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**Criminalisation of EU Competition Law Enforcement – A possibility after  
Lisbon?***Gurgen Hakopian\**

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The EU's competence to criminalise competition law enforcement has been and will continue to be a subject of debate. Before the entry into force of the Treaty of Lisbon opinions were divided on the question whether the Community had the power to introduce criminal law sanctions at the level of the EU institutions and the Member States. It can however be said that the old Treaty did not preclude the adoption of such measures, in theory at least, based on the wording of Art 83 EC and the Community's criminal law competence. The new TFEU has introduced a specific legal basis for the adoption of substantive criminal law measures in Art 83 TFEU, thus changing the dynamics in this area. Examination of the new system of EU criminal law reveals that criminalisation of competition law at the level of the EU institutions would no longer be possible without a Treaty amendment. Subject to the conditions mentioned in Art 83(2) TFEU, the Union does have the competence to criminalise competition law enforcement at the level of the Member States through harmonisation. The European Public Prosecutor, who would have the power to prosecute certain crimes before the national courts, could play a role in this respect, as it was originally intended to include bid-rigging in his competence *ratione materiae*. Even though the adoption of criminal law measures is technically 'easier' after the entry into force of the Treaty of Lisbon, broad consensus will still be required. Any developments in criminal competition law enforcement will depend on the political will in the Union.

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**1. INTRODUCTION**

The effectiveness of EU competition law enforcement has been an issue of concern for some time. It has been openly questioned whether the current system, based on administrative fines, is sufficiently deterrent to assure compliance with the legal rules. Since there is increasing awareness in the EU and its Member States that this might not be the case, alternative methods of enforcement are being considered. One such approach is the institution of criminal sanctions for individuals and corporations. The current system allows Member States the choice between administrative, civil and criminal measures in the enforcement of national and EU competition rules. In the last decade certain Member States have used this possibility to criminalise their national enforcement systems. The United Kingdom and Ireland respectively introduced and expanded criminal competences in competition law in 2002. In the Netherlands, a proposal will be tabled by the legislator for the (re-)introduction of criminal law sanctions for both individuals and undertakings in the near future.<sup>1</sup> While it is clear that

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\* PhD candidate, Radboud University Nijmegen. The author would like to thank Prof Johan van de Gronden and Dr Henri de Waele for their useful comments and insights.

Member States have the authority to criminalise competition law enforcement, the question whether the EU has the same competence is open for discussion.<sup>2</sup>

This paper will investigate whether the new system of EU criminal law provides for an adequate framework for the EU legislator to introduce a criminal enforcement system of competition law in the European Union both at the level of the EU institutions and at the level of the Member States, by means of full or partial harmonisation, and how this compares to the system before the entry into force of the Treaty of Lisbon.<sup>3</sup> Particular attention will be paid to any effects the abolishment of the Pillar structure may have on the abovementioned issue.

The paper will start with a brief summary of the discussion concerning the possibilities of criminalising EU competition law enforcement under the old Pillar system. The analysis will focus on the interplay between a number of proposed legal bases and the debate on the Community's criminal law competence. Arguments from both sides of the spectrum will be considered. Subsequently, attention will be paid to the new substantive provisions of European criminal law, particularly Art 83 TFEU. This provision provides for a specific legal basis for the adoption of substantive criminal law measures in the EU. The debate on the extent of the Union's competence over criminal law is not settled however, as a number of questions arise from the wording of the Treaty. The conditions for the application of both paragraphs of Art 83 TFEU will be analysed in detail. The relationship between this Article and Art 103 TFEU will also be considered, followed by a critical analysis of the new system of EU criminal law in the context of criminalising competition law enforcement. Finally, it will be examined what role the institution of a European Public Prosecutor's Office could play in a possible scenario of criminal competition law enforcement. At the end of the paper, a number of conclusions will be drawn. It will be shown that possibilities for the criminalisation of EU competition law continue to exist, albeit in a modified manner. However, it will be argued that despite the substantial changes in EU criminal law, the most important issue remains the political will of the EU and its Member States to criminalise competition law enforcement.

## 2. VIEWS ON CRIMINALISATION UNDER THE PILLAR SYSTEM

The old Art 83 EC gave the Community the competence to adopt legislation (both regulations and directives) to give effect to the prohibitions laid down in Art 81(1) EC, but stated in paragraph (2)(a) that this would be done 'by making provision for fines

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<sup>1</sup> For a more detailed discussion of the proposal see R de Bree, 'Mededingingsrecht en strafrecht: hernieuwde kennismaking' (2006) 7 *Markt en Mededinging* 205. Due to the recent (February 2010) collapse of the Dutch government however, tabling it may take more time than originally anticipated.

<sup>2</sup> It is perhaps important to note that while Member States have a broader competence to criminalise the enforcement of EU competition law at the national level, this paper will approach the subject from the viewpoint of criminalising cartel offences in particular.

