Communitarization of the EU third pillar today and according to the Lisbon Treaty

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Abstrakt: Práce se pokusí popsat a analyzovat současné projevy tzv. komunitarizace třetího pilíře EU, kterou autor chápe jako proces, kdy oblast policejní a justiční spolupráce v trestních věcech začíná být ovlivňována či dokonce podřizována komunitárním principům a mechanizmům (zásada loajality, nepřímého účinku, efektivity, role Komise a ESD), a to při začlenění do režimu mezivládní spolupráce. Ta má být překonána Lisabonskou smlouvou, která danou oblast podřizuje zásadně komunitárnímu režimu (hlasování kvalifikovanou většinou ve spolurozhodovaní proceduře s EP, podrobení se jurisdikci ESD, přímý účinek). Práce se pokusí srovnat a analyzovat výhody a nevýhody obou režimů v dané oblasti. Podtrhne přitom i specifika komunitárních mechanizmů v této oblasti dle Lisabonské smlouvy. Ambicí práce je rovněž upozornit na možnosti, ale i meze a rizika rozvoje komunitárního režimu v oblasti trestní politiky podle Lisabonské smlouvy.

Klíčová slova: třetí pilíř, první pilíř, mezivládní spolupráce, komunitární právní řád, policejní a justiční spolupráce v trestních věcech, obecné zásady, svěření pravomocí, sdílené pravomoci, subsidiarita, proporcionalita, přednost, přímý účinek, nepřímý účinek, odpovědnost za škodu (Francovich), hlasování kvalifikovanou většinou, záchranná brzda, posílená spolupráce, přeshraniční dvojí trestání (ne bis in idem), princip legality, Evropská Rada, Komise, Evropský parlament, Rada, Soudní dvůr (ESD), národní parlamenty, žlutá, oranžová, červená karta.

Abstract: This paper attempts to describe and analyze the current instances of the so-called communitarization of the third pillar of the EU, which the author considers to be a process, when the police and judicial cooperation in criminal matters starts to be influenced or even subjected to the Community principles and mechanisms (such as the principle of loyal cooperation, indirect effect, effectiveness, the role of the Commission and ECJ), while falling into the intergovernmental framework. However, this framework should be displaced by the Lisbon Treaty, which in principle subjects this area to the communitarian regime (voting by the qualified majority in co-decision procedure with EP, jurisdiction of the ECJ, direct effect). The paper will try to compare and analyze both advantages and disadvantages of both (intergovernmental and communitarian) frameworks in the field of criminal matters. Specific characteristics of communitarian mechanisms under the Lisbon Treaty will be emphasized as well. The aim of the paper will be to show the possibilities and opportunities, but also limits and risks of further developments of communitarized criminal policy under the Lisbon Treaty.

Key words: third pillar, first pillar, intergovernmental cooperation, Community legal order, police and judicial cooperation in criminal matters, general principles, conferral of powers, shared competence, subsidiarity, proportionality, supremacy (primacy), direct effect, indirect effect, liability for damages (Francovich), qualified majority voting, emergency break, enhanced cooperation, cross-border double jeopardy principle (*ne bis in idem*), substantive legality principle, European Council, Commission, European Parliament, Council, Court of Justice (ECJ), national parliaments, yellow, orange, red card.

Introduction

This paper will focus on developments and possible future prospects within the third pillar of the European Union (EU). First, I will briefly sum up the "constitutional" foundations of the third pillar, as regards both the role of the Union institutions and legal effects of the measures adopted under this framework as provided for in the Treaty on European Union (TEU), especially its Title VI, which governs police and judicial cooperation in criminal matters. Then I will show, how this area of criminal matters has been communitarized, especially by the case-law of the Court of Justice (ECJ). Turning to the new settlement of this area according to the Lisbon Treaty, especially Title V, chapters 1, 4 a 5 of the Treaty on the Functioning of the European Union (TFEU),[1] I will try to describe and analyze the most important novelties, which the new framework introduces. In principle all classical Community rules and principles should apply within the specified field of criminal matters. However, important specific characteristics applicable to this area (such as maintaining unanimity in certain matters, emergency break and enhanced cooperation) will be emphasized as well. Finally the paper will on the basis of attained experience and concrete examples attempt to point to the possible advantages, respectively disadvantages and risks, which the new framework may bring in contrast to the current state of affairs in the explored area of criminal matters.

The "constitutional" foundations of the third pillar compared to the first pillar

The third pillar, established by the Maastricht Treaty and limited to police and judicial cooperation in criminal matters by the Amsterdam Treaty, forms basically a distinct framework of intergovernmental cooperation, which is to be differentiated from the Community legal order, resting on the TEC and developed by the ECJ case-law[2]. First and

[1] TFEU will replace the current Treaty establishing the European Community (TEC). The area of police and judicial cooperation will be transfered from TEU to the TFEU and included in Title V, with the heading "Area of freedom, security and justice," which will contain also chapters on general provisions, policies on border checks, asylum, immigration and judicial cooperation in civil matters.

