. cit., § 9 Rn. 5; M. Herdegen, op. cit., § 1 Rn. 1ff., 5, § 5 Rn. 1ff.

\textsuperscript{43} K. Ambos, op. cit., § 9 Rn. 5; G. Conway, loc. cit., p. 68o Fn. 3; F. Fink-Hooijer, loc. cit., p. 174.

\textsuperscript{44} M. Herdegen, op. cit., § 1 Rn. 1ff., § 5 Rn. 1ff.

\textsuperscript{45} M. Herdegen, op. cit., § 4 Rn. 20ff.


\textsuperscript{47} K. Ambos, op. cit., § 9 Rn. 3; M. Herdegen, op. cit., § 1 Rn. 14.

\textsuperscript{48} K. Ambos, op. cit., § 11 Rn. 1 Fn. 1; J. Deutscher, Die Kompetenzen der Europäischen Gemeinschaften zur originären Strafgesetzgebung (Frankfurt am Main 2000), p. 33.

\textsuperscript{49} M. Kaiafa-Gbandi, loc. cit. (Fn. 1o), p. 247.
(hereinafter: 'EC Treaty'). More precisely, it signifies that every act of legislation requires a power of authority either explicitly provided for in or derived from the interpretation of the EC Treaty. Consequently, the Community may enact criminal laws if such a competence has been delegated to it explicitly in or by interpretation of the EC Treaty.

The EC Treaty does not formally provide for the authority to generally enact criminal laws. It is, however, conceivable that when Member States conferred the power to regulate certain subject-matters to the Community, they concomitantly delegated the competence to regulate these domains also penologically. Legally, this could be justified by the doctrine of implied powers, maybe combined with the effet-utile-principle.

Understanding criminal law as a 'core of state sovereignty', such an approach might, however, not be applicable with respect to this sensitive field of law. Rather, the competence could require an explicit provision in the EC Treaty, albeit not a general one, but at least one for the specific subject-matter in question. As regards the Community's financial interests, such a provision could be Article 280 (4) EC Treaty. This, however, becomes only decisive if the Community does not already enjoy the authority in question without an explicit Treaty provision. Consequently, this issue has to be addressed first (3.1).

3.1 Implied Powers and Effet-Utile-Principle

Some academics submit the Community's power to regulate certain subject-matters also includes the capacity to create criminal laws in respect thereof. It would not be mandatory that the EC Treaty explicitly contains a competence norm delegating such an authority to the Community. It is further submitted that the competence in question does not in any event concern the core of criminal law. It would only

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50) K. Ambos, op. cit., § 11 Rn. 1; B. Hecker, op. cit., § 4 Rn. 54ff.; E. Herlin-Karnell, loc. cit., p. 79.
51) See K. Ambos, op. cit., § 11 Rn. 4; R. Hefendehl, loc. cit., p. 163; H. Satzger, op. cit., § 7 Rn. 23.
54) Compare K. Ambos, op. cit., § 11 Rn. 4.
55) K. Ambos, op. cit., § 11 Rn. 1 Fn. 1; E. Herlin-Karnell, loc. cit., p. 83; M. Kaiafa-Gbandi, loc. cit. (Fn. 6), p. 487.
affect criminal law related to business and the law of supplementary penalties, consequently just certain special areas.\textsuperscript{57} Dogmatically, this approach rests upon the doctrine of implied powers and the \textit{effet-utile-principle}.\textsuperscript{58}

In principle, the \textit{doctrine of implied powers} is acknowledged under Community Law.\textsuperscript{59} Up to certain, strictly confined limitations, the Community may enjoy the power to administer competences not having been explicitly assigned to it. This presupposes that the explicit delegation of related authorities logically requires the exercise of those competences so that they have to be considered implicitly conferred upon the Community.\textsuperscript{60} To justify the Community’s competence for enacting criminal laws, the application of this approach gets supplemented by the \textit{effet-utile-principle},\textsuperscript{61} according to which Community Law has to be enforced in the most effective way possible.\textsuperscript{62} Both these basic principles allegedly establish the Community’s competence in question.

This is unimpressive. The aforementioned considerations do not change the fact that criminal law affects the ‘core of State sovereignty’, being a ‘specific concept’ thereof,\textsuperscript{63} and ‘symbolises a national identity and culture’.\textsuperscript{64} Moreover, criminal law and its application are the sharpest means of intervening into individuals’ lives and actions.\textsuperscript{65} A delegation of authority in this sensitive field requires – maybe unlike other branches – an \textit{explicit Treaty provision}.\textsuperscript{66} More important is, since the details of the doctrine of implied powers are generally, especially as regards their limitations, highly controversial,\textsuperscript{67} the application of such a doctrine becomes even more problematic.

\textsuperscript{57} M. Böse, \textit{Strafen und Sanktionen im Europäischen Gemeinschaftsrecht} (Köln, Berlin, Bonn, München 1996), p. 82; see K. Ambos, \textit{op. cit.}, § 11 Rn. 4.

\textsuperscript{58} See K. Ambos, \textit{op. cit.}, § 11 Rn. 4.

\textsuperscript{59} ECJ, Judgement 27.9.88 – C-165/87 (Commission/Council), para. 8; J. Deutscher, \textit{op. cit.}, pp. 206ff.; M. Herdegen, \textit{op. cit.}, § 9 Rn. 57.

\textsuperscript{60} J. Deutscher, \textit{op. cit.}, pp. 206ff.; M. Herdegen, \textit{op. cit.}, § 9 Rn. 57.

\textsuperscript{61} See K. Ambos, \textit{op. cit.}, § 11 Rn. 4.

\textsuperscript{62} ECJ, Judgement 17.1.1980 – C-792/92 R (Camera Care/Commission), para. 18; M. Herdegen, \textit{op. cit.}, § 9 Rn. 46.


\textsuperscript{64} W. Perron, \textit{loc. cit.}, in M. Hettinger et al., \textit{op. cit.}, p. 435.

\textsuperscript{65} R. Hefendehl, \textit{loc. cit.}, p. 161.


\textsuperscript{67} M. Herdegen, \textit{op. cit.}, § 9 Rn. 58.
Furthermore, the assertion that only special areas of criminal law would be affected is not convincing either. In the first place, these claimed distinctions are difficult to draw; it is, for example, already under German law controversial what exactly the elements and the content of criminal law related to business are. But even if one could find criteria to persuasively demarcate these fields, the acts of legislation would continue to be acts of criminal law legislation. Why acts of legislation in certain criminal law fields should not require an explicit delegation of authority when the general competence to enact criminal laws does, cannot be explained convincingly.

For all these reasons, the doctrine of implied powers and the effet-utile-principle do not lead to the Community's authority to enact criminal laws. Such a competence requires an explicit delegation provided for by the EC Treaty.

