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European Studies  
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# The New EU Criminal Law Competence in Action:

## The Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation

Marta Miglietti

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## ABSTRACT

The aim of this paper is to analyse the proposed Directive on criminal sanctions for insider dealing and market manipulation (COM(2011)654 final), which represents the first exercise of the European Union competence provided for by Article 83(2) of the Treaty on the Functioning of the European Union. The proposal aims at harmonising the sanctioning regimes provided by the Member States for market abuse, imposing the introduction of criminal sanctions and providing an opportunity to critically reflect on the position taken by the Commission towards the use of criminal law.

The paper will discuss briefly the evolution of the EU's criminal law competence, focusing on the Lisbon Treaty. It will analyse the 'essentiality standard' for the harmonisation of criminal law included in Article 83(2) TFEU, concluding that this standard encompasses both the subsidiarity and the *ultima ratio* principles and implies important practical consequences for the Union's legislator.

The research will then focus on the proposed Directive, trying to assess if the Union's legislator, notwithstanding the 'symbolic' function of this proposal in the financial crisis, provides consistent arguments on the respect of the 'essentiality standard'. The paper will note that the proposal raises some concerns, because of the lack of a clear reliance on empirical data regarding the essential need for the introduction of criminal law provisions. It will be stressed that only the assessment of the essential need of an EU action, according to the standard set in Article 83(2) TFEU, can guarantee a coherent choice of the areas interested by the harmonisation process, preventing the legislator to choose on the basis of other grounds.

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## TABLE OF CONTENTS

<b>1</b>	<b>INTRODUCTION</b>	<b>8</b>
<b>2</b>	<b>THE SUBSTANTIVE CRIMINAL LAW COMPETENCE OF THE EU POST-LISBON</b>	<b>9</b>
2.1.	INTRODUCTION: THE HARMONISATION OF CRIMINAL LAW IN THE EU	9
2.2.	FROM MAASTRICHT TO LISBON: THE EVOLUTION OF THE EU APPROACH TO CRIMINAL LAW	10
2.3.	THE ECJ'S CONTRIBUTION TO THE DEVELOPMENT OF EU CRIMINAL LAW	11
2.4.	THE LISBON TREATY	12
2.5.	THE NEW LEGAL BASIS OF ARTICLE 83 TFEU	13
2.6.	THE SPECIAL FEATURES ARTICLE 83(2) TFEU	14
2.6.1.	<i>THE ORIGINS</i>	14
2.6.2.	THE LIMITS OF THE POWER CONFERRED ON THE UNION	15
2.6.3.	ESSENTIALITY REQUIREMENT: LEGALITY, CONSISTENCY AND PRACTICAL CONSEQUENCES	18
2.7.	ARTICLE 83(2) TFEU IN ITS PRACTICAL APPLICATION	19
2.8.	CONCLUSIONS	21
<b>3</b>	<b>THE PROPOSAL FOR A DIRECTIVE ON CRIMINAL SANCTIONS FOR INSIDER DEALING AND MARKET MANIPULATION: IS THE PROPOSAL CONSISTENT WITH ITS LEGAL BASIS?</b>	<b>22</b>
3.1.	INTRODUCTION	22
3.2.	THE FIGHT AGAINST MARKET ABUSE BEFORE LISBON	22
3.2.1.	<i>THE MAD</i>	22
3.2.2.	THE IMPLEMENTATION OF THE DIRECTIVE IN RELATION TO THE SANCTIONING REGIME	23
3.3.	THE NEW "PACKAGE" AGAINST INSIDER DEALING AND MARKET MANIPULATION	23
3.3.1.	<i>THE DEBATE OVER THE REFORM</i>	23
3.3.2.	THE PROPOSED DIRECTIVE ON CRIMINAL SANCTIONS FOR INSIDER DEALING AND MARKET MANIPULATION AND THE LEGISLATIVE PROCEDURE	25
3.4.	THE ASSESSMENT OF THE ESSENTIAL NEED OF CRIMINAL SANCTIONS	26
3.4.1.	<i>THE PROPOSAL</i>	26
3.4.2.	CONSULTATIONS WITH THE INTERESTED PARTIES	27
3.4.3.	<i>THE IMPACT ASSESSMENT</i>	29
3.4.4.	<i>THE EP REPORT</i>	31
3.5.	CONCERNS ABOUT THE RESPECT OF THE "ESSENTIALITY REQUIREMENT"	31
<b>4</b>	<b>CONCLUSIONS</b>	<b>33</b>
<b>5</b>	<b>BIBLIOGRAPHY</b>	<b>35</b>

## 1 Introduction

The proposed Directive COM(2011)654 on criminal sanctions for insider dealing and market manipulation aims at harmonising the sanctioning regime provided by the Member States to market abuse, imposing the introduction of criminal sanctions. This proposal represents an interesting initiative, being the first exercise of the European Union (EU) competence provided for by Article 83(2) of the Treaty on the Functioning of the European Union (TFEU). This “test-exercise” of the use of Article 83(2) TFEU provides an opportunity to critically reflect on the position taken by the Commission towards the use of criminal law, an area that has received a new structure under the Lisbon Treaty, which abolishes the former “pillar” structure.