[2] See these crucial judgements of the ECJ: C- 26/62 *Van Gend en Loos*, 5.2.1963, (direct effect) a C- 6/64 *Costa v. ENEL*, 15.7.1964 (supremacy or primacy of EC law); and further elaboration on this as regards both direct and indirect effect: C-152/84 *Marshall*, 26.2.1986, C-14/83 *Von Colson a Kamman*, 10.4.1984, C-106/89 *Marleasing*, 13.11.1990, C-194/94*CIA Security v. Securitel*, 30.4.1996, and primacy of EC law, or even the emerging concept of pre-emption: C-11/70 *Internationale Handelsgesselschaft*, 17.12.1970; C-35/76, resp. C-106/77 *Simmenthal I, II*, 15.12.1976, resp. 9.3.1978; C-10-22/97 *Ministero delle Finanze v. IN.CO.GE´90 Srl*, 22.10.1998; C-148/78 *Ratti*, 5.4.1979; C- 31/78 *Bussone*, 30.11.1978; C-11/92 *Gallaher*, 22.6.1993; including liability for damages for infringement of Community law: C-6 & 9/90 *Francovich*, 19.11.1991; C-46/93

foremost, the nature of the third pillar as laid down especially in the Title VI of the TEU resembles more the classical international regime (where, it seems, there is no room for a simple hierarchy or subordination, but the consent of each and every state is predominant) rather than the supranational one, which was developed under the first pillar, patterned by the primacy and direct applicability (and effectiveness) of adopted rules towards individual member states (even when outvoted) and their citizens. From the institutional point of view, similarly, the institutions such as the European Commission (Commission), European Parliament (EP) and the ECJ were not granted such broad powers, as is the case in the first pillar. By contrast, the Council of Ministers (the Council), which represents the individual member states, was given great external and legislative powers, including the veto right for each and single minister thanks to the unanimity voting, introduced as a rule for decision-making in this sensitive and with the sovereignty of the member states´ closely connected area of police and judicial cooperation in criminal matters. Moreover, the intergovernmental character of the third pillar seems to be strengthened by the legislative initiative of each member state (sharing this right with the Commission) and mainly by the weakening of both the EP, limited only to consultation within the legislative process, and the Commission, which is not allowed to pursue infringement procedure as is the case under the first pillar Community legal order. Also the limited jurisdiction of the ECJ, as compared to its role under the first pillar, is of great significance, when assessing the specific nature of the third pillar framework. Preliminary rulings, seemingly limited in its subject, are not obligatory at all at any stage and annulment actions are limited only to privileged applicants. Infringement procedure, as mentioned above, does not apply at all. As a result, the member states do not run any risk of being financially penalized by the ECJ, when infringing third pillar union law.

As regards the legal effects of the measures adopted under the third pillar, the TEU explicitly abolishes direct effect of the decision and framework decision. The latter resembles by definition and aim in approximating national laws directive under the first pillar, however, without possessing a feature of *direct effect* loses much of its strength, because the particular provisions of the framework decision cannot be then directly invoked by individuals before the national authorities, and the courts particularly, with a view setting aside, if necessary, contrary national rule and applying directly effective one (in upwards vertical relations at least).

Brasserie/Factortame, 15.3.1996; C-178/94 and others point cases *Dillenkofer*, 8.10.1996; C-224/01 *Köbler*, 30.9.2003, which might be read also in conjunction with the judgement C-453/00 *Kühne & Heitz*, 13.1.2004; summarized In Craig, P., de Búrca, G. EU Law – Text, Cases and Materials. New York: Oxford University Press, 2003, s.178- 228; 257-315.

Although it might seem from all above mentioned that the intergovernmental framework of the third pillar absolutely prevails,[3] the next chapter will show, how especially the ECJ is ready to make use of some communitarian aspects involved in that framework and extend them to the maximum, while borrowing the concepts from the first pillar as well, in order to promote more uniform application of the union law in this field and guarantee at least some kind of judicial protection. It will be, however, also pointed to the extension of the community competence over criminal matters by the ECJ, revealing the potential of the first pillar for the purposes of criminal regulation.

Third pillar under attack – creeping communitarization

In general

In spite of the fact of intergovernmental characteristics of the third pillar, as briefly sketched above, I will try to illustrate, how this pillar has been communitarized, i.e. influenced by and subjected to the Community principles, rules and mechanisms.

Among the Union institutions it was mainly the ECJ which heavily supported this process by taking full advantage of its jurisdiction and pointing to the broad tasks and objectives of the Union and the necessity to ensure both the consistency within the Union framework as a whole and the effectiveness of the measures adopted within the third pillar particularly (see below, *Pupino*, *Segi*, *EAW* judgements of the ECJ). ECJ also promoted uniform application of crucial third pillar rules and principles, such as the prohibition of cross-border double jeopardy (see below, sketched case-law of the ECJ on *ne bis in idem*).