3.2 Article 280 (4) EC Treaty

As has already been pointed out, the EC Treaty does not explicitly contain a provision, generally delegating authority to enact criminal laws to the Community. However, the requirements illustrated do not necessarily have to be met with respect to a delegation of authority which affects criminal law as a whole. Rather, the required preconditions can also be fulfilled if the EC Treaty provides for an explicit provision with respect to a specific area of criminal law. As regards the matter of examination at hand, such a norm could be Article 280 (4) EC Treaty.

By virtue of this provision, the Community, acting through the Council, 'shall adopt the necessary measures in the fields of the prevention of and fight against frauds affecting [its] financial interests.' Consequently, the Community's competence in question first requires that the term 'measures' encompasses 'acts of legislation' in criminal law.

Since 'measures' and 'acts of legislation' are not identical, the term 'measures' has to be interpreted. Methodologically, there are different approaches. Mainly, one can distinguish a grammatical, systematic, historic, and teleological interpretation. Order and content of these approaches are, already under domestic legal systems,
subject to controversies. Considering that there are also self-contained rules of interpretation with respect to International Law, one has to, at first, decide which rules to apply when interpreting Community Law – a field of law both distinct from domestic and International Law.

The interpretation of Community Law follows its own rules. First of all, one has to focus on the wording. Alongside with this grammatical/textual approach, the terms have to be interpreted systematically and teleologically, the latter particularly meaning 'in light of the Treaties'. In contrast, the historic interpretation plays only an ancillary role. In general, taking into account the jurisprudence of the European Court of Justice, the interpretation of Community Law is also determined by the aforementioned effet-utile-principle and, hence, at least according to the Court, considered a means to further European Integration.

In application of these rules, the wording of the term ‘measures’ is open to encompass ‘acts of legislation’. A systematic interpretation leads to the same result. According to Article 280 (2) EC Treaty, ‘Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.’ In this context, the term ‘measures’ also means ‘acts of legislation’: Member States shall under their national domestic law criminalize frauds detrimental to the Community as they criminalize frauds detrimental to themselves. Hence, one has to conclude that the term ‘measures’ as used in Article 280 EC Treaty, consequently also in paragraph 4, is a ‘superordinate concept’, encompassing also ‘acts of legislation’. It can, therefore, be recorded that paragraph 4, sentence 1 could indeed provide for the competence in question.

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77) M. Herdegen, op. cit., § 9 Rn. 74.
78) K. Hailbronner and G. Jochum, op. cit., § 4 Rn. 311; M. Herdegen, op. cit., § 9 Rn. 74.
79) M. Herdegen, op. cit., § 9 Rn. 74; compare also the groundbreaking decision ECJ, Judgement 5.2.1963 – C-26/62 (Van Gend en Loos/Administratie der Belastingen), summary 3.
81) F. Zieschang, loc. cit., p. 260.
However, sentence 2 has to be taken into consideration too. This provision reads as follows: 'These measures shall not concern the application of national criminal law or the national administration of justice.' The interpretation of this 'ambiguous clause' is disputed.\(^{84}\)

First of all, one could argue that if the measures provided for in Sentence 1 shall not concern national criminal law or the national administration of justice, the Community does not have the competence to acts of legislation in the field of criminal law, since such actions would clearly concern national criminal law and the national administration of justice.\(^{85}\)

On the other hand, one can highlight that the phrase does only mention the application of national criminal law or the national administration of justice. It does not explicitly exclude the possibility that the Community's measures may not concern the creation of criminal law.\(^{86}\) This interpretation would not affect the aforementioned provisional result. The Community would have the competence to enact criminal laws.

The persuasiveness of these concepts\(^{87}\) has to be assessed on the basis of the aforementioned methodology. Starting from the wording, one has to concede that the phrase indeed only mentions the term 'application'. Eventually, this alone does not give the Community the competence in question. One has also to take into consideration that these measures provided for in the first sentence 'shall not concern' the mentioned areas. If one stresses this part, one can also understand it 'shall in no way concern' national criminal law and the administration of justice.\(^{88}\) Hence, the wording does not seem to be clearly in favour of the competence in question, nor does it rule out this possibility either.

Applying the systematic and teleological interpretation, the result does not seem to be clear either at first sight. Particularly with respect to a teleological approach combined with the aforementioned principles applied by the European Court of Justice, one might jump to the conclusion that the Community indeed is entitled to enact criminal laws. It could potentially be argued that the effet-utile-principle and

\(^{84}\) In detail K. Ambos, op. cit., § 11 Rn. 8; I. Fromm, loc. cit., pp. 28ff.

\(^{85}\) See K. Ambos, op. cit., § 11 Rn. 10.

\(^{86}\) R.-J. Colomer, Opinion of Advocate General, C-176/03 (Commission/Council), para. 78.


\(^{88}\) K. Ambos, op. cit., § 11 Rn. 10; I. Fromm, loc. cit., p. 29.
the nature of interpretation as a means for further integration lead to this result. This could be underpinned by the notion that, as has been illustrated previously, the founding fathers of a Treaty have historically always considered the field of economics and finances a means to further integration.

This reasoning is not persuasive. The less significance of a historic interpretation has already been emphasized. Much more important are systematic and teleological considerations. Systematically, one must not only consider Article 280 EC Treaty but the whole framework of European Law. In this respect, it is interesting to note that criminal law was, in principle, classified as belonging to the third pillar. It should deliberately not fall under the scope of the first pillar. This seems to argue against the Community competence in question.

This, however, is less evident than one might have thought at first sight. With Article 280 EC Treaty, Member States have deliberately included the fight against frauds within the EC Treaty, although criminal law matters usually fall within the third pillar. Thus, it is not a priori impossible that they also delegated the authority to enact criminal laws with respect to this specific area. Consequently, the systematic interpretation does not lead to a definite result.

Hence, the decisive question is if teleological deliberations can convincingly explain that Member States have delegated the competence in question to the Community. This has to be answered in the negative. The mere reasoning with the effet-utile-principle is insufficient. As the Bundesverfassungsgericht, the German Supreme Constitutional Court, held in its fundamental Maastricht-Decision, the application of the effet-utile-principle in context of extensively interpreting the
Community’s competences is limited by the principle of conferred powers. It is irreconcilable with this concept and the legal structure of the Community as a supranational organization that one easily assumes competences by applying the *effet-utile-principle* when such competences have not clearly been delegated.

This trendsetting jurisprudence is even clearer when it comes to criminal law. 'Affecting the very core of State sovereignty', competences in this field can only be delegated in a 'non-ambiguous' and 'explicit' way. An ambiguous provision like Article 280 (4) EC Treaty does not meet these requirements. Teleologically, the second sentence has thus to be interpreted as ruling out the Community’s competence in question.

For all these reasons, Article 280 (4) EC Treaty does not empower the Community to acts of legislation in criminal law.