<sup>3</sup> To clarify: criminalisation at the level of the EU institutions means making serious breaches of competition law European crimes, prosecuted by a European authority at the EU courts.

and periodic penalty payments'. It has therefore been argued that the EC lacked the power to adopt criminal sanctions in competition law, for instance by the German government before the ECJ.<sup>4</sup> It is evident that the authors of the EC Treaty intended to introduce a system of competition law enforcement based on (administrative) fines, not criminal sanctions. However, the question whether it would have been possible in theory is a different one. While it is true that the EC Treaty did not give the Community the explicit power to introduce criminal law sanctions in competition law matters, it must be kept in mind that the 'fines and periodic penalty payments' mentioned in Art 83(2)(a) EC were<sup>5</sup> merely examples and did not in any way constitute an exhaustive list of measures.<sup>6</sup>

The Community's criminal law competence was expanded by the ECJ in its famous *Environmental Crimes* judgment,<sup>7</sup> where a framework decision adopted under the Third Pillar was annulled on the grounds that it encroached upon the Community's competence to adopt the measure using First Pillar legislation. The Court pointed out that according to Art 47 EU, 'nothing in the Treaty on the European Union is to affect the EC Treaty', a principle that is also found in Art 29 EU.<sup>8</sup> It went on to state that:

'As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence [...] However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'<sup>9</sup>

The ECJ repeated this point of view in another case concerning environmental protection, with the important addition that 'the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.'<sup>10</sup> Despite the fact that these cases were concerned specifically with

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<sup>4</sup> Case C-240/90, *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-05383, paras. 16-17.

<sup>5</sup> Note that Art 103(2)(a) TFEU is unchanged from its predecessor Art 83(2)(a) EC. This provision will be discussed in more detail below.

<sup>6</sup> As pointed out by M Zuleeg in 'Criminal Sanctions – Panel Discussion', in: C D Ehlermann, I Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing, 2003) 389.

<sup>7</sup> Case C-176/03, *Commission of the European Communities v. Council of the European Union (Environmental Crimes)* [2005] ECR I-07879.

<sup>8</sup> *Id.*, para 38.

<sup>9</sup> *Id.*, paras 47-78.

<sup>10</sup> Case C-440/05, *Commission of the European Communities v. Council of the European Union (Ship-Source Pollution)* [2007] ECR I-09097, para 70. For a more detailed discussion of both judgments see S Peers, 'The European Community's criminal law competence: The plot thickens' (2008) 33 *European Law Review* 399.

environmental protection, it has been argued that the reasoning followed by the ECJ applies to other areas of Community law as well, including competition law.<sup>11</sup>

Consequently, several scholars have expressed the opinion that the introduction of criminal competition law enforcement in the EU would indeed have been possible both at the level of the EU institutions and at the national level through full harmonisation.<sup>12</sup> Interestingly enough, the Commission itself has seemed open to the possibility of the application of criminal sanctions in the past:

‘Deterring undertakings and individuals from entering or re-entering cartel arrangements is one of our main objectives. We [the Commission, GH] therefore welcome all sanctions, including criminal sanctions, which contribute to the deterrent effect on cartels’.<sup>13</sup>

Wils has argued that in the event that Art 83 EC would not be considered to be a sufficient legal basis for introducing criminal law sanctions, ‘the solution would be to use Art 308 EC’.<sup>14</sup> The purpose of this provision was to provide a necessary power, when none is available elsewhere in the EC Treaty, to attain any Community objective.<sup>15</sup> Any proposal based on Art 308 EC had to be ‘in the course of the operation of the common market’, but over the years its scope has been expanded to include much that is not primarily concerned with the operation of the economic community.<sup>16</sup>

While it is clear that different opinions existed on the Community’s criminal law competence in general and its competence in competition law matter in particular, it can be said that the old system did not exclude, in theory at least, the possibility of introducing criminal law sanctions for competition law enforcement both at the level of the EU institutions and at the level of the Member States. The answer to the question whether this could have been achieved by using Art 83 EC, Arts 29 and 47 EU, Art 308 EC, or a combination of these provisions, will now almost certainly remain in the realm of guesswork and speculation.

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<sup>11</sup> R de Bree, ‘Mededingingsrecht in het strafrecht: ‘Law in the making?’ (2008) 9 *Actualiteiten Mededingingsrecht* 212-213; R Barents, ‘De denationalisering van het strafrecht’ (2006) 10 *Sociaal-Economische Wetgeving* 371; A Dawes & O Lynskey, ‘The ever-longer arm of EC law: the extension of community competence into the field of criminal law’ (2008) 45 *Common Market Law Review* 140-151.

<sup>12</sup> Barents, *supra* note 11; W Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (Kluwer, 2002) 232-237; Zuleeg, *supra* note 6, 389-391.

