The Protection of EU Financial Interests: The Tip of the Iceberg of the Europeanization of the Criminal System

Luigi Foffani

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Abstract The article analyses the protection of EU financial interests and the legal basis for harmonizing domestic penal provisions after the entry into force of the Lisbon Treaty. In this framework, this paper focuses on the problems arising the interpretation of Article 325 TFEU.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union

L. Foffani (✉)
Department of Law, University of Modena and Reggio Emilia, Via San Geminiano No. 3, Modena, Italy
e-mail: luigi.foffani@unimore.it

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1 The Protection of the Financial Interests as Prototype of the "EU Legal Goods"

The protection of the financial interests of the European Community first—and then of the European Union—has always been the primary need and fundamental motive of the process of Europeanization of criminal law and procedure: since the first steps in the fight against fraud in public subsidies to the detriment of the Community, through the evolution of the European jurisprudence with the leading decision about Greek corn (1989), the entrance into force of the Amsterdam Treaty and of article 280 of the Treaty Establishing the European Community, to the *Corpus Juris* project for the protection of financial interests of the Community (1997/2000)[1] and the subsequent Green Paper presented by the Commission and moving in the same direction, there have been several initiatives and projects aiming at progressively and largely involving the criminal matter in the construction of Europe with the primary purpose of incrementing, harmonizing and—as ultimate perspective—unifying the protection of financial interests of the European Union. With regard to such legal good, which is seen as the archetype and paradigm of supranational and EU legal goods and has—rightly or not—been considered neglected by national legislators for years, the goal of harmonization or unification of the crimes and of the institutional and procedural instruments designed to enforce them is still far ahead, although the awareness of national legislators in this field has noticeably increased and spread in almost all the systems, due to the assimilation of the EU financial interests to the national financial—or more generally public—interests.

It is no surprise that with the Lisbon Treaty and the historic acknowledgement of a EU competence in criminal matters, extended to several subjects much broader than just the early pioneering initiatives, the necessity of protecting the financial interests of the European Union is not only expressly mentioned, but also granted a privileged status among the EU criminal competences, with a specific and more advanced legal basis.

Even in the present context of European criminal policy, which—starting from the third pillar and the establishment of the AFSJ—has become wider and broader—with regard to policy areas, protection purposes, protected interests, criminal phenomena to contrast, etc.—the protection of the financial interests of the Union represents the spearhead of the historical process of Europeanization of European criminal law and procedure.

[1] Delmas-Marty and Vervaele (2000).

2 The Lisbon Treaty and the New Framework of EU Competences in Criminal Matters

2.1 Article 83 TFEU

The prescriptive framework of the new EU competences in criminal matters—in which the protection of the financial interests is inserted—is drawn—with some kind of lexical and political ambiguity—from Articles 82–86 (entitled, without any reference to the breadth of its content, "judicial cooperation in criminal matters") and Article 325 (in the paragraph regarding combating fraud) of the new Treaty on the Functioning of the European Union (TFEU). In this prescriptive framework it is possible to find the *three different legal bases for harmonization of criminal law*.

The first is the one regarding the "*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" [Art. 83(1) TFEU]. These "areas of particularly serious crimes" are identified in a limited (but very generically defined) number of macro-areas of criminal phenomena, which do not correspond to specific crimes, but to generic criminal classification (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), with the possibility for the European Parliament and Council to identify "other areas of crime," in order to expand the European criminal competence.

The second legal basis is the one regarding the so called "*accessory*" *criminal competence*: when 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" outside the criminal field [Art. 83(2) TFEU].

2.2 Article 325 TFEU

Finally, the third legal basis is the one specifically referring to counter "*crimes affecting the financial interests of the Union*."