Furthermore, the potential of expansive growth of the communitarian control over criminal matters was also supported by the ECJ case-law on the possibility of implicit competence over criminal matters within the first pillar under certain conditions (see below, *Environmental crimes* and *Ship source pollution* judgements of the ECJ).

Besides that, the process of communitarization was also boosted by the practice developed within the Council, where special negotiation techniques, political pressure, package deals seem to undermine *de iure* unanimity voting rule as well.[4]

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[3] However, there is a regular „bridge," enabling to transfer the respective areas of criminal matters to the first pillar entailed in Article 42 TEU. The cumbersome procedure which subjects such a unanimous decision of the Council to the constitutional procedures of member states makes this provision, however, practically ineffective.

[4] See, more elaborated on this matter: Čakrt, F.: Nástin komunitarizace v rámci III. pilíře. Trestněprávní revue, 2007, č. 1, s. 4 – 12.

Moreover, the active role of the Commission, coming up with legislative proposals, which seem not always to observe both the union and Community fundamental principles such as the subsidiarity principle[5] or even fundamental rights[6], contributed also a lot to the communitarization of this area.

The role of the ECJ in communitarization of the third pillar

In my view ***Pupino*** represents a leading case in this area. The ECJ was asked by the Italian court within the preliminary ruling procedure under article 35 TEU to give an interpretative ruling on a specific provision of the framework decision on the protection of victims, which related to the special criminal procedure in respect of vulnerable victims, respectively application of the procedural benefits towards maltreated children. After declaring its jurisdiction and its scope under the Article 46(b) TEU, in conj. with Article 35 TEU, the ECJ stressed the binding nature of framework decisions, inspired largely by the Article 234 TEC. Due to the fact that the TEU in this respect expressly excludes direct effect, the ECJ could only promote the effectiveness of the framework decisions by the so-called *indirect effect*, elaborated within the first pillar. And indeed, it did so, stating that the binding character of the framework decisions places on national authorities, and particularly national courts, an obligation to interpret national law in conformity[7].

Moreover, the ECJ added, that while having the jurisdiction in preliminary ruling procedure, this would be deprived of most of its useful effect, if individuals were not entitled to invoke framework decisions in order to obtain a confirming interpretation of national law before the courts of the member states[8]. Furthermore, the ECJ, without any reference in the text of the TEU (unlike Article 10 TEC), went further to pronounce the applicability of *the principle of loyal cooperation*[9] in this field as well, pointing to the aim of the Union to create an ever closer Union among the peoples of Europe and necessity to ensure that the Union may effectively fulfil its tasks.[10] The applicability of *the principle of loyal cooperation* within the

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[5] See, ibid p. 7 as regards the critical reflection on this as exemplified by the Green book on the conflicts of jurisdictions and the principle *ne bis in idem* in criminal proceedings, KOM(2005) 696

[6] See, for instance the so-called data retention directive, where the protection of the fundamentals principle of protection of personal data might be interfered with disproportionately

[7] C-105/03, *„Pupino,"* 16. 6. 2005, para 34.

[8] C-105/03, *„Pupino,"* 16. 6. 2005, para 38.

[9] However, S. Peers notices that the ECJ makes, with exception of requirement to take measures to ensure fulfilment of obligations, no reference to other aspects of the principle of loyal cooperation, see Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the *Pupino* and *Segi* judgments. Common Market Law Review, 2007, č. 44, p. 916, 917.

[10] C-105/03, „Pupino," 16. 6. 2005, paras 41, 42: *„... treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe and that the task of the Union, which is founded on the European*

third pillar gave rise to the debate on possible far-reaching implications this might bring. As we know, from the principle at stake important Community principles, rules, mechanisms were inferred, such as the principle of supremacy (primacy, precedence), the *Francovich* principle of liability for damages, the twin principles of effectiveness and equivalence, just to name the most important ones. And some authors indeed suggest the possible application of at least some of them, such as *Francovich principle of liability for damages* and *principles of effectiveness and equivalence*.[11] Finally, *Pupino* ruling itself, while setting limits to the application of the so-called *indirect effect* (cannot be *contra legem* and conflict the *principles of legal certainty* and *non-retroactivity* or establish and aggravate criminal liability)[12], in my view, implicitly suggests that general principles of Community law, or at least some of them, may and should be applied within the third pillar, as well. I agree with S. Peers that the general principles of Community law[13] (such as protection of human rights, legal certainty and of the protection of legitimate expectations, non-retroactivity, principle of equality and non-discrimination, principle of the right to defence and the rule against double jeopardy; principles governing the exercise of community powers such as principle of conferred powers, subsidiarity and proportionality) should apply in their entirety here as well.[14] However, the ECJ when ruling on the observance of these principles should, in my view, pay due respect to the principles of subsidiarity and the primary (or largely exclusive) responsibility of member states for maintaining public order and security on their territory and observing their human rights obligations under the European Convention for the protection of human rights and fundamental freedoms (ECHR), from which the ECJ itself should in no case depart as well[15].