<sup>13</sup> O Guersent, ‘The EU Model of Administrative Enforcement Against Global Cartels: Evolving to Meet Challenges’, in: C D Ehlermann and I Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007)

<sup>14</sup> W Wils, ‘Is criminalization of EU competition law the answer?’, in: K J Cseres, M P Schinkel and F O W Vogelaar (eds.), *Criminalization of Competition Law Enforcement – Economic and Legal Implications for the EU Member States* (Elgar, 2006) 95.

<sup>15</sup> Its successor, Article 352 TFEU, will be considered in more detail below.

<sup>16</sup> House of Commons, European Scrutiny Committee, ‘Article 308 of the EC Treaty’, 29th Report, Session 2006-07 (The Stationery Office Limited, 2007)

### 3. THE TFEU AND THE NEW SYSTEM OF EU CRIMINAL LAW

The first and most important thing to note about the new system of EU criminal law is that mutual recognition is (still) the leading principle.<sup>17</sup> In fact, the Union's competence to adopt measures in the field of criminal procedure is subordinate to the principle of mutual recognition.<sup>18</sup> This must be kept in mind when analysing the Union's criminal law competence in the TFEU.

With the abolishment of the Pillar structure, a new provision for the institution of substantive criminal law measures in the European Union was introduced: Art 83 TFEU. The provision reads:

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

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

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

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<sup>17</sup> Art 82(1) TFEU states: 'Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.'

<sup>18</sup> See Art 82(2) TFEU as well as V Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) 156-158.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Art 83(1) and Art 83(2) TFEU both confer the competence to adopt substantive criminal law measures, but the legislative procedure that has to be followed is different. For the first paragraph, the ordinary legislative procedure<sup>19</sup> applies. The second paragraph states that the measures shall be adopted by using the same procedure as was followed for prior harmonisation measures.<sup>20</sup> Art 83(1) TFEU lays down certain ‘areas of (particularly serious) crime (with a cross-border dimension)’, some of which have been deliberately drafted in a broad way as to leave a wider margin to the EU legislator,<sup>21</sup> while Art 83(2) TFEU is not limited in subject matter. The Council may extend the list of crimes in Art 83(1) TFEU if it considers it necessary to do so. What does this mean for the relationship between the two? The logical conclusion would be that the Council cannot extend the areas of crime mentioned in the first paragraph to cover offences falling under the second paragraph, and that Art 83(2) TFEU cannot be utilised to adopt measures concerning the areas of crime mentioned in Art 83(1) TFEU.<sup>22</sup> Keeping this in mind, it is now time to consider whether this Article constitutes a sufficient legal basis for the introduction of criminal law sanctions in competition law matters at the level of the EU institutions and/or at the level of the Member States.

A first important remark to be made is that both paragraphs of Art 83 TFEU exclusively provide for the use of directives in adopting substantive criminal law measures. As directives are obviously still only binding upon the Member States,<sup>23</sup> it must be concluded that the wording of Art 83 TFEU excludes the possibility of instituting a criminal system of competition law enforcement at the level of the EU institutions.<sup>24</sup> Therefore, any discussion of the possibilities that this Article provides for

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<sup>19</sup> Art 294 TFEU (ex Art 251 EC).

<sup>20</sup> As Art 83(2) can only be used in an area which is already subject to harmonisation. We shall return to this point later.

<sup>21</sup> C Ladenburger, ‘Police and Criminal Law in the Treaty of Lisbon – A New Dimension for the Community Method’ (2008) 4 *European Constitutional Law Review* 34-36.

<sup>22</sup> See also S Peers, ‘EC Criminal Law and the Treaty of Lisbon’ (2008) 33 *European Law Review* 516-517. He considers each paragraph to be a *lex specialis* as regards the other.

<sup>23</sup> Art 288 TFEU.

<sup>24</sup> Wils (*supra* note 14, 97) reached the same conclusion when discussing Article III-271(1) of the now defunct Constitutional Treaty, the predecessor of Art 83(1) TFEU: ‘the fact that this Article only allows the use of European framework laws [the CT equivalent of directives, GH] [...] appears to close the door to criminalization of EU antitrust enforcement at the level of the EU institutions.’

criminalising EU competition law enforcement must be confined to the scenario of harmonisation at the level of the Member States.