3.3 Conclusion

The Community is not entitled to enact criminal laws on the European plane.
4. The Communities’ Power to Approximate National Criminal Law by Directives

Even though the Community does not currently enjoy the authority to enact criminal laws, Community Law already at present plays a significant role for Member States’ domestic criminal laws. With respect to the subject at hand and the available limited scale of the examination, the following illustration will be confined to one specific form of this interaction: the issuance of directives aimed at harmonizing domestic criminal law norms.

For that purpose, the main general characteristics of directives have to be briefly illustrated (4.2.). Subsequently, it is to portray what problems follow from thereof with respect to criminal law (4.3.). First, the need for approximation of criminal laws shall be addressed (4.1.).

4.1 The Need for Approximation

For the time being, the Community does not enjoy the competence to enact criminal laws. Concomitantly, it has a ‘vital interest’ to protect its financial interests. Therefore, the Community depends on the criminal law legislation and its enforcement by Member States. Despite this fact, Member States have shown a kind of ‘laxity ... for an effective penal protection of its [the Community’s] goods.’

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105) For the changes which were intended by the European Constitution, M. Kaiafa-Gbandi, loc. cit. (Fn. 6), pp. 490ff.; J. Vogel, ‘The future of European integration in the area of criminal justice’, in: B. Schünemann, op. cit., pp. 373ff.


110) J. Fromm, loc. cit., p. 27; B. Hecker, op. cit., § 14 Rn. 3.


112) M. Kaiafa-Gbandi, loc. cit. (Fn. 10), p. 244.
A model example can be found in Greece in the 1980s. In 1986, a company called ITCO allegedly exported two consignments of maize from Greece to Belgium. In fact, the consignments comprised maize imported from Yugoslavia. Since Yugoslavia was not a Member State to the Community, agricultural levy would have had to be paid to the Community. The reasons for this not having happened were mainly due to the fact that Greek authorities had deliberately and falsely declared the consignments as comprising Greek maize.113

This state of facts led to a European Court of Justice's judgement and developed the assimilation principle.114 The Court held in this 'landmark decision'115 in application of the principle of solidarity116 that 'the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.'117 'For that purpose, [...] they must ensure [...] that infringements of Community law are penalized under conditions [...] which are analogous to those applicable to infringements of national laws of similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.'118 'Moreover, the national authorities must proceed [...] with the same diligence as that which they bring to bear in implementing corresponding national laws.'119

However, the Court leaves a certain degree of discretion to Member States on how they fulfil these requirements.120 Since Member States have made use of this discretion, many different criminal laws can be found within the EU.121 For example, whereas fraud under German law can also be committed by omission,122 the

115 A. Klip, loc. cit., in D.M. Currin et al., op. cit., p. 113 Fn. 24.
116 J. Eisele, loc. cit. (Fn. 108), p. 1158; B. Hecker, op. cit., § 7 Rn. 27ff.
French system does not provide for such a criminal responsibility. According to Grasso, the same is true, at least up to 2003, for the criminal laws of Bulgaria and Romania. Furthermore, whereas Spain criminalizes only wilful conducts causing a certain minimum damage, such a minimum loss is not required under Italian law. Already this brief overview illustrates the ‘fragmentation’ of criminal laws.

All these differences lead to loopholes and aggravate the fight against frauds. This is even more evident as the crimes in question are predominantly committed by highly intelligent culprits. Usually, they belong to organized crime, having enormous assets at their disposal. Furthermore, the perpetrators often operate trans-nationally, in many cases resorting to straw men and fictitious companies as well as the latest technical equipment. In addition, European integration has opened national borders, making it easier to move from one country to another without any border controls.

Therefore, approximation of criminal laws is considered one inevitable means to effectively protect the Community’s financial interests within the destined ‘area of freedom, security and justice’, Article 29 (1) of the Treaty on European Union (hereinafter: ‘EU Treaty’). Since the Community is not empowered to enact

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123) G. Dannecker, loc. cit. (Fn. 122), p. 588; B. Hecker, op. cit., § 14 Rn. 20; examples taken from B. Hecker, op. cit., § 14 Rn. 20.
135) G. Dannecker, loc. cit. (Fn. 99), p. 95.
criminal laws, it might only be competent to oblige Member States to harmonize their systems. This could be achieved by issuing directives (4.2.).

4.2 The General Characteristics of Directives

Directives are part of the secondary Community Law. They are addressed to and binding upon each Member States, as to the result to be achieved. The choice of form and method how to implement the directives are left to the national authorities (Article 249 (3) EC Treaty).

Therefore, directives are the ‘classic instrument’ to harmonize national laws. Their big advantage is due to the discretion to Member States. This makes them especially attractive in sensitive fields in which Member States might consider it an interference with their sovereign rights if legal actions are being taken on the Community field.

As regards the competence, only those Community institutions may issue directives upon which such powers have been conferred by the EC Treaty, Article 7 (1) EC Treaty. Particularly, this means that the issuance of directives may only concern such areas that fall within the scope of the Community (principle of limited authorization/compétence d'attributision').

4.3 Approximating National Criminal Laws by Directives

Approximating criminal laws by issuing directives requires particularly that the EC Treaty provides for such an authority. With respect to the subject at hand, the EC Treaty must provide for a competence to issue directives as regards the fight against frauds (4.3.1.). If such an authority exists, it has to be examined to which degree the Community is entitled to define Member States’ obligations to implementation (4.3.2.).

4.3.1 Authority to Issue Directives

The question of a Community’s competence has a significant practical impact, and contains legal and political explosives. In order to understand the sometimes quite emotionally-led debate, the legal and practical dimensions will be briefly portrayed first (4.3.1.1.). Then, the different legal approaches that make allowance

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136) G. Dannecker, loc. cit. (Fn. 66), p. 300.
137) K. Ambos, op. cit., § 11 Rn. 30; M. Herdegen, op. cit., § 9 Rn. 33ff.
138) J. Deutscher, op. cit., p. 368; M. Herdegen, op. cit., § 9 Rn. 36; H. Satzger, op. cit. (Fn. 17), § 7 Rn. 22, § 8 Rn. 31.
139) M. Herdegen, op. cit., § 9 Rn. 36.
for the general authority of the Community to issue directives affecting criminal matters will be illustrated (4.3.1.2.) and assessed (4.3.1.3.).

4.3.1.1 Legal and Practical Dimension of the Problem

The relevant Treaties deliberately allocated 'criminal matters' on the third pillar. Thus, the authority of approximating criminal laws might compellingly and exclusively be part of the third pillar, too. If this was true, it would solely be up to Member States to decide upon taking the relevant steps for a harmonization. Acting on the third pillar, Member States would have significant power to independently approve or disapprove any further developments. This stems from the fact that Member States can, as they have repeatedly done since the 1997 Amsterdam Treaty which provided for it, resort to the adoption of framework decisions, Article 34 (2) lit. b EU Treaty. These decisions have to be taken unanimously, Article 34 (2) EU Treaty, and without any significant involvement of the European Parliament. Every single Member State enjoys a 'veto power' by which it can easily determine the pace of the approximation.