Communities, supplemented by the policies and forms of cooperation established by that treaty, shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples…. It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions…"

[11] See, for instance Spaventa, E.: Opening Pandora´s Box: Some reflections on the Constitutional Effects of the Decision in Pupino. European Constitutional Law Review, 2007, č. 3, s. 18 – 22 or Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the *Pupino* and *Segi* judgments. Common Market Law Review, 2007, č. 44, p. 921 – 924, where the author comes up with practical examples, for instance that the wrongful detention, prosecution and conviction connected to the double leopardy rules should be compensated in accordance with the principles established as regards Community damages liability.

[12] C-105/03, *„Pupino,"* 16. 6. 2005, paras 44, 45.

[13] For a systematic categorization of Community general principles see, Týč, V.: Působení práva Evropské unie ve sféře českého právního řádu In: Evropský kontext vývoje českého práva po roce 2004: sborník z workshopu konaného na Právnické fakultě MU v Brně dne 26.9.2006. 1. vyd. Brno: Masarykova univerzita, 2006, s. 22-27.

[14] See, Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the *Pupino* and *Segi* judgments. Common Market Law Review, 2007, č. 44, p. 926 – 928.

[15] Compare, Article 52(3) of the Charter of fundamentals rights of the Union, which shall be legally binding according to the Article 6(1) of the TEU, introduced by the Lisabon Treaty.

Similarly, the ECJ, while interpreting, should not encroach upon legislative domain of the Council as well. The ECJ in my opinion should be very careful and restraint in using too much extensive interpretation which might run counter words and intent of drafters and legislators. I admit, there might be instances, where the court must decide on the merits and deliver the justice to individuals, even (if necessary and well justified) by going beyond the text and finding just solutions by systematic a teleological interpretation. However, in general and as a rule, the ECJ should, in my view, especially in this sensitive field of criminal affairs, be very cautious when trying to unify some of the controversial concepts, beyond the adopted legislative consensus reached. In this regard, the unifying case-law of the ECJ **on the principle against double jeopardy** (*ne bis in idem*)[16] seem to me (at least as regards some judgements) very ambitious and too extensive as well, and in some instances undermining criminal justice systems of individual member states.[17] I am hinting here at some kind of hidden communitarian mechanism, which might be activated through preliminary rulings, and which attributes the ECJ the role of *de facto* legislator, when interpreting the very broad and vague terms, adopted within the Council.

Finally, the ECJ affected heavily the criminal field, which was generally perceived to be the domain of member states or their cooperation within the third pillar,[18] by two its famous rulings on ***Environmental crimes***[19] and ***Ship source pollution***[20]. The ECJ delivered its judgement on *Environmental crimes* upon the respective action brought by the Commission, which asserted that the Council had encroached upon its competences under the TEC by adopting framework decision on the protection of environment through criminal law under the third pillar. The ECJ took the same view and annulled the challenged framework decision on grounds that it indeed encroached on the powers which Article 175 of the TEC in the area of environment confers on the Community[21]. As a starting point the ECJ stressed that

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[16] See judgements: ; C-187/01, C-385/01, *Gozütok & Brügge,* 11.2.2003, C-288/05, *Kretzinger,* 18.7.2007,; C-367/05, *Kraajjenbrink,* 18.7. 2007; C-150/05, *Van Straaten,* 28.9.2006; C-467/04, *Gasparini,* 28.9.2006; C-436/04, *Van Esbroeck,* 9.3. 2006; C-469/03, *Miraglia,* 10.3.2006.

[17] For a brilliant reflection see, Komárek, J.: „Tentýž čin“ v prostoru svobody, bezpečnosti a práva. Jurisprudence, 2006, č. 3, s. 51 – 57.

[18] However, also the previous case-law of the ECJ show form the 1980s, that even at that times the field of criminal policy was not completely immune from the operation of Community law, especially when the principle of effectiveness and equivalence or non-discrimination were at stake (see, judgement 68/88, *„Greek Maize,“* 21. 9. 1989 or judgement 186/87, *„Cowan,“* 2. 2. 1989) or when disproportionate (criminal) restrictions on freedom of movement arose (see, judgement C-118/75, “*Watson and Belmann,”* 14. 7. 1976 or judgement C-265/88, *“Messner,”* 12. 12. 1989), See very brilliant summary in: Kmec, J.: Evropské trestní právo. Mechanismy europeizace trestního práva a vytváření skutečného evropského trestního práva, Praha: C.H.Beck, 2006, s. 230.

[19] C-176/03, *„Environmental crimes,“* 13. 9. 2005

[20] C-440/05, *„Ship source pollution,“* 23. 10. 2007

[21] C-176/03, *„Environmental crimes,“* 13. 9. 2005, para 53.