As stated before Art 83(1) TFEU is exclusively concerned with ‘particularly serious crime with a cross-border dimension’ and provides an exhaustive list of ‘areas of crime’ that conform to this standard of seriousness. Competition law offences, and more specifically cartel offences, are not included in the list. However, it is too simplistic to dismiss this provision’s usefulness for the matter at hand based on this fact alone. An interesting point of view is that cartel offences could theoretically be seen as a species of corruption.<sup>25</sup> While there is no definition of corruption to be found in the TFEU (or, indeed, any of the other areas of crime listed in Art 83(1) TFEU), the Commission has in the past expressed its thoughts on the issue:

‘There is no single uniform definition of all the constituent elements of corruption. [...] Whereas one of the rather traditional definitions, followed by the World Bank and the non-governmental organisation Transparency International, views corruption as “the use of one’s public position for illegitimate private gains”, it appears more appropriate to use a broader definition such as the one of the Global Programme against Corruption run by the United Nations, i.e. “abuse of power for private gain” and including thereby both the entire public and private sector’.<sup>26</sup>

Though the EU has adopted the UN’s broader definition to include the private sector, it is too much of a stretch to throw competition law offences in the corruption bin. An argument can be made that an overlap between the two exists, but corruption is only a part of competition law offences such as bid-rigging and market sharing. A tying of the two categories would therefore lack the necessary legal basis and credibility. Another hypothetical scenario would be to include serious breaches of competition law in the definition of ‘organised crime’. In Art 1 of Joint action 98/733/JHA, a criminal organisation was defined as ‘a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.’<sup>27</sup> A cartel could probably be described as such a ‘structured association’, leaving the issue of the minimum penalty required. For an offence to be qualified as part of organised crime, there must be a maximum sentence of at least four years imprisonment in place. The seriousness of cartel offences is recognised by a number of Member States. In the UK and Ireland, a conviction

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<sup>25</sup> Peers, *supra* note 22, 522.

<sup>26</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, ‘On a Comprehensive EU Policy Against Corruption’ (28 May 2003) Brussels COM/2003/0317 final.

<sup>27</sup> Joint action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351, 1-3.

under that offence carries a maximum prison sentence of five years.<sup>28</sup> In Estonia however, individuals can only be punished for competition offences by means of up to three years imprisonment.<sup>29</sup> Then there are of course the Member States who have not criminalised competition law enforcement at all. In the absence of clear consensus on the matter, it seems premature to include cartel offences in the organised crime category.<sup>30</sup> Thus it must be concluded that Art 83(1) TFEU is not a very convincing legal basis for the criminalisation of EU competition law at this point in time. That being said, its application could of course be extended by a unanimous decision of the Council (after consulting the Parliament), should it be considered necessary to include competition law offences in the current list of areas of crime.

Art 83(2) TFEU gives the Union the power to adopt substantive criminal law measures in areas other than those mentioned in Art 83(1) TFEU, subject to a number of conditions: the measures in question must be essential to ensure the effective implementation of a Union policy, in an area already subject to harmonisation, and must be adopted by the same decision-making process as in the main harmonisation policy. It is interesting to note that the provision refers to approximation of criminal laws and regulations of the Member States, a phrase not found in Art 83(1) TFEU. Prima facie this seems to imply a limited degree of integration. Then again, Art 83(2) TFEU does not require the crime in question to be ‘sufficiently serious’ with a ‘cross-border’ dimension. Yet it would be premature to conclude that this provision is unlimited in its legislative mandate, considering the fact that any necessity to legislate at the European level automatically implies some kind of ‘Union dimension’.<sup>31</sup> So how should the conditions for the application of Art 83(2) TFEU apply? The requirement that criminal law measures be ‘essential’ already existed under the Community’s criminal law competence and so far there is no reason to assume that it must be applied differently under the TFEU. The precise meaning of this condition has always been somewhat unclear:

‘It is thus clear that the questions whether criminal measures are in a particular case ‘essential’ for combating serious offences or ‘necessary’ in order to ensure that rules are ‘fully effective’ call, not only for ‘objective’ consideration of the substantive legal basis or policy area in question, but also for a degree of judgment. From that perspective, it was no accident that the Court referred to criminal law measures

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<sup>28</sup> Section 190(1)(b) Enterprise Act 2002 (UK); Section 8(1)(b)(ii) Competition Act 2002 (Ireland).

<sup>29</sup> Articles 399-402 of the Estonian Penal Code. See also A Proos, ‘Competition policy in Estonia’, in: K J Cseres, M P Schinkel and F O W Vogelaar (eds.), *Criminalization of Competition Law Enforcement – Economic and Legal Implications for the EU Member States* (Elgar, 2006) 307-311.

<sup>30</sup> An example from the Netherlands is perhaps illustrative of the difficulties concerning the overlap between the two concepts. In 2008 a number of window cleaners were prosecuted for taking part in a criminal organisation. The court in question however ruled that their actions factually constituted cartel behaviour, which is not a criminal offence in the Netherlands, and dismissed the case. See De Bree, *supra* note 11, 215-216.