Two different provisions move in this direction: the first one, starting from the criminal proceeding and the organization of justice, allows the European Council and Parliament, "by means of regulations adopted in accordance with a special legislative procedure", to establish a "*European Public Prosecutor's Office from Eurojust*" (Art. 86 TFEU), with the possibility, in the absence of unanimity in the Council, to proceed upon request of a group of at least nine Member States (so called enhanced cooperation). As Eurojust and the European Public Prosecutor's Office will specifically dealt with in the context of this research, I will not linger

over this topic, if not to mention the area of competence of the European Public Prosecutor's Office: first of all, "crimes affecting the financial interests of the Union," which will be defined in the regulation establishing the Public Prosecutor's Office, with the further possibility to "extend the powers of the Public Prosecutor's Office to include serious crime having a cross-border dimension" [Art. 86(4) TFEU], namely that area of criminality already taken into consideration within the first legal basis. I would rather focus on the substantial aspects of the new discipline.

The second normative provision, also aiming at the protection of the financial interests of the Union, is the one regarding the specific matter of "*combating fraud*," namely Article 325 TFEU, heir of Article 280 TEC, introduced in 1998 by the Treaty of Amsterdam and whose ambiguous formulation led scholars to a great debate about whether or not it implicitly attributed to the EU institution a specific competence in criminal matters in order to protect the communitarian finances. The new version of the Treaty of Lisbon settles this ambiguity (and probably it could not have been otherwise since Art. 83 explicitly gives the Union a broader competence in criminal matters).

In the first place, the Union and Member States are expected to "counter fraud and any other illegal activities affecting the financial interests of the Union through measures [...], which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies" (effectiveness and dissuasiveness of measures of protection).

In the second place, Member States are expected to adopt "the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests" (principle of assimilation).

In the third place, "the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud [... and] organise, together with the Commission, close and regular cooperation between the competent authorities" (cooperation).

Finally, EU-Parliament and Council "shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies" (effectiveness and equivalence of protection).

It is a complex system of provisions, which clearly aims at pursuing the objective of an effective, dissuasive, harmonized (or better, equivalent in all the Member States) protection of the financial interests of the Union, reached through a "close and regular cooperation between the competent authorities."

On the contrary, the ambiguous clause, which excluded from the possible measures the Council (today the European Parliament) could adopt, those measures regarding "the application of national criminal law or the national administration of justice" (Art. 280 par. 4 TEEC in the pre-Lisbon Treaty version) has been eliminated, which obviously is not an accidental omission, considering the interpretative debate generated in the past.

However, Art. 325 TFEU is still ambiguous because it does not mention criminal matters as a possible subject of those measures; yet the criminal competence of the Union in this matter could be inferred from the combined interpretation of Articles 83 and 325, and from the difficult evolution of the latter provision; moreover, crimes against the financial interests of the Union could emerge also from the catalogue contained in Article 83, *e.g.* corruption, which is generically mentioned among the "areas of particularly serious crime with a cross-border dimension," and which can include the corruption of EU officers, a classic crime against the financial interests of the Union.

Once having established that Article 325 TFEU applies also to criminal measures, scholars are now, after the entrance into force of the Lisbon Treaty, discussing the question of whether the juridical basis of the EU competence in criminal matters for the purpose of protecting the financial interests of the Union differs from (with regard to normative instruments) and is broader and more pervasive than the general competence described by Article 83 TFEU for the "serious transnational criminality" and for the accessory criminal competence of the Union.

The most significant difference—which marks an unquestioned primacy of the "communitarian finances" in the scale of priorities of the European Union's criminal policy—consists in the link (only potential but already expressly predetermined) with the establishment of the European Public Prosecutor's Office, whose competence could possibly be extended—through a contextual or subsequent decision of the Council or the European Parliament—to the typical crimes of serious transnational criminality, but not to the area of "accessory" criminal competence of the EU. This one is obviously a choice fraught with potential consequences in terms of effectiveness and equivalence of protection accorded to the interests at stake.

The further consequences that some scholars have tried to draw from the formulation of Article 83 and 325 TFEU are, instead, questionable.

Article 83 TFEU limits the criminal competence of the Union to the provision of "minimum rules concerning the definition of criminal offences and sanctions," thus defining the terms of a criminal law regulatory power shared between the EU and the Member States, according to a model in some way comparable to—in the Italian constitutional system—the relationship between the delegating law and the law made under delegate powers. Moreover, Article 83 indicates as an exclusive instrument for criminal harmonization, the "*directive*," a normative act, which imposes on the Member States the goal to achieve, leaving them some margin of discretion in the choice of the instruments for reaching it, and which assumes that the Member States enforce the directive with a national law.