This situation changes dramatically, if the competence would fall within the first pillar. If this was true, the Community would be in charge of the approximation process. It could issue directives obliging Member States to harmonize their criminal systems. Unlike the aforementioned procedure, Member States would have a weakened position. Although the directive has, ultimately, to be adopted by the Council, constituted of Member States' representatives, both the Commission and the European Parliament enter the decision-making process. Moreover, the final
decision within the Council does not have to be adopted unanimously. A majority decision suffices. Hence, a Member State could be obliged to implement, as an act of secondary Community Law, changes concerning its national criminal law, even though it did not vote in favour of such an approximation. Should Member States refuse the implementation, the Commission, 'monitoring and enforcing' the Treaty, may then bring the matter before the European Court of Justice (Article 226 (2) EC Treaty). Therewith, the general feature of current criminal law in Europe that 'the ultimate direction [of the further development] will no longer be decided' in Member States 'alone, but will be determined in Europe as well' becomes fiercely intensified.

The problem affects the relationship between the first and third pillar and the allocation of competences within the EU. The juridical starting point for its solution can be found in the EU Treaty itself. By virtue of its Article 29 (1), Member States are competent to develop common action in the fields of cooperation in criminal matters. Hence, this subject-matter falls, in principle, within the scope of the third pillar and not under the authority of the first pillar. However, Article 29 (1) EU Treaty does contain a caveat: 'Without prejudice to the powers of the European Community'. Consequently, the decisive question is whether the competence of approximating criminal laws as a special component of criminal matters falls within the 'powers of the Community'. If this is the case, the Community is the competent authority. Then, framework decisions in this field are, due to a lack of competence, void.


151) C. Krehl, 'Reforms of the German Criminal Code – Stock-taking and Perspectives – also from a Constitutional Point of View', German Law Journal (2003), p. 431. In the original quotation, Krehl only refers to Germany. His findings are, however, also true for every other Member State.


4.3.1.2 Illustration of the Different Approaches

With regards to the Community’s authority, different approaches are made allowance for in general.\(^{54}\)

Sometimes, it is submitted that the Community can a priori not have such a competence. Considering its general lack of authority in criminal matters, one would have to compulsorily draw the conclusion that the Community also lacks the competence to issue directives affecting criminal laws.\(^{55}\) Usually though, such an a priori denegation is rejected. The reasoning is not regarded as ‘logically obligatory’.\(^{56}\) Emanating from this basis, differences of opinion, however, arise.

The question has been debated for years in the scholastic world. The spectrum, which can be found in respect thereof, ranges from deriving a competence from the principle of solidarity contained in Article 10 EC Treaty,\(^{57}\) from certain, broadly worded delegations of authority in specific substantives,\(^{58}\) up to resorting to the very generic competence norm of Article 308 EC Treaty.\(^{59}\) In between, other points of view apply the aforementioned doctrine of implied powers,\(^{60}\) the effet-utile-principle\(^{61}\) or draw upon Articles 94 ff. EC Treaty.\(^{62}\)

This debate got ignited anew,\(^{63}\) when, on 13 September 2005, the European Court of Justice spoke out for the first time on the issue.\(^{64}\) According to its

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\(^{57}\) H. Satzger, op. cit. (Fn. 17), § 8 Rn. 32.

\(^{58}\) B. Hecker, op. cit., § 8 Rn. 40ff.; H. Satzger, op. cit. (Fn. 17), § 8 Rn. 33.

\(^{59}\) K. Ambos, op. cit., § 11 Rn. 31; J. Eisele, loc. cit. (Fn. 108), p. 1160; H. Satzger, op. cit. (Fn. 52), pp. 437ff.

\(^{60}\) S. Gröblinghoff, Die Verpflichtung des deutschen Strafgesetzgebers zum Schutz der Interessen der Europäischen Gemeinschaften (Heidelberg 1996), pp. 94ff.

\(^{61}\) M. Böse, op. cit., p. 81; dismissive H. Hugger, op. cit., pp. 58ff.


\(^{63}\) M. Böse, loc. cit., p. 211.

'startling', 'groundbreaking' strongly debated and sometimes harshly criticized judgement, the Court entitled the Community, at least with respect to environmental criminal law, to take 'measures which relate to the criminal law of Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.' The Court's reasoning has been interpreted not to be limited to environmental criminal matters. Even though it does not explicitly state which of the methodological approaches it refers to, the judgement has been interpreted as relying upon a 'vague alliance of the delegation of specific substantive competences and the doctrine of implied powers, carried out to an extreme.'

4.3.1.3 Assessment
It is beyond this examination's scope and purpose to discuss the persuasiveness of all these different approaches in depth. Nevertheless, some remarks shall be made.

(a) The Community's competence in question is not impossible a priori. The authority to originally enact criminal laws and the competence to issue directives affecting criminal matters are distinct. Hence, both questions do not necessarily

\[\text{165) R. Hefendehl, loc. cit., in: B. Schünemann, op. cit., p. 451; T. Pohl, loc. cit., p. 213.}\]
\[\text{166) A. Klip, loc. cit., in: D.M. Curtin et al., op. cit., p. 138 Fn. 105; W. Perron, loc. cit., in: M. Hett}
\[\text{inger, op. cit., p. 429 (quotation in German).}\]
\[\text{167) M. Böse, loc. cit., pp. 211ff.; S. Braum, 'Europäische Strafgesetzgebung: Demokratische Strafge}
\[\text{169) ECJ, Judgement 13.9.2005 - C-176/03 (Commission/Council), para. 48; see for deliberations concerning 'effectiveness' E. Herlin-Karnell, loc. cit., pp. 74ff.}\]
\[\text{171) R. Hefendehl, loc. cit., p. 165 (quotation in German); similar T. Pohl, loc. cit., p. 216.}\]
have to be answered in the same way. One should rather make allowance for the competence in question, provided that it can be referred to a sound basis.

It is rather doubtful this can be convincingly achieved by resorting to Article 10 EC Treaty, by the application of other general generic competence norms or the doctrine of implied powers.

Article 10 EC Treaty and its principle of solidarity only oblige Member States to protect the Community’s interests within their criminal systems. Establishing an obligation for Member States does not automatically grant competences to the Community to call Member States to criminalize a certain conduct by issuing directives. Rather, this requires a special compétence d’attribution itself. Consequently, Article 10 EC Treaty is not a sufficient basis.

Besides these considerations, this approach constitutes, as well as the application of other general and generic competence norms, a fungous line of reasoning. Particularly in respect of Community competences concerning criminal laws, the authority should be based on a clear and convincing fundament. If applying overall, in its content and limitations not clearly defined principles meets these requirements despite its rather non precise argumentation, is disputable. Since the communitisation of criminal matters also affects a sensitive branch of law, strict requirements for any Community competence have to be claimed. It is beyond this paper’s scope to terminally decide if resorting to Articles 94 ff., 308 EC Treaty meets the necessary threshold. What casts doubts on such a line of reasoning is, however, that in both cases Article 251 EC Treaty does not apply, preventing the European Parliament from an appropriate involvement in the decision-making process. This might disregard, at least as far as directives harmonizing criminal laws are concerned, the fundamental principle of democracy.