<sup>31</sup> E Herlin-Karnell, ‘The Lisbon Treaty and the Area of Criminal Law and Justice’ (2008) 3 *Sieps European Policy Analysis* (2008) 5-6, available at [http://www.sieps.se/epa/2008/EPA\\_nr3\\_2008.pdf](http://www.sieps.se/epa/2008/EPA_nr3_2008.pdf).



which the Community legislature ‘considers necessary’ and established that ‘the Council took the view that criminal penalties were essential’. [...] It appears to me problematic, in particular, that the conditions for the adoption of measures relating to criminal law under the Community pillar, notably the legislative procedure, depend on the area of Community action concerned, and vary accordingly.<sup>32</sup>

It is to be expected that it will continue to be difficult to assess whether this condition is satisfied in practice. Another issue that is unclear at this point in time is what institution will have to prove that criminal law measures are in fact essential. It seems logical that the case law of the Court will be taken into consideration (for example, it should now be clear that environmental protection is an essential Union policy), but one can imagine a situation where there is a disagreement between the Council on the one hand and Commission and Parliament on the other, and the suggestion that both issues are ‘highly likely to be the subject of ECJ litigation’ does not seem to be far off.<sup>33</sup>

The requirement that the area concerned must have already been subject to harmonisation measures also existed under the old system, albeit implicitly.<sup>34</sup> A number of questions arise from this condition. First of all, it must be determined to what extent the Union can adopt criminal law measures. The wording of the TFEU makes it clear that the measures can be adopted to the extent that the area in question has been harmonised, but there is no reason to conclude that full harmonisation is a requisite for the adoption of measures under this provision. In short, the Union can only adopt criminal law measures in the area of competition law to the extent that it has harmonised competition law. Next, it should be noted that criminal law measures adopted under Art 83(2) TFEU must not precede the harmonisation measures in question.<sup>35</sup> If harmonisation measures are not in place, the adoption of criminal law measures cannot logically prove to be ‘essential to ensure the effective implementation of a Union policy’, since such a policy would not exist. There is however no indication to be found of a minimum waiting period, which means that in theory criminal law measures could be adopted immediately after the adoption of the harmonisation measures. Finally, does the precondition of prior harmonisation imply that criminal law measures adopted on the basis of Art 83(2) TFEU must be separate from the original legislation at issue? Certainly, the Treaty imposes no obligation to do so. However, the requirement that the same legislative procedure must be followed strongly points towards the conclusion that it was indeed the intention of the Treaty drafters that separate measures be used. There is also the matter of the British, Irish and Danish opt-outs from policing and criminal law and the emergency brake procedure of Art 83(3)

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<sup>32</sup> Opinion of A G Mazák, Case C-440/05, *Commission of the European Communities v. Council of the European Union* [2007] ECR I-09097, paras 119, 121.

<sup>33</sup> Mitsilegas, *supra* note 18, 108.

<sup>34</sup> *Supra* note 10, para 66.

<sup>35</sup> The Article states: ‘in an area which *has been subject to harmonisation measures* [...] adopted by the same ordinary or special legislative procedure *as was followed for the adoption of the harmonisation measures in question*’ [emphasis added, GH].

TFEU. In the case of simple amendment of existing legislation, Member States could have the power to invoke their opt-outs and the emergency brake in the areas already subject to harmonisation, thus perhaps extending the influence of Art 83 TFEU to non-criminal matters.<sup>36</sup> It can therefore be assumed that the use of separate measures was intended to avoid such complication in the future. In short, it can be said that Art 83(2) TFEU could definitely constitute a sufficient legal basis to criminalise the enforcement of EU competition law enforcement through harmonisation at the level of the Member States. Competition law is of course an area that has been subject to harmonisation measures, but it would still have to be proven that criminal law measures are essential to ensure the effective implementation of the Union's competition law policy. Who will get the final word on the precise definition of these criteria is however still unclear.

Before drawing further conclusions, it is important to examine the relationship between Art 83 TFEU and Art 103 TFEU, the provision that deals specifically with the adoption of competition law measures and the successor of Art 83 EC. As noted in the second paragraph of this paper, it has been argued that 'fines and periodic penalty payments' were mentioned in Art 83(2)(a) EC as examples, and criminal competition law measures could have been adopted in theory by using this Article as a legal basis. If we assume that the same reasoning applies to the new Article (and indeed there is no reason why it should not), does that mean that the existence of a specific legal basis for the adoption of substantive criminal law measures, Art 83 TFEU, precludes the adoption of criminal law measures on the basis of Art 103 TFEU? This issue is of the utmost importance, since Art 103 TFEU, like its predecessor, allows for the use of both regulations and directives, and thus could perhaps be seen as providing the possibility to criminalise competition law enforcement at the level of the EU institutions. The Article also contains its own legislative procedure (decision of the Council, on a proposal from the Commission and after consulting the European Parliament, known as the 'consultation procedure').<sup>37</sup> Taking this into account, another question would be whether all competition law measures should be adopted on the basis of Art 103 TFEU. According to a leading commentator, there would be some friction between the two provisions:

'If it were desired to adopt criminal law measures concerning EU competition law, these would have to be carefully distinguished from the competence in para.1 [Art 83(1)] concerning the adoption of measures concerning (private) corruption. This point is relevant since the decision-making rules would be different (consultation of the EP for competition law measures, as distinct from the ordinary legislative procedure for measures concerning corruption)'.<sup>38</sup>

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<sup>36</sup> Peers, *supra* note 22, 520-521.

