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EU-GLOBACT HANDBOOK

EUROCRIMES

A Q&A COMPENDIUM AND STRUCTURAL FRAMEWORKS ON OFFENCES UNDER ARTICLE 83 TFEU

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OVERVIEW

The Journal of International Criminal Law (*JICL*) is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and publications;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and
- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.



The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about “ecocide” is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, e.g., political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, e.g., the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

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EU Judicial Cooperation in Criminal Matters

by Anna Oriolo *

SUMMARY: I. Introduction – II. EU (*Indirect*) Competence in Criminal Matters – III. EU Criminal *Direct* Competence, the EPPO, and Financial Protection.

KEY WORDS: EPPO; Eurocrimes; EU Financial Interests; Judicial Cooperation; Transnational Crime.

I. Introduction

Transnational crimes (or cross-border crimes) are so-called “multinational” criminal phenomena (including offences linked to organised groups, businesses, and political lobbies) that transcend national borders, violate the laws of different States, or have an impact on more than one nation. These offences are emblematic of the link between internal and external security: they represent a significant threat to individuals and communities, businesses, national institutions, and the economy as a whole. Indeed, perpetrators of acts of terrorism and other organised crimes use their massive illegal profits to infiltrate the economy and institutions, including through corruption, thereby eroding the rule of law and fundamental rights, undermining the global security, and damaging their trust in public authorities.

Furthermore, **global emergencies**, such as armed conflicts, health emergencies, and natural disasters, amplify the threat that cross-border offences pose to the values and interests of the global community and to international security: the **Russia-Ukraine crisis**, the **Covid-19 pandemic**, and **environmental disasters** caused by climate change have created lucrative opportunities for transnational crime.

Commonly, the legal framework for countering transnational crimes is applied through state criminal justice systems, namely by criminalising specific behaviours in national legislation and prosecuting and punishing the offenders within those individual States. This **criminal justice approach** is reflected in the main international instruments for combating serious crimes of a transnational nature, such as **the 2000 United Nations Convention against Transnational Organized Crime (Palermo Convention, UNTOC)**. The UNTOC deliberately does not contain a strict definition of cross-border crimes, nor does it list them, preferring instead to focus on the **transnational “nature” of these violations**. This choice allows for a broader applicability of its provisions to new types of crime that may emerge over time as global, regional, and local conditions evolve.

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REFERENCES

UNTOC, 2000, Art. 3 para. 2 , Scope of application

“For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.”

II. EU (*Indirect*) Competence in Criminal Matters

The definition contained in Article 3(2) of the UNTOC covers a whole range of cross-border violations of general interest that require a “global response” through cooperation among States, similarly to “international” crimes or core international crimes (such as war crimes, crimes against humanity, genocide, and crimes against peace), even though the latter do not necessarily (directly) involve multiple countries.

To tackle these constantly evolving challenges, the European Union adopted a new Common Strategy to combat transnational crime in 2021 as part of its EU Security Strategy, ensuring it can act as a united, more influential “**global actor**” and strengthen international cooperation.

For over a decade the EU has been adopting a series of criminal law measures to combat offences of cross-border interest, aiming for a degree of uniformity in definitions and sanctions for certain very serious crimes, such as terrorism, trafficking in human beings and drugs, and fraud affecting the Union’s financial interests. Indeed, **Article 29 of the Treaty on European Union (TEU)** already tasked the EU with “providing citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters”. However, until the entry into force of the **Treaty of Lisbon in 2009**, an explicit legal basis for EU competence in the field of transnational crime was lacking, meaning that only a very limited number of such measures fell within the scope of Union policies.

CASE STUDY

Court of Justice of the European Union, *Commission v. Council*, 2005

Nevertheless, in a landmark 2005 judgment on an environmental matter the EU Court of Justice stated that although, at the time, neither criminal law nor the rules of criminal procedure fell within the competence of the (then) Community, this “cannot, however, 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”, as written in para. 49.

Currently, however, Articles 82 and 83 of the Treaty on the Functioning of the European Union (TFEU) expressly recognize, and in much greater detail than the aforementioned Article 29 TEU, the EU’s competence in procedural and substantive criminal law to ensure a high level of (common) security through the approximation of national criminal legislations, if necessary. The Treaty of Lisbon also introduced Article 86 TFEU, which

allows the Council, by means of regulations, to establish a European Public Prosecutor's Office (EPPO) to combat serious crimes affecting the financial interests of the Union. With regard to **“procedural” criminal competence**, **Article 82 TFEU** mandates the European Parliament and the Council to establish **“minimum rules”** to facilitate the **mutual recognition of judgments** and judicial decisions, as well as **police and judicial cooperation in criminal matters** having a cross-border dimension. In particular, paragraph 2 of Article 82 TFEU allows the Union to establish minimum rules concerning the **rights of individuals involved in criminal proceedings**. These minimum rules have been progressively established by the European legislator through a series of directives concerning specific rights (such as the right to interpretation and translation, the right to information in criminal proceedings, the right of access to a lawyer, the right to be present at the trial, etc.), leaving national authorities of the EU Member States “the choice of form and methods” to achieve the common result. The reliance on directives to regulate this matter has created a “systemic defect”, since, despite providing for “common” rules regarding the EU's criminal competence, Member States organize the procedures for transposing and implementing these rules (contained in directives) in different ways.