Eventually, the doctrine of implied powers is not a sufficient basis either. As far as this theory is concerned, one already has to recall its weaknesses which have been pointed out previously. Moreover, its requirements are not met. The explicit
delegation of related authorities does not logically require the issuance of directives aimed at approximating criminal laws.\textsuperscript{180}

(b) Consequently, the competence in question may, at least with respect to the Community's financial interest, cogently be justified only by a specific substantive competence. For this field, Article 280 (4) EC Treaty might in this context meet the necessary requirements.

Its wording encompasses criminal law measures.\textsuperscript{181} Systematically, paragraph 4 has to be interpreted together with paragraphs 1, 2 and 3. It is submitted that those provisions 'declaratorily mirror' the aforementioned European Court of Justice's Greek corn scandal ruling; it was this decision that led to the incorporation of these principles into the EC Treaty via Article 280 EC Treaty.\textsuperscript{182} Consequently, Article 280 (4) Sentence 1 EC Treaty should also be interpreted 'in light of' the principles developed by the Court in this judgement. Since the Court obliged Member States to protect the Community's financial interests also by their criminal laws, the terms 'effective and equivalent protection in the Member States' (Article 280 (4) Sentence 1 EC Treaty) is also interpreted to encompass a protection by 'criminal laws'.\textsuperscript{183} If Article 280 (4) EC Treaty empowers the Community to 'adopt measures [...] with a view to [...] protection by criminal laws in the Member States', this provision seems to be a competence norm for issuing directives approximating criminal laws in this field.

This is underpinned by the characteristics of directives. Since they leave certain discretion to Member States, they are distinct from acts of legislation as discussed above. As far as directives are concerned, it is not the Community which enacts a criminal law norm; it is the singular Member State,\textsuperscript{184} even though the Member State enacts the provision to fulfil its obligation under Community Law.

Therefore, the delegation of authority in this respect is, as opposed to the competence to originally enact criminal laws, rather more reconcilable with Article 280 (4) EC Treaty.\textsuperscript{185} Issuing the directives in question does not concern the application of national criminal law or the national administration of justice as much as the

\textsuperscript{180} H. Hugger, op. cit., pp. 56ff.

\textsuperscript{181} B. Hecker, op. cit., § 8 Rn. 60.

\textsuperscript{182} P.J. Cullen, loc. cit., in: P. Cullen, op. cit., p. 5; G. Dannecker, loc. cit. (Fn. 66), p. 287; J. Eisele, loc. cit. (Fn. 108), p. 1158; B. Hecker, op. cit., § 4 Rn. 100, § 7 Rn. 33, 8 Rn. 60; H. Satzger, op. cit. (Fn. 52), p. 434.

\textsuperscript{183} B. Hecker, op. cit., § 7 Rn. 33, § 8 Rn. 60.

\textsuperscript{184} J. Deutscher, op. cit., p. 369; H. Satzger, loc. cit. (Fn. 177), pp. 55ff.; see also COM (2001) 272final, Explanatory Memorandum, p. 6f.

original enactment of criminal laws.\textsuperscript{\textasciitilde 86} In this sense, Article 280 (4) Sentence 2 EC Treaty can be ‘interpreted narrowly’.\textsuperscript{\textasciitilde 87}

This does not contravene the EU’s general three-pillar-structure and is not hindered by other systematic deliberations. Indeed, ‘criminal matters’ are, in general, allocated on the third pillar. Moreover, the EU Treaty provides in its ‘passerelle provision’\textsuperscript{\textasciitilde 88} of Article 42 a special and demanding procedure for transferring actions referred to in the PJCCM onto the first pillar.\textsuperscript{\textasciitilde 89}

However, these aspects do not persuasively exclude a Community’s competence for approximating criminal laws concerning its financial interests.\textsuperscript{\textasciitilde 90}

Article 280 (4) EC Treaty should be compared with Article 152 (5) EC Treaty. Article 152 (5) EC Treaty deals with public health and reads in its relevant parts as follows: ‘Community action in the field of public health shall fully respect the responsibilities of the Member States […]. In particular, measures […] shall not affect national provisions […]’.\textsuperscript{\textasciitilde 91}

At first, it is noteworthy that Article 152 (5) Sentence 1 EC Treaty explicitly and strongly calls for fully respecting the responsibilities of Member States. Article 280 (4) EC Treaty lacks such a strong and non ambiguous statement. Its content seems to be less strict. Systematically, one, therefore, has to conclude that whereas Article 152 (5) EC Treaty clearly rules out a Community’s competence, Article 280 (4) EC Treaty deliberately does not. Moreover, Article 152 (5) EC Treaty illustrates that the EC Treaty itself knows unambiguous provisions, undoubtedly preventing the reader to assume any Community competences in the wake of interpretation. Since Article 280 (4) EC Treaty does not make such a strong statement, it, \textit{e contrario}, gives more power to the Community than Article 152 EC Treaty does.

This is not contravened by the different wordings of the second sentences of the provisions. It is to concede that Article 152 (5) Sentence 2 EC Treaty speaks of ‘shall not affect’, whereas Article 280 (4) Sentence 2 EC Treaty only reads ‘shall not concern’. Theoretically, one could argue that both terms have different meanings, the term ‘not concern’ prohibiting more actions. This could follow from assuming

\textsuperscript{\textasciitilde 86} B. Hecker, \textit{op. cit.}, § 8 Rn. 60.

\textsuperscript{\textasciitilde 87} COM (2001) 272final, Explanatory Memorandum, p. 6; thereto G.J.M. Corstens, \textit{loc. cit.}, pp. 141ff., where the quotation of the aforementioned Memorandum can be found; M. Heger, \textit{loc. cit.}, p. 312.

\textsuperscript{\textasciitilde 88} G.J.M. Corstens, \textit{loc. cit.}, p. 135.


\textsuperscript{\textasciitilde 90} J. Eisele, \textit{loc. cit.} (Fn. 108), pp. 1158f. The argumentation is confined to Article 280 EC Treaty and the fight against fraud. It might be possible that the Community enjoys more powers in this field than it does in others.
a hierarchical structure between ‘affecting’ and ‘concerning’, according to which an ‘affection’ already occurs at an earlier stage.

Ultimately, this does not change the aforementioned line of reasoning. It is not evident a priori that both terms have a distinct content. This can be underpinned by the fact that the German version uses the same phrases in both provisions and does not assume any essential differences.