Article 47 of the TEU provides that nothing in the TEU is to affect TEC.[22] Then the ECJ examined both the aim and content of the challenged framework decision and realized that indeed the main purpose of the adopted measure was the protection of the environment. As regards implied competence to criminal regulation within this field, the ECJ firstly stated that *as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence*.[23] However, the ECJ did not stop here, but went further on to hold that the Community legislature is not prevented to adopt measures which relate to the criminal law of the member states 1) which it considers *necessary* in order to *ensure that the rules* which it lays down (on environmental protection) are *fully effective* and 2) where the application of *effective, proportionate and dissuasive criminal penalties* by the competent national authorities is an *essential measure* (for combating serious offences).[24]

This controversial judgement gave of course a strong weapon in the hands of Commission, which interpreted its implications very extensively both as regards the fields of Community policies to which it may be applied and the intensity of the criminal regulation itself[25] and as A. Dawes and O. Lynskey in their brilliant reflection of this case put it – some of its conclusions drawn (such as the power to decide under the first pillar policies on the choice of the criminal penalties to be applied) were even contradictory to the judgement itself[26].

The second judgement of the ECJ on *Ship source pollution*[27] was expected with hope that it will bring answers to the open questions which the ruling on *Environmental crimes* remained unresolved. However, the ECJ judgement seems to be rather disappointing in this respect. The answer to the question, whether the criminal competence under the first pillar should be derived from the necessity to ensure the effectiveness of the (crucial) Community policies, as the Advocate General Mazák suggested in his opinion[28], or is limited solely to the environmental policy, is somehow ambiguous. The ECJ confirmed that the challenged measure could have been validly adopted under the first pillar within the specific competence

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[22] Ibid. at para 38.
[23] Ibid. at para 47.
[24] Ibid. at para 48.
[25] See doc. COM 2005 (583), dated 23.11.2005, Brussels, Communication from the Commission to the European Parliament and the Council, particularly para 10, where it states that the member states freedom to choose the penalties they apply may be limited by the Community legislature, if the effectiveness of community law so requires.
[26] See, Dawes, A., Lynskey, O.: The ever-longer arm of EC law: The extension of Community comeptence into the field of criminal law. Common Market Law Review, 2008, č. 45, s. 138, 139.
[27] C-440/05, *„Ship source pollution,"* 23. 10. 2007
[28] Opinion of the Advocate General Mazák C-440/05, *„Ship source pollution,"* 23. 10. 2007, paras 88 – 102, especially 99.

under the transport policy, however the ECJ emphasized the link with environmental protection in this case as well.[29] Fortunately, at least another issue on the intensity of criminal legislation within the first pillar was clearly resolved, by stating that under the first pillar the Community does not possess the power to impose *the type and level of criminal penalties*.[30] It should therefore limit itself to imposing effective, proportionate and dissuasive criminal penalties and leave it up to the member states to specify them in their respective criminal systems.[31]

To sum up the case-law of the ECJ in the third pillar it may be concluded that many Community principles, rules, mechanisms and concepts (such as indirect effect, principle of loyal cooperation, principle of liability for damages, right to defence, principle against double jeopardy and general principles including human rights and legal certainty) developed under the first pillar were (some of them possibly) transposed within the third pillar by the creative case-law of the ECJ. The magic word of effectiveness played the most important role in its case-law as introduced in *Pupino* and confirmed in later ECJ judgements (besides those mentioned above *Segi*[32] and *European arrest warrant*[33] judgement of the ECJ may be added). Third pillar of the Union temple started to be progressively rebuilt by the ECJ. And the Lisbon Treaty accomplished this work in high style.

Third pillar "lisbonised" – communitarization with some specific characteristics accomplished

If the Lisbon Treaty is to be ratified by all of the member states and enters into force, then the third pillar will diminish and the institutional balance and functioning of the area of police and judicial cooperation in criminal matters will be largely transformed. This area will be "lisbonized," i.e. will be governed mostly and largely by supranational principles, rules and mechanisms, which are today called the Community ones.

The role of the institutional actors will change significantly. The Commission, the EP, the ECJ as well as national parliaments (NPs) will gain a lot of new power in this domain. By contrast, individual member states will lose their right to legislative initiative (only ¼ of them together will retain this right – see Article 76 TFEU) and more importantly, in principle, also