<sup>37</sup> Note that the phrase 'acting by a qualified majority' that appeared in Art 83(1) EC is gone from Art 103(1) TFEU.

<sup>38</sup> Peers, *supra* note 22, 522.

As for the first question, it must be concluded that substantive criminal law measures cannot be adopted on the basis of Art 103 TFEU alone. The reason for this is simple: there is a specific legal base to be found in the Treaty for the adoption of such measures. In the absence of other provisions that explicitly confer the competence to adopt substantive criminal law, Art 83 TFEU has to be seen as the correct legal basis in this area. Since Art 103(2)(a), like its predecessor, only mentions ‘fines and periodic penalty payments’, it must be concluded that this Article does not confer the competence to adopt criminal law measures in the area of competition law. This reasoning also applies to another legal base mentioned under the old system, Art 352 TFEU (ex Art 308 EC). With the entry into force of Art 83 TFEU, the argument that the Treaties do not provide the necessary power to adopt criminal law measures is no longer valid. The ECJ’s case-law on the Community’s criminal law competence is also no longer relevant in this regard. It is clear that it will not be possible to adopt ‘Community criminal law’ on this basis, not only because the Community has ceased to exist but because of the introduction of a specific legal base for the adoption of substantive criminal law measures. Art 83 TFEU was created with the intent to end the confusion in this field, as evidenced by the fact that the criteria of ‘essentiality’ and ‘effectiveness’ have been transposed from the ECJ’s case-law into the second paragraph of this provision. An interesting question is whether the ECJ’s ‘centre of gravity’-theory could play a role in determining the correct legal base for the adoption of criminal competition law measures:

‘in the context of the organisation of the powers of the Community the choice of a legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure [...] If examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component [...] Exceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases’.<sup>39</sup>

Could one then argue that in the criminalisation of competition law enforcement, competition policy is the ‘predominant purpose or component’, thereby ignoring Art 83 TFEU entirely as a legal basis and basing any measures in this field solely on Art 103 TFEU? If the answer to this question is in the affirmative, it would mean that Art 103 TFEU could be used to criminalise competition law enforcement at the level of the EU institutions. Such reasoning does not seem entirely convincing however. First of all, it would be hard to argue that criminal law as the purpose of the proposed legislation is completely subordinate to competition policy. Second, the fact that there is a specific

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<sup>39</sup> Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. [2002] ECR I-11453, paras 93-94.

legal basis for the adoption of criminal law measures that did not exist for the Community means that Art 83 TFEU cannot be ignored on the basis of this doctrine alone, especially considering the fact that criminal law measures are not mentioned in Art 103 TFEU. Nevertheless, it remains an interesting point and the last word has definitely not been said on the matter.

Finally, we must consider what consequences the legislative procedure laid down in Art 103 TFEU may have for any Union competence to criminalise competition law on the basis of Art 83 TFEU. The answer to this question is twofold. In the case of Art 83(2) TFEU, there do not seem to be too many problems. Any measure adopted on the basis of this provision would have to follow the same legislative procedure that was used for prior harmonisation of competition law (Art 103 TFEU/Art 83 EC). The issue is with Art 83(1) TFEU, which, as correctly noted by Peers, imposes the use of the ordinary legislative procedure and can therefore be in conflict with Art 103 TFEU. It is highly unlikely that Art 83(1) TFEU can be used to criminalise the enforcement of EU competition law at this point in time. However, should the Council unanimously decide to extend the list of areas of crime mentioned in this provision to include competition law offences, there is no theoretical objection why it cannot constitute a valid legal base for the adoption of criminal competition law measures. In that case a specific basis for the adoption of such measures would exist, separate from the competence laid down in Art 103 TFEU. Whether one would consider separating the Union's competence to adopt criminal competition law measures from its general legislative competence in competition law is another question entirely.

#### 4. THE EUROPEAN PUBLIC PROSECUTOR

The idea for a European Public prosecutor was developed as early as 1997 by a study group funded by the Commission.<sup>40</sup> Now, more than a decade later, we find a specific legal basis for the creation of such an office, Art 86 TFEU:

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

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<sup>40</sup> See the two main publications of this group: M Delmas-Marty (ed.), *Corpus Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Editions Economica, 1997) and M Delmas-Marty and J A E Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States, Penal Provisions for the Protection of European Finances*, (Intersentia, 2000-2001).