However, the French, Italian and Spanish versions also use different terms. All languages are, however, equally significant, none of them enjoying any primacy. It is rather significant which wording expresses the provision’s telos in the best way.9

One should assume that both terms mean the same. There is no logically compulsory difference in their contents. If also one of the binding languages, and even one which is usually very precise, particularly when it comes to legal terms, confirms this assumption, this is another major indication. In addition, this seems to at best express the provisions’ ratio. Since Sentence 1 of Article 152 (5) EC Treaty strongly calls for fully respecting the responsibilities of Member States, Article 280 (4) EC Treaty does not. Thus, Article 152 (5) EC Treaty wants to clearly repeat the competences of Member States in this field, whereas this does not seem to be the rational of Article 280 (4) EC Treaty. These provisions’ evident telos, being derived from their wording, can not simply be contravened by using, if at all slightly different, terms. If the EC Treaty would have really assumed a difference and with the consequences portrayed above, the Treaty would have made it much clearer and more evident.

Consequently, the abovementioned conclusion remains valid. Comparing both provisions, it is revealed that Article 280 (4) EC Treaty can be interpreted broadly.

This has now to be seen in the interplay with some of the already aforementioned aspects. The 1997 Amsterdam Treaty, which established Article 280 (4) EC Treaty, wanted to further promote the integration process.92 The whole provision has to be understood in the light of the aforementioned European Court of Justice’s corn scandal decision.93 Moreover, one must not forget the ‘cutting edge character’ of the fight against fraud for the field of criminal law.94 ‘more and more becoming the motor of a European criminal law’.95 Furthermore, the Community does not only have a vital interest to protect its financial interests, but Member States have

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91) F. Zieschang, loc. cit., p. 259. See, however, also T. Pohl, loc. cit., pp. 218f.
93) G. Dannecker, loc. cit. (Fn. 66), pp. 282f.
94) U. Sieber, loc. cit., p. 186 (quotation in German).
been aware of this fact.\textsuperscript{196} Such an effective protection has necessarily to include actions also concerning criminal matters.\textsuperscript{197}

In addition, the necessary requirements with respect to the principle of democracy are in any case met by this approach. Article 280 (4) EC Treaty explicitly refers to Article 251 EC Treaty, triggering the sufficient\textsuperscript{198} involvement of the European Parliament as a directly democratically legitimated body, by elections, in the decision-making process.

Moreover, Article 280 (4) EC Treaty \textit{substantially} covers the protection of the Community's financial interests. This relativizes the concern, considering the peculiar nature of criminal law as a 'symbol of national identity and culture';\textsuperscript{199} Member States should be prevented from too strongly interfering by the Community. Since it is the Community's goods which are concerned, there seems to be no, at least not a relatively big, room for refusing criminal law legislations out of reasons motivated by \textit{national} identity and culture.\textsuperscript{200}

The combination of all these aspects and the understanding of their interplay justify the interpretation of Article 280 (4) Sentence 2 EC Treaty, as a sufficient basis for the \textit{approximation of laws} in this respect.\textsuperscript{201} Thus, Article 29 (1) EU Treaty's caveat, to be read together with Article 47 EU Treaty, becomes applicable. Hence, \textit{this component of 'criminal matters'} is not allocated on the third, but on the first pillar.\textsuperscript{202}

(c) Since therewith a competence norm has been found, it can be left undecided if, with respect to other areas of law, this approach is generally convincing and if the other approaches might also be able to empower the Community in this matter. However, since the issue has, particularly in the wake of the \textit{European Court of Justice's} decision, been debated so quick-temperedly, some further annotations seem to be appropriate.

\textsuperscript{196} H. Satzger, \textit{op. cit.} (Fn. 52), p. 434.

\textsuperscript{197} Compare in this context T. Weigend, \textit{loc. cit.}, p. 66.

\textsuperscript{198} In this direction also K. Ambos, \textit{op. cit.}, §11 Rn. 4; O. Hedtmann, \textit{loc. cit.}, p. 133.

\textsuperscript{199} A. Klip, \textit{loc. cit.}, in: D.M. Curtin et al., \textit{op. cit.}, p. 119.

\textsuperscript{200} B. Hecker, \textit{loc. cit.}, p. 730.


\textsuperscript{202} COM (2001) 272final, Explanatory Memorandum, p. 6f.
The judgement's weakest point is its lack of detailed argumentation. The Court should have entered into a debate at great length. It would have had to deal with all existing pros and cons. This should have included the controversy if granting the Community the authority in question, is reconcilable with the principle of *nulla poena sine lege parlamentaria*. This has been doubted, since the Community has often been criticized as lacking a sufficient democratic structure. Moreover, it would have been necessary, from a dogmatic point of view, to clearly emphasize which methodical approach the Court wants to adopt.

This criticism is even more important because the subject at hand is a *criminal law* matter and concerns 'a question of extraordinary importance for the future of EU criminal law'. This branch of law is not only 'highly sensitive' but also an area which has not been the primary field of the 'communisation process' yet. Since the Court's ruling has now - on the jurisprudence level - paved the way for an intensified Community intervention, the Court should have been aware of the historic opportunity it had to gain support for the further Europeanization of criminal law.
which the Court obviously intended to promote.\textsuperscript{214}

The Europeanization of criminal law has been called the 'logical consequence of a general Europeanization of all spheres of life'\textsuperscript{215} and the 'irrefutable necessity' considering a 'Europe without borders'.\textsuperscript{216} 'In short, legal Europe is attempting to catch up with criminal Europe.'\textsuperscript{217} Nevertheless, this development is sometimes critically eyed. The existing concerns and apprehensions\textsuperscript{218} could have been tempered by the Court by also more clearly defining the limitations of the Community competence. Its mere reference that the Community (!) has to consider the measures 'necessary in order to ensure that the rules [...] are fully effective' does not meet the required threshold.\textsuperscript{219}

The Court also missed the opportunity to elaborate on its own role in the integration process.\textsuperscript{220} Its judgement will certainly not contribute to diminishing the concerns it is exposed to. The Court's role and self-conception of being the 'motor' of the integration process might be, in principle, correct. However, this does not prevent the Court from entering into in-depth debates and carefully giving reasons for its decisions. In the long run, the Court will not fulfil its role and gain acceptance in the European population\textsuperscript{221} if it confines itself to simply delivering judgements that condescend opposing views. Rather, the process of integration will only succeed if it is based on trust and confidence.\textsuperscript{222}

Moreover, one should be careful to concentrate on plainly juridically approaching and assessing the process of Europeanization of criminal law. Judicial reasoning is, at least theoretically and ideally, not political reasoning. Which powers the
Community should have, is not up to the jurist to decide. He has to define which authorities the Community currently enjoys. Hence, all the arguments being based on politically motivated deliberations, in favour or not in favour of a further Europeanization, are methodologically invalid right from the outset.

Apart from these grave reservations, it seems, as has been already stated, persuasive to at least consider the Community competent to issue directives affecting criminal laws in the wake of its efforts to protect its financial interests. Consequently, Member States lack, pursuant to Article 29 (1) EU Treaty, the authority to adopt framework decisions dealing with this matter.