Art. 325 TFEU generically mention "*measures*" to prevent and combat "fraud and any other illegal activities affecting the financial interests of the Union;" such measures must be "dissuasive" and allow "effective protection in the Member States and in all the Union's institutions, bodies, offices and agencies." From such a generic formulation of the provision, some scholars have tried to infer the consequence that the Union could exercise its criminal competence, for the purpose

of protecting its financial interests, through *regulations* immediately enforceable as law in all the Union's territory, without the necessity of implementation through legislation in the Member States. A sharp separation would thus be established—on the institutional and procedural level—between the general competence of the Union, based on the cooperative model and shared between the Union and the Member States, and the specific competence (self-protective) of the Union, exercised for the protection of its financial interests, which would then enjoy a privileged condition, much more authoritative and imperative towards Member States. The political legitimacy of such interpretation—and its acceptability on behalf of the Member States—is questionable, especially because it is based on rather weak textual arguments.

In my opinion, the interpretation of Article 325 as implicitly referring to Article 83 TFEU for the specification of the instruments and procedures of the exercise of the European criminal competence for the protection of the Union's financial interests (through directives and not regulations) is stronger and more balanced. The generic formulation of Article 325 TFEU ("measures" for the prevention and counter of "fraud and any other illegal activities affecting the financial interests of the Union") depends on the circumstance that this provision does not have an entirely criminal content, unlike Article 83; Article 325 deals with prevention, as well as repression, thus referring not only to criminal, but also to administrative measures. This constitutes a reasonable explanation of the different and more generic formulation of this provision in comparison with Article 83 and allows a harmonious coordination between the two provisions.

3 Conclusions

1) The Treaty on the Functioning of the European Union, as noted above, in order to protect the financial interests of the Union as well as for a wider criminal policy, assigns competence to the European institutions and designs a particular procedure for the exercise of this power. What is still needed, however, is the indication of a catalogue of the *guiding principles and criteria of European criminal policy*: subsidiarity, *extrema ratio*, proportion (comprehensive of the idea of culpability as both limit and foundation of criminal responsibility and of the necessity of an offence of a "legal good" deserving criminal protection: harm principle), horizontal and vertical coherence, etc. The necessity of developing a list of principles, which is able to guide and limit the European criminal policy, has been recently taken into consideration, in the institutional context, by the Stockholm Program[2] and in the academic context, by the Manifesto on the European Criminal Policy.[3]

[2] European Council, The Stockholm Programme—An open and secure Europe serving and protecting citizens, OJEU, 4 May 2010, C 115/1.

[3] A Manifesto on European Criminal Policy Initiative (2009).

2) *Crimes affecting the "financial interests of the Union:"* this is the key phrase which defines the area of effectiveness of Article 325 TFEU. How should we interpret today the relevance of this form? Is an interpretation wider than the traditional one possible?

When the *Corpus Juris* was enacted, only fraud in public EU subsidies and crimes of public EU officers (corruption, embezzlement of public funds, abuse of the powers of office) were considered crimes affecting the financial interests of the Union. Today, the question to ask is whether crimes such as market abuses should be included in this category.

This could be achieved through an "institutional" and not only a patrimonial interpretation of the phrase "financial interests of the Union:" not only the resources of the Union, but also the financial institution that are legally conformed to the Union. The stability, accuracy and transparency of financial markets would become part of this new and broader "legal good" (*Rechtsgut, bene giuridico*), thus helping to give this specific area of European criminal competence an interpretation, aiming more at the protection of interests concerning all the Union's citizens, than at the mere economic and patrimonial interests of the Union itself.

References

Delmas-Marty M, Vervaele JAE (eds) (2000) The implementation of the *Corpus Juris i*n the Member States. Penal provisions for the protection of European Finances, vol I–IV. Intersentia, Antwerpen-Groningen-Oxford

European Criminal Policy Initiative (2009) A manifesto on European Criminal Policy. Zeitschrift für Internationale Strafrechtsdogmatik 12:707 ff