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

An initial important remark to be made is that there is no obligation to create a European Public Prosecutor, this Article merely provides the possibility to do so. It is not unthinkable that the EPP will never come into existence.<sup>41</sup> The initiative to create the EPP must be taken by the Council in a unanimous decision or a group of at least nine Member States. The Prosecutor will be concerned with crimes against the Union's financial interests, though its powers may be extended by the Council to include 'serious crime having a cross-border dimension'. The Prosecutor's competence would extend to the entire territory of the Union, which would constitute a single legal area for this purpose.<sup>42</sup> He will only be able to bring cases before national courts, which means that a vertical structure will be introduced in cooperation in criminal matters. If coercive measures need to be taken, the Prosecutor can apply for a warrant at the competent national judicial authority. The Member States themselves will identify

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<sup>41</sup> And if it does it has been suggested that its institution 'will not be for tomorrow'. Ladenburger, *supra* note 21, 39.

<sup>42</sup> Corpus Juris 2000, Art 18, available at <http://www.law.uu.nl/wiarda/corpus/index1.htm>.

which authority is competent. Once the warrant is obtained, the Prosecutor will have the power to take direct action and enforce it throughout the whole territory of the Union.<sup>43</sup> The EPP will be independent of the EU institutions and the Member States, composed of a Chief Prosecutor in Brussels and Deputy Prosecutors in each of the national capitals. The Chief would be appointed by the Council for a non-renewable term of six years, the Deputies would be appointed by the Chief from a pool of national public prosecutors. As of now it is unclear whether these prosecutors would remain national prosecutors or acquire a separate 'European' status.

If it was decided to criminalise the enforcement of EU competition law, could the EPP prosecute these crimes before the national courts? The answer to this question cannot be found in the Treaty, but clues can be found in the Corpus Juris proposals and the Commission's Green Paper relating to this issue.<sup>44</sup> The most important question that needs answering is what crimes exactly the EPP will be able to prosecute, as the term 'crimes against the financial interests of the Union' is rather vague. One remark that can be made is that these crimes do not have to be committed in the Union itself, but merely against it.<sup>45</sup> The Corpus Juris 2000 contains a list of crimes for which the EPP would be competent. These are: fraud affecting the financial interests of the European Communities and assimilated offences; market-rigging; money laundering and receiving; conspiracy; corruption; misappropriation of funds; abuse of office; disclosure of secrets pertaining to one's office. All these offences are also found in the Commission's Green Paper. Of particular interest for this paper is of course the reference to market-rigging. In the Corpus Juris 2000, the crime is defined as follows:

'It is a criminal offence for a person, in the context of an adjudication process governed by Community law, to make a tender on the basis of an agreement calculated to restrict competition and intended to cause the relevant authority to accept a particular offer.'<sup>46</sup>

The Green Paper has the following to say on the matter:

'Getting, or trying to get, a specific bid accepted by any contract-awarding authority whatever, using means that violate Community rules on public procurement, such as an illegal agreement, might therefore be made a common criminal offence if there is actual or potential damage to the Community's financial interests.'<sup>47</sup>

Essentially, this is a description of the competition law offence known more commonly as bid-rigging. It must however be kept in mind that none of these documents are as

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<sup>43</sup> *Id*, Article 24.

<sup>44</sup> Commission of the European Communities, 'Green Paper on criminal-law protection of the Financial interest of the Community and the establishment of a European Prosecutor' (11 December 2001) Brussels COM/2001/715 final.

<sup>45</sup> C van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in: N Walker (ed.), *Europe's Area of Freedom, Security and Justice* (OUP, 2004) 219.

<sup>46</sup> *Supra* note 42, Article 2.

<sup>47</sup> *Supra* note 44, section 5.2.2.1, 37.

yet part of European law.<sup>48</sup> Therefore it cannot be stated with certainty that these very same definitions will be used to define the crime of market-rigging, or indeed that market-rigging will even be one of the crimes affecting the financial interests of the Union that the EPP will be competent to prosecute. It is not determined what crimes will be included in the regulations that need to be adopted in order to create the Prosecutor. These crimes will together constitute a mini-EU criminal code. If market-rigging is included in the list, this will have two major consequences. The first is that the EPP will be able to bring criminal proceedings before the national courts for this particular breach of competition law. The second is that market-rigging will constitute a European crime and this part of competition law will be criminalised by means of an EU regulation. Considering that other competition law offences are not mentioned in the Corpus Juris and the Green Paper, we have to assume that it was not originally intended to give the EPP the power to act in these matters. Then again, it remains to be seen what crimes will be included in the Prosecutor's competence. Should it be considered desirable to give the EPP full competence in competition law matters, an alternative route is available via Art 86(4). In a procedure similar to Art 83(1), the Council can unanimously extend the EPP's competence to include 'serious crime having a cross-border dimension' after obtaining the consent of the Parliament and consulting the Commission. It must however be kept in mind that even if the whole of EU competition law was to be criminalised in the regulation(s) creating the EPP, criminal enforcement at the level of the EU institutions would still not be possible, as the Prosecutor can only bring cases before the national courts. An interesting question, largely beyond the scope of this paper, is whether it would be wise in the first place to confer this responsibility on the EPP. Considering the fact that the EPP system will provide for centralised investigation and decentralised trials, it is doubtful whether this will be the most effective way of criminal competition law enforcement in the EU. These doubts include concerns about the differences in the Member States in the protection of defendants' rights in criminal proceedings.<sup>49</sup>