4.3.2 Degree of the Authority to Issue Directives

Therewith, however, it has only been shown that such a competence, in principle, exists. Now it must be determined to which extent the Community may define what Member States have to implement. This issue is controvertible.

According to some academics, the Community enjoys a broad degree. This includes the definition of specific elements of a criminal offence as well as specifications concerning the character and the extent of the criminal punishment which should be provided for. Even under such clear definitions, the singular Member State would remain the one to ultimately enact the criminal law norms.

This point of view is not all-too-true. If one already takes into account the characteristics of directives, leaving the choice of form and methods for the required implementation to Member States (Article 249 (3) EC Treaty) and hence leaving them certain discretions, those directives should allow for a margin of decision for Member States. Nevertheless, under general European Law it is seen legitimate

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223) Besides the question of the degree of the Community’s authority (see 4.3.2.), the Community’s competence is, as general, limited by the principle of subsidiary (Article 2 (2) EU Treaty, Article 5 (2) EC Treaty) and the principle of proportionality (Article 5 (3) EC Treaty), see J. Eisele, loc. cit. (Fn. 108), p. 1161; B. Hecker, op. cit., § 8 Rn. 63ff.
228) M. Zuleeg, loc. cit., p. 767.
229) K. Ambos, op. cit., § 11 Rn. 32; H. Satzger, op. cit. (Fn. 17), § 8 Rn. 37.
if directives include extremely detailed provisions to be implemented.230

This can, however, not be true as far as directives harmonizing criminal laws are concerned.231 In this context, it has to be kept in mind that the Community does not have the competence to originally enact criminal laws. This fundamental principle would not be regarded adequately, if the Community could in every single detail oblige Member States to implement the directive.232 Such an implementation, lacking any kind of discretion for Member States, would ultimately be an 'evasion' of the missing authority for originally enacting criminal laws.233 Even if the criminal law provisions would in this case be established by Member States, it could not be considered a 'free' and 'independent' act. Member States would act under a 'European vis compulsiva'.234

Hence, the Community’s extent of defining the directives’ content is limited. It may only issue directives which leave a degree of discretion to Member States.235

At first, this concerns the statutory definition of a crime. The directive may include general aspects, i.e. describing the 'main features'236 or the 'overall concept'237 of the facts constituting an offence in a general sense.238 It must, however, not contain any definite elements of a criminal offence.239

In addition, the Community is entitled to address the legal consequences.240 In particular, the directive may explicitly call for a general criminal punishment,241 providing such statements of requirement do not inadequately confine Member


231) C. Schröder, op. cit., p. 185; see also G. Dannecker, loc. cit. (Fn. 99), p. 98.

232) K. Ambos, op. cit., § 11 Rn. 32; J. Deutscher, op. cit., p. 370; H. Satzger, op. cit. (Fn. 17), § 8 Rn. 37.


234) S. Gröblinghoff, op. cit., p. 135 (quotation in German).

235) K. Ambos, op. cit., § 11 Rn. 32; B. Hecker, op. cit., § 8 Rn. 70ff.

236) S. Gröblinghoff, op. cit., p. 136.

237) B. Hecker, op. cit., § 8 Rn. 70, 72; H. Satzger, op. cit. (Fn. 52), p. 462.

238) S. Gröblinghoff, op. cit., p. 136; C. Schröder, op. cit., p. 188.

239) B. Hecker, op. cit., § 8 Rn. 70; B. Hecker, loc. cit., p. 726. See for further requirements B. Hecker, op. cit., § 8 Rn. 70.

240) J. Eisele, loc. cit. (Fn. 108), pp. 1162ff.; dismissive C. Schröder, op. cit., p. 188.

241) J. Eisele, loc. cit. (Fn. 108), pp. 1162ff.; dismissive H. Satzger, op. cit. (Fn. 52), pp. 455ff.; C. Schröder, op. cit., p. 188.
States’ discretion. This is wise since the statutory definition of a crime and its legal consequences are connected.\(^2\)

Whether this authority includes defining the *precise form* and the minimum and maximum *range of the criminal punishment*, is doubtful.\(^2\) These questions have to be answered in the negative.\(^2\)

At first, the directive must not provide for the *specific form* of the criminal punishment.\(^2\) Considering the different criminal law systems within Member States, respectively following well-established traditions and national peculiarities, some Member States are not aware of certain forms of punishment that are common to other European systems.\(^2\) Whereas, for example, Germany does *de lege lata* not provide for a *criminal* responsibility of juristic persons,\(^2\) such a criminal liability can be found in Denmark, France, the United Kingdom and others.\(^2\)

If a directive could explicitly provide for such a specific form of criminal punishment, some Member States would be forced to introduce completely new means of punishment or change existing ones. This is disproportionate. Pursuant to the *principle of proportionality* (Article 5 (3) EC Treaty), the Community has to respect the respective criminal law culture of Member States’ legal systems,\(^2\) giving them the opportunity to implement the directive by ‘respecting [their] own domestic criminal laws’ coherence’.\(^2\) This includes choosing from equally effective measures to reach a legitimate goal only those on the Community level which give way to the broadest room possible for Member States’ discretion and respect Member States’ sovereignty as far as possible.\(^2\)

Whereas it does not violate the principle of proportionality, if the directive generally calls for a *criminal law punishment*, defining the *specific form thereof* does. Not calling for criminal punishment would not be as equally effective. Reaching the goal of effectively combating crime by

\(^{242}\) As J. Eisele put it, both elements have to be ‘properly harmonized with each other’, J. Eisele, *loc. cit.* (Fn. 108), p. 1162 (quotation in German), referring to BVerfGE 90, 145 [173].

\(^{243}\) Thereto J. Eisele, *loc. cit.* (Fn. 108), pp. 1162f; H. Satzger, *op. cit.* (Fn. 52), pp. 455ff.

\(^{244}\) H. Satzger, *op. cit.* (Fn. 52), pp. 455ff.; dismissive J. Eisele, *loc. cit.* (Fn. 108), pp. 1162f.

\(^{245}\) H. Satzger, *op. cit.* (Fn. 52), pp. 456.

\(^{246}\) H. Satzger, *op. cit.* (Fn. 52), p. 456.


\(^{249}\) H. Satzger, *op. cit.* (Fn. 52), pp. 457f.

\(^{250}\) B. Hecker, *op. cit.*, § 8 Rn. 70; see also J. Eisele, *loc. cit.* (Fn. 107), p. 994; H. Satzger, *op. cit.* (Fn. 52), p. 455.