REFERENCES

TFEU, Art. 82

“1. 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.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between Member States;
- (c) support the training of the judiciary and judicial staff;
- (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such minimum rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) the mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 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.”

As for EU “**substantive**” criminal law, it can be harmonized through:

- Article 83(1) TFEU, which governs the so-called **Eurocrimes**;
- Article 83(2) TFEU, which concerns the **implementation of EU policies**;
- Article 325(4) TFEU, relating to the **protection of the EU’s financial interests**.

Turning to the examination of Article 83 TFEU, pursuant to paragraph 1 of the provision in question, the Union’s competences in substantive criminal law concern the adoption of minimum rules on the definition of criminal offences and sanctions in specific “areas of particularly serious crime with a cross-border dimension”.

This is an autonomous but indirect criminal competence, exercised through directives, which are acts that, as stated, are not self-executing by nature, binding Member States to certain objectives to be achieved while leaving them free to choose the appropriate means to reach that result. This **indirect competence** specifically covers a list of **Eurocrimes** set out in paragraph 1 of Article 83, namely: **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**. To these, an additional offence was added at the end of 2022 via a specific decision of the Council of the EU, which introduced the **violation of EU restrictive measures**.

REFERENCES

TFEU, Art. 83

“1. The European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may 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 minors,
illicit drug trafficking,
illicit arms trafficking,
money laundering,
corruption,
counterfeiting of means of payment,
computer crime,
organised crime,
violation of Union restrictive measures.

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.

Within the same period, 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 inform 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.”

III. EU Criminal *Direct* Competence, the EPPO, and Financial Protection

Article 325(4) TFEU allows the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt specific measures in the field of prevention and the **fight against fraud affecting the financial interests of the Union**, an area in which a body of pre-Lisbon legislation already exists.

REFERENCES

TFEU, Art. 325, para. 4

“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, 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.”

Every year, EU Member States detect and report **cross-border fraud** amounting to billions of euros, including a loss of at least **50 billion euros in value-added tax (VAT)**. However, national measures to combat large-scale transnational financial crimes remain limited and are unable to effectively protect the Union’s budget. Similarly, neither the European Anti-Fraud Office (**OLAF**), nor the EU judicial cooperation unit (**Eurojust**), nor the European Union Agency for Law Enforcement Cooperation (**Europol**) are empowered to initiate investigations or criminal prosecutions within the Member States. In response, the Council of the European Union, acting in accordance with Article 86 TFEU, adopted **Regulation (EU) 2017/1939** establishing **the European Public Prosecutor’s Office (EPPO)**, which is tasked with investigating and prosecuting the perpetrators of fraud and other offences affecting “**the financial interests of the Union**”. These interests encompass the management of budget appropriations, as well as all cases impacting the assets of the EU and those of the Member States, such as fraudulent activities related to Union funds (for instance, the use or presentation of false, incorrect, or incomplete statements or documents resulting in the misappropriation, misapplication, or wrongful retention of funds or assets from the Union budget or budgets managed by the Union or on its behalf), collectively referred to as “**PIF offences**”.

Fraud affecting the financial interests of the Union includes “serious” offences against the common EU VAT system, such as those connected to the territory of two or more Member States and involving a total damage of at least ten million euros (namely, the use or presentation of false, incorrect, or incomplete VAT-related statements or documents, or the non-disclosure of VAT-related information in violation of a specific obligation, having the effect of reducing the Union’s budget resources). However, the EU’s financial interests can also be compromised or threatened by money laundering, corruption, and misappropriation.

Furthermore, the *ratione materiae* competence of the **EPPO extends to ancillary offences** deemed to be “inextricably linked” to PIF offences, such as acts aimed at securing the material or legal means to commit offences affecting the Union’s financial interests or to secure the profit or proceeds thereof. Moreover, the European Public Prosecutor’s Office can investigate and prosecute offences related to organised crime (including membership, organisation, and leadership of a criminal organisation) when the objective of such an illegal network is to commit PIF offences. Finally, Article 86 (4) TFEU provides that **the European Council** (acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission) **may amend the powers of the EPPO and extend them to cover other serious crimes** that “have a cross-border dimension” and “implications in more than one Member State”, such as terrorism and environmental crime.

REFERENCES**TFEU, Art. 86**

“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.

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.”