[29] C-440/05, *„Ship source pollution,"* 23. 10. 2007, paras 66, 67, 69.
[30] Ibid. para 70
[31] See, brilliant reasoning in this respect in the Opinion of the Advocate General Mazák C-440/05, *„Ship source pollution,"* 23. 10. 2007, paras 106, 107, 108 and further.
[32] C-355/04 P, *„Segi,"* 27. 2. 2007
[33] C-303/05, *„European arrest warrant,"* (Advocaten voor de Wereld VZW), 3. 5. 2007

the veto power in the decision making process, which will be newly subject to co-decision with the EP. Furthermore, member states will be subject to infringement procedure, where both the Commission and the ECJ will exercise their prerogatives (including supervising and penalizing ones) in order to ensure that the union law is observed.[34] The ECJ will be attributed by the full jurisdiction over this field at the same time (only with one exception: the ECJ will have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services with regard to the maintenance of law and order and the safeguarding of internal security[35]). Moreover, the ECJ may develop its human rights case-law, thanks to the binding force of the Charter of Fundamental Rights of the Union (see, Article 6 (1) TEU in conj. with the Charter itself). Especially in the field of criminal matters such a case-law may play a very important role. It will be seen how the relationship with ECHR Strasbourg Court but also national constitutional courts will develop in this respect.

With the new Lisbon Treaty the Commission may turn to the real "engine" of the development of "European criminal area". Its strength and influence derives not only from its legislative monopoly (however, as mentioned above it will be shared with ¼ of members states), but mainly, in my view, from a firm and very broad legal bases for its activities in this field, as regards legislation in the field of substantive and procedural criminal law and cooperation and assistance in criminal matters (but also as regards operational and non-operational police cooperation). The concrete competences within these fields are defined with a certain precision. Compared to the current regulation in articles 29, 31, 34 of the TEU, they are more elaborated but much more extensive as well. They fall within the area of the so-called *shared competence* (see, Article 4(2)(j) TFEU), however, the modified version of pre-emption should apply in my view in this area (see, Article 2(2), read in conj. with Article 2(6) TFEU), because only minimum rules on certain aspects of procedural and substantive criminal law are allowed to be adopted (see, Article 82 (2) and 83 (1) TFEU), other aspects may be added upon the unanimous decision of the Council and consent of the EP. It should be, however, kept in mind that the substantive criminal competence is supposed to be potentially expanded also within the harmonized fields, where even the cross-border element is missing (see, Article 83 (2) TFEU). This competence reflects and develops the potential of the ECJ judgements on *Environmental crimes* and *Ship source pollution*, while making clear that this competence may go beyond the environmental policy and may extend to virtually all

[34] However, according to the Protocol (No 36) on Transitional Provisions the infringement procedures and the new ECJ jurisdiction will apply (at the latest) after 5 years from the entry into force of the Lisabon Treaty, if the relevant measures will not be amended before.
[35] Article 276 of the TFEU

harmonized policies and contrary to the *Ship source pollution* may even impose specified criminal penalties, all this upon the condition if this proves to be *essential* to ensure the effective implementation of the particular Union policy.

It is supposed that the measures adopted under all above mentioned competences will be the *directives*.[36] Unlike the former TEU no exclusion of *direct effect* is provided for. As a result, direct effect will be applied in respective relations if classical conditions will be fulfilled (measure is clear, precise, unconditional). Of course, it must be assumed, in my view, that also other current Community (and future Union) principles (anyway largely transposed to the third pillar through the *Pupino* ruling and its implications) must apply, if no separate framework is provided for this area.

Finally, the crucial element of the new framework for police and judicial cooperation in criminal matters will be the introduction of co-decision procedure (EP and Council sharing legislative competence) and qualified majority voting within the Council in this field. However, some specific characteristics will apply as well. The so-called mechanism of emergency brake and enhanced cooperation shall apply in this context.[37]

As regards the *emergency brake*, each member of the Council will be entitled to suspend the ordinary legislative procedure and refer the draft directive to the European Council, when it considers that fundamental aspects of its criminal justice system would be affected. Within the time limit of four months the European Council may find the consensus. If this procedure fails, nine member states will be able to establish *enhanced cooperation* among themselves on the basis of draft directive concerned (see Article, 82 (3) and 83 (3) TFEU), while no further approval is required.

A kind of modified mechanism shall apply in the context of the possible establishment of the European Public Prosecutor´s Office as well as in the sphere of operational police cooperation where unanimity is required. In these cases, a group of at least nine member states may refer the matter to the European Council. Again, if the consensus is not reached within four months in the European Council, at least nine member states, if they wish so, may establish enhanced cooperation among themselves in the particular matter, while no further approval is required (see Article 86(1) (2, 3), 87 (3) (2, 3) TFEU, enhanced cooperation, however, shall not apply to the development of schengen acquis).

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[36] Only the measures under the article 82(1) TFEU within the field of criminal cooperation and assistance (recognition, conflict of jurisdiction, facilitation of criminal cooperation as regards proceedings in criminal matters and the enforcement of decisions) could be adopted even by *regulations* under the qualified majority voting.

[37] This will, however, not be the case of the competence under article 82(1) TFEU, see the previous note.