\(^{251}\) H. Satzger, *op. cit.* (Fn. 52), p. 456.
harmonizing domestic criminal laws does, however, not require simultaneously defining the specific form by which the conduct has to be punished.\textsuperscript{52}

For the same considerations, directives must not precisely define the range of criminal punishment.\textsuperscript{53} If directives would also oblige Member States to criminalize, for example, a specific fraud affecting the Community by a term of imprisonment ‘from a minimum of five years’ or ‘a maximum of ten years’, Member States’ right to discretion would be too strongly curtailed.\textsuperscript{54} This also constitutes a violation of the aforementioned principles.\textsuperscript{55} Member States’ criminal law systems have to respect their own individual balance of ranges of punishment as regards their other national criminal laws. If, for example,\textsuperscript{25} one Member State decided to protect its own financial interests by relatively soft criminal punishments like ‘pecuniary penalty or imprisonment up to two years’, it would be opposed to severe legal problems if a directive would oblige it to protect the Community’s interests by a term of imprisonment with a minimum of five years. In order to keep the overall balance within its own system, the Member State would be forced to change its own general concept.\textsuperscript{25} This cannot be asked, since it would mean an unjustified de facto delimitation of Member States’ discretion.

Eventually, this is underpinned by Article 280 EC Treaty itself. Incorporating the European Court of Justice’s principles developed in the corn scandal ruling, Member States are obliged to take criminal law measures. Pursuant to Article 280 (2) EC Treaty, this obligation is somehow confined to the ‘same measures they take to counter fraud affecting their own financial interests.’ Hence, if a Member State has decided to protect its own financial interests in a relatively soft way, this has to be respected. By referring to the same standard as regards its own interest, Article 280 (2) EC Treaty illustrates that the obligations of Member States have to be in accordance with their own criminal law systems. This normative principle would be weakened and evaded if a directive based on Article 280 (4) EC Treaty could determine the range of punishment and in the wake potentially force Member States to change their domestic systems.

Ultimately, the legality of the Community’s action, i.e. the question if the Community bodies acted within their authority, has to be examined for each

\textsuperscript{52} H. Satzger, \textit{op. cit.} (Fn. 52), p. 458.
\textsuperscript{53} H. Satzger, \textit{op. cit.} (Fn. 52), pp. 460ff.; dismissive J. Eisele, \textit{loc. cit.} (Fn. 108), pp. 1162f.
\textsuperscript{54} H. Satzger \textit{op. cit.} (Fn. 52), pp. 460ff.
\textsuperscript{55} B. Hecker, \textit{op. cit.}, § 8 Rn. 70.
\textsuperscript{57} J. Eisele, \textit{loc. cit.} (Fn. 108), p. 1163.
directive individually. If the existing proposals, concerning the protection of the Community’s financial interests, meet these requirements, is beyond this paper’s scope. This has to be left undecided here.

5. Conclusion and Prospects

The European concept of fighting frauds consists of numerous means. Two elements of this strategy have been examined.

The paper has shown that the Community does not enjoy the competence to originally enact criminal law norms. Such an authority has not generally been provided. It does not exist for the specific area of protecting the Communities’ financial interests either. Article 280 EC Treaty is not a sufficient basis.

On the other hand, the Community is entitled to issue directives harmonizing criminal laws, at least as regards its financial interests. The required competence norm is Article 280 EC Treaty.

However, the Community’s authority is limited. Considering criminal law’s peculiarities and the aforementioned lack of a Community’s competence to originally enact criminal laws, the directive must leave sufficient discretion to Member States.

The directive may concern the statutory definition of a crime and the legal consequences as far as they respect the guidelines which have been elaborated on. In particular, the Community might call Member States to provide for a criminal punishment of a certain conduct. Then again the directive must not define the specific form or determine the range of the criminal punishment.

In its 13 September 2005 ruling, the European Court of Justice assumed a Community competence to issue directives approximating criminal laws. As regards the fight against fraud, this is in accordance with this paper’s reasoning. The judgement though is characterized by an extreme weak line of argumentation and methodologically poor. The Court was evidently driven by the motivation to advance European integration. Nevertheless, it missed a historic opportunity. As regards the Europeanization of criminal law, its decision could turn out a Pyrrhic victory. Even though it paved, on the jurisprudence level, the way for advancing Europeanization, critics of this process and of the Court will be felt assured in their reservations. The functioning of the Europeanization process will only turn

out a success, if it is accepted by its addressees, i.e. the European civilians. Trust and confidence are prerequisites therefore. Thus, the Court should reconsider its self-perception and reassure itself about its significant role, in particular when it is called to decide upon criminal matters.

Nevertheless, the Europeanization of criminal law will most likely proceed prospectively in either case. In the aftermath of the expansion since the Communities' establishment, the advanced integration within Member States, the abolishment of border controls and, despite obverse actions in the wake of fighting terrorism, the maximization of EU citizen's freedoms, criminals also have made use of these advantages. Ultimately, these aspects will promote — if not rather force — further Europeanization. In today's globalized and technically highly developed world, national democracies will not be able to effectively protect their interests and citizens, if they merely act alone on the domestic plane.

Where and when this process will end, is not yet predictable. Persistence on implementing the Europeanization of criminal law, one would have to envisage institutional criminal law bodies, e.g. a European Prosecutor as well as a European Criminal Court. To have a European criminal law in its pure form, these organs would have to apply original European criminal laws, both substantially and procedurally. This presupposes that the Community will at some time in the future be competent to originally enact criminal law norms.

Presumably, the fight against fraud will play a leading role in this development. This area already features the most advanced achievements. Moreover, European law's history has shown that the integration has always embarked upon the economic field. As far as the communitisation of criminal law is concerned, this will most likely not be different.

Time will tell if such notions will ever be implemented and assume, in whole or in part, a definite legal form. The development of the past decades has to be kept in mind. Shortly after the Second World War, nobody would have imagined the level of European integration that exists today. Similarly, the creation of a

\[\text{\textsuperscript{261}}\text{Compare also V. Stiebig, loc. cit., p. 492.}\]

\[\text{\textsuperscript{262}}\text{See V. Stiebig, loc. cit., pp. 469, 477ff.}\]

\[\text{\textsuperscript{263}}\text{Compare U. Sieber, 'Grenzen des Strafrechts', 119 Zeitschrift für die gesamte Strafrechtswissenschaft (2007), pp. 3ff.}\]

\[\text{\textsuperscript{264}}\text{See W. Perron, loc. cit., in: M. Hettinger et al., op. cit., pp. 438f.}\]


\[\text{\textsuperscript{266}}\text{G. Dannecker, loc. cit. (Fn. 66), p. 308.}\]

\[\text{\textsuperscript{267}}\text{G. Dannecker, loc. cit. (Fn. 66), pp. 282f.}\]
permanent International Criminal Court was often considered unthinkable. It would be surprising if the nations of Europe, with all their common grounds and history, fomented by future generations\textsuperscript{268} of young Europeans who have never lived in a Europe without the EU, could in the end, not arrive at a comparable achievement.

\footnote{268} Compare M. Zuleeg, \textit{loc. cit.}, p. 769.