## 5. CONCLUSION

When one considers the possibility of criminalising the enforcement of EU competition law, the following two scenarios come to mind:

1. The institution of a criminal law framework at the level of the EU institutions, with the Commission or another entity acting as the prosecutor before the European courts. Such a system would most probably have to be reinforced by some kind of European criminal code.
2. The harmonisation of criminal competition law enforcement in all the Member States. Member States will be obliged to impose criminal sanctions for certain

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<sup>48</sup> Mitsilegas, *supra* note 18, 230-231.

<sup>49</sup> S Peers, *EU Justice and Home Affairs Law* (OUP, 2006) 490-491.

competition law offences, but the enforcement will be carried out by national authorities before the national courts.

While both scenarios would most probably have been possible in theory under the Pillar system, we have seen that matters are slightly different under the new TFEU. The first scenario appears to be closed off for the time being, considering the fact that Art 83 TFEU only allows for the use of directives and that there is no specific legal base to be found for the criminalisation of competition law elsewhere in the Treaty. Should there be a desire to criminalise competition law enforcement at the level of the EU institutions, a Treaty amendment would be necessary. This could be achieved in a number of different ways: an amendment of Art 83 TFEU, providing for the use of regulations to adopt substantive criminal law measures; an amendment of Art 103(2)(a) TFEU, adding the words ‘criminal law sanctions’ to the list of ‘fines and periodic penalty payments’ (this would create an explicit legal base for the adoption of criminal law sanctions in competition law, meaning that there would no longer be an obligation to use Art 83 TFEU); or the creation of an entirely new provision conferring the competence to criminalise competition law enforcement. The second scenario remains a definite possibility. Art 83(2) TFEU, provided that its conditions are fulfilled, could undoubtedly be used for the harmonisation of criminal competition law enforcement in the Member States. A dual legal basis with Art 103 TFEU would most likely be needed. Whether Art 83(1) TFEU provides this competence as well is unlikely. Competition law offences are not included in the areas of crime mentioned in this provision, and it is hard to make a convincing argument that they fit into one of the existing categories. In the absence of an explicit reference to competition law, it must be assumed that Art 83(2) TFEU is the correct legal basis for the time being. The European Public Prosecutor could potentially play a role here, prosecuting competition law offences before the national courts. However, it is unclear what crimes will be included in the EPP’s competence in the future. Market-rigging was originally intended to be one of them, but whether that intention will become reality remains to be seen. Even so, market-rigging is only one specific breach of competition law and for the EPP to be effective in this regard his competence will have to be extended to cover a much wider range of offences.

The debate on the Union’s criminal law competence after the entry into force of the Lisbon Treaty and the TFEU is certainly not settled yet. However, the most crucial element for the introduction of criminal law sanctions in the EU in general and the criminalisation of competition law enforcement in particular remains the political will of the EU and its Member States. Even though criminal law has been moved into the domain of what used to be ‘Community’ decision-making, large support will still be required across the Union to adopt substantial measures. The emergency brake procedure contained in Art 83(3) TFEU is evidence of that fact. This provision allows any Member State to object to a measure based on Art 83(1) or (2) on the grounds that



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it ‘would affect fundamental aspects of its criminal justice system’.<sup>50</sup> There is also the matter of the unanimity requirements concerning the extension of the Union’s criminal law competence in Art 83(1) TFEU and the European Public Prosecutor’s competence in Art 86(4) TFEU. Finally, the British, Irish and Danish opt-outs could also potentially play a role here, though the complexity of the rules in this field leaves a large amount of uncertainty for the future. When there is consensus across the Union that criminalisation of EU competition law is desirable, the necessary steps will undoubtedly be taken. At this moment such consensus is lacking, though it can perhaps be said that there is agreement throughout the Union that bid-rigging can be qualified as a criminal offence. The TFEU provides for the possibility of criminalisation in the Member States through harmonisation. If it were decided to criminalise competition law enforcement at the level of the EU institutions, a Treaty amendment would most likely be needed. Once again the outcome depends on the political will in the Union.

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<sup>50</sup> Though a Member State would have to convincingly argue that this is the case. For a more detailed discussion of the emergency brake procedure, see Peers, *supra* note 22, 522-529.