As regards the strengthening of the role of the EP, it has already been mentioned that the EP will win much of the power in this field. First and foremost, when the ordinary legislative procedure shall be applied the EP should be treated on equal footing with the Council. It will be a striking change from the current state of affairs where its role is in principle limited only to consultation and giving non-binding opinions or issuing declarations. In cases where unanimity decisions will be taken its consent will be required. However, as some authors regret,[38] there will be still blind areas, where the EP shall not exercise its capacity, such as the area of defining the strategic guidelines for legislative and operational planning within the area of freedom, security and justice (Article 68 TFEU)[39].

Finally, the new role and powers of the national parliaments (NPs) should not be forgotten. The main new competence, they are granted, is that of the control of the principle of subsidiarity (and possibly proportionality as well).[40] In this area if ¼ of the NPs (each parliament holding two votes, in bicameral systems one for each chamber) claim breach of the subsidiarity principle within the 8 weeks from the submission of particular proposal, the challenged measure must be reviewed by the Commission and decision on maintaining, withdrawing or amending the measure must be explained. This procedure is called "yellow card" and as shown cannot block the legislation. Only if ½ of the votes of NPs claim the same, then first the proposal might be blocked by the majority of the EP or 55% of the Council. This so-called "orange card" seems to me, however, nearly useless because such a majority would anyway block the proposal. The "red card" is then used within the context of general passarelle, or deepening clause, which enables each and every NP to veto the decision of the European Council to move from unanimity to qualified majority voting (or ordinary procedure) (see, Article 48(7) TEU)[41].

Pros and cons, opportunities and risks of the new framework

The most interesting and challenging issue, I will try to deal with now, is to point (on the basis of attained experience and concrete examples) to the possible advantages and

[38] Weyembergh, A.: Approximation of criminal laws, the constitutional treaty and the Hague programme. Common Market Law Review, 2005, č. 42, p. 1595, 1596.
[39] See the Tampere programme, Hague programme and its Action Plan, accessible at: http://europa.eu/
[40] See Article 5 TEU, Article 69 TFEU, Articles, 6 a 7 of the Protocol on the application of the principles of subsidiarity and proportionality (2007) attached to the Lisbon Treaty.
[41] For me it is regretable that at least within the competences under Article 82(2(d) and 83 third par. This procedure is not envesiged. Such a regulation would support in my view the constitional conformity of these provisions.

disadvantages, as well as opportunities and risks, which the new framework may bring in contrast to the current state of affairs in the explored area of criminal matters.

In my opinion, the new legal framework may cut off some of the shortfalls inherent in the current system. The qualified majority voting within the Council may indeed contribute to attaining better and faster compromises (at least when the emergency breaks are not activated[42]) and replace the current prolonged negotiations which more importantly often lead to the vague and broad compromises, sometimes entailing special exemptions etc.. This "bad habit" has problematic repercussions both as substantive and procedural aspects are concerned. First, from a substantive point of view, vague and broad provisions within the criminal measures may run counter the substantive legality principle,[43] the fundamental principle of a particular importance especially within the criminal field (*nullum crimen sine lege, nulla poena sine lege*). Furthermore, the relevant provisions of adopted measures are often constructed in order to ensure that member states will not be forced to change their laws, however, then any regulation might become useless and practical added value might be missed. On the other hand, these vague and broad definitions may be "sent" to the ECJ, which then may give a more specific and controversial meaning to their words, also contrary to the intent of its drafters and legislators (see some judgements on *ne bis in idem*). Thus paradoxically the meant advantage may turn to be a great disadvantage for its creators as well.

On the other hand, there is no doubt that the introduction of *qualified majority voting* to a large area of substantive and procedural criminal law and certain aspects of both police and criminal cooperation might give rise to undue over-regulation, centralization and unification, which will not take into account legitimate national specifics arising from different environments and legal traditions. To find the blocking minority in the qualified majority environment will be much harder than it is in the current unanimity environment (indeed, practitioners argue that even in the environment of unanimity it is practically necessary to find at least some other "co-fighters"). In this environment the Commission will be able to push ahead much more comfortably its proposals, even problematic ones. Let´ s mention two examples from the procedural and substantive criminal field – one abandoned, one still negotiated. The first was a *draft framework decision on certain procedural rights*

 Critically to this mechanism see Monar, J.: Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the ‚Area of Freedom, Security and Justice' ? European Constitutional Law Review, 2005, č. 1, p. 241..

[43] See, Weyembergh, A.: Approximation of criminal laws, the constitutional treaty and the Hague programme. Common Market Law Review, 2005, č. 42, p. 1588 – 1590.

within the criminal proceedings[44]. This draft was put to the ice, when one "big" (UK) and about four "small" states (including the Czech republic) effectively rejected it. There were good reasons for such a stance, in my view. Besides the unclear legal basis (which under the Lisbon Treaty will no longer be the case) there were among others reasonable objections as to the added value of this measure, in this field, which has already been well occupied by the ECHR rules and the Strasbourg case-law, which could be threatened or weakened through the possible divergent case-law of the ECJ. Another example of the problematic criminal law proposal of the Commission, in this case from the substantive criminal law field, both as regards legal basis (again with the Lisbon Treaty the competence will be also clearly established in this field and it will not be necessary to found it on extensive reading of the expansive ECJ case-law as introduced in *Environmental crimes* and *Ship source pollution*) but mainly as regards the lack of necessity of such a regulation, is the Commission proposal for a *directive on sanctioning of employers of illegally staying third country nationals*[45], which includes also the proposals for criminalizing the employers of third country nationals. This directive (among other objections) seems me to be both contrary to the principle of subsidiarity and proportionality, especially for the lack of a clear justification. It was not explained, if the member states are really not able to tackle the illegal immigration on their own. It was not shown that this proposal might serve its aim (really effective fight against illegal immigration). No statistics were delivered as regards the so-called secondary flows of illegal immigrants and so-called "nasty" employers, who are able to "count well" and "run their business with illegal migrant workers" if not harshly criminalized by the Community. Proportionality was not considered properly as well (should not it be left up to the member states to decide on criminal or administrative sanctioning). Also some of the concepts involved (e.g. exploiting working conditions) could be objected from the point they contradict the substantive legality principle and other elements for other reasons (proportionality of criminalizing 4 illegal migrants or repeated employment of illegal migrant workers). Last but not least the criminal law imperative of *ultima ratio* was not in my view well observed as well.[46]

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[44] See, document 10287/07, Brussels, 5 June 2007, Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.

[45] See, document COM(2007) 249 final Brussels, 16.5.2007, Proposal for a directive of the EP and of the Council providing for sanctions against employers of illegally staying third-country nationals, especially Art. 3, 10 – 13.

[46] I had an opportunity to take part in a partly negotiating of this instrument and preparing positions of the Czech republic as well. However, these are my personal remarks and reflections only. See also brilliant critical reflection on the same matter in: Dawes, A., Lynskey, O.: The ever-longer arm of EC law: The extension of

I will stop here. I just wanted to illustrate, the problems, which occur in the criminal field nowadays and which may effectively be aggravated if the Lisbon Treaty comes into force. However, to be fair, it must be remembered that with the Lisbon framework not only *qualified majority* comes, but also *emergency brakes* and *enhanced cooperation*, as well as somehow strengthened *subsidiarity control* exercised by the NPs may be applied. If these brakes were not inserted in the Lisbon Treaty framework, I would probably argue without any hesitance, that the new framework creates a dangerous engine, which will produce possibly harmless (procedural rights) and unnecessary (criminalizing employers of illegal migrants) Union criminal legislation. Because, the brakes are there, I am cautious to absolutely reject the new framework. However, I admit, that it is the question, whether these brakes are sufficient, especially when considered in the whole context, where the ECJ gained the full jurisdiction over Union criminal matters, The Commission its infringement powers and the integrationistic-oriented EP gained in principle the equal legislative powers as the Council.

To sum up, the Lisbon treaty does form a kind of risk and a great deal of adventure at the same time. But maybe the actors will surprise, manage and pass the test somehow. Maybe, they will not.

Will the advantages or disadvantages prevail? The result of the play or the whole game will depend upon many variables. Will the ministers invoke fundamentals of their respective criminal systems? Will the European Council be able to come to consensus or will it start in fact enhanced cooperation? Will the enhanced cooperation be exercised? Will those states, which will abstain resist or be integrated? Will not be then the mutual trust (which seem to be a fiction in fact nowadays) even more undermined in the multi-speed criminal arena of enhanced cooperation and more confusing for the law enforcement authorities on the one side and more attractive for forum-shopping and safe havens-loving criminals on the other side? Will the NPs boldly take up their roles? Will they raise yellow and orange cards? How will the Commission and the respective ministers react? And what about the ECJ?

These are the open questions and challenges the Lisbon Treaty brings.

Lets´ come and see. No boring films, no soap operas, are expected. Drama, thriller will come. Welcome in new “lisbonized” criminal area!

Community competence into the field of criminal law. Common Market Law Review, 2008, č. 45, p. 147 – 151 and as regards the possible IP criminal area and competition area, 145 – 147, respectively 151 – 155.

Conclusion

In this paper I focused on describing and analyzing the main developments within the third pillar of the EU and beyond. I showed, how this intergovernmental pillar and criminal matters as such have been influenced and subjected to the Community principles, rules and mechanisms, especially by the expansive ECJ case-law, represented by the judgements such as *Pupino*, *Environmental Crimes* or *Ship source pollution*. Then I turned my attention to the novelties introduced by the Lisbon framework in the explored area, both as regards institutional and functional aspects of the new order, while emphasizing some unique characteristics newly introduced (emergency brake, enhance cooperation). Finally I tried to sketch the future advantages, respectively disadvantages and risks of the new order in this field. I concluded my paper by raising questions as to the future prospects of this area under the Lisbon Treaty, which represents a true leap into the unknown in this respect.

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