In particular, this paper will try to assess if the proposal can be considered to meet the requirements set by its legal basis. To this aim, this paper will discuss briefly the evolution of the EU’s Criminal Law competence, analysing the “ratio” and the conditions for the approximation of substantial criminal law, especially in the Lisbon Treaty. It will focus on the ‘essentiality standard’ for harmonisation included in Article 83(2), as to say, the fact that the harmonisation of criminal law shall prove ‘essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures’. The conclusion on this issue will be as follows: this standard can be considered as a respect for the principles of subsidiarity and proportionality (*ultima ratio*) and this requirement implies important practical consequences for the Union’s legislator.

The research will then focus on the process that led to the proposal of the Directive and on the content of the proposal itself, analysing the elements provided by the legislator for the assessment of the “essentiality standard”, both in the proposal and in the Impact Assessment accompanying it. The conclusion of this assessment will note that the proposal raises some concerns on this first use of Article 83(2) TFEU, in particular for the lack of a clear reliance on empirical data regarding the essential need of introducing criminal law provisions in this specific field.

In particular, it will be stressed that a “rush” to criminal law linked to the “urgency” to give symbolic and strong responses to certain emergencies seems to underestimate the need to adopt a rigorous approach in the harmonisation of criminal law. The coherence of the use of EU Criminal law and its new potentially important role under the Lisbon Treaty may significantly suffer from this approach. Actually, only a deep and evidence-based analysis into the essential need for criminal law represents an ‘objective’ reference for harmonisation. This approach can prevent the legislator from choosing on the basis of other grounds and guarantee a coherent recourse to these important and potentially far-reaching tools.

## 2 The Substantive Criminal Law Competence of the EU Post-Lisbon

### 2.1. Introduction: the Harmonisation of Criminal Law in the EU

To understand the rationale of the legislative proposal for a Directive on criminal sanctions for insider dealing and market manipulation, it is necessary to have a synthetic overview of the process of harmonisation of criminal law provisions in the Union. It is equally important to have an overview of the evolution of the Union's powers in this field.

Under the first point of view, it is possible to affirm that the EU has carried on its initiatives in the field of criminal justice, according to two main "traditional" goals: the aim of tackling serious cross-border crimes (to foster 'the confidence of citizens in using their right to free movement' (European Commission, 2011a: p. 5)) and the need to ensure the effective implementation of the EU policies. To achieve these results, the main traditional tools of the EU in managing criminal justice and enhancing judicial cooperation have consisted in the mutual recognition of judicial decisions and the harmonisation of criminal law (Harding and Banach-Gutierrez, 2012: p. 760).

In particular, pursuant to the principle of mutual recognition,<sup>1</sup> national judges are required to recognise the judicial decisions issued by judges from other Member States and execute them 'with a minimum of formalities and with limited grounds for refusal' (Long, 2010: pp. 8-9).<sup>2</sup> The mutual recognition principle has been officially considered the 'cornerstone' of judicial cooperation (European Commission, 2010a: p. 4), and has been seen often as a better alternative to the harmonisation of laws among Member States.<sup>3</sup>

However, this principle has proven insufficient to 'bridge all major gaps existing between the different national legal systems' (Long, 2010: p. 8) and these differences have created enforcement problems (Fichera, 2011: p. 93).<sup>4</sup> Actually, the principle of mutual Recognition 'can only function effectively on the basis of mutual trust among judges' (European Commission, 2010a: p. 4), that is to say, when domestic judicial authorities trust that a foreign legal system is founded on the same fundamental values (Fichera, 2013: p. 192). The achievement of mutual trust requires 'minimum standards and a reinforced understanding of the different legal traditions and methods' (*ibid*). In brief, mutual recognition without minimum harmonisation can raise difficulties, since only a 'common minimum platform [...] ensures a virtuous cycle of cooperation' (Fichera, 2013: p. 181. See also Parisi, 2012: pp. 43-44).

Considering this aspect, the process of harmonisation of criminal law (both substantive criminal law and criminal procedure) among Member States has been carried out to 'enhance the mutual trust between Member States and the national judiciaries' (European Commission, 2011a: p. 3), foster their cooperation and facilitate the work of Eurojust and Europol (Long, 2010: p. 8. See also Weyembergh, 2005: p. 1574). Actually, the process of harmonisation of criminal law consists in the modification or introduction of criminal provisions in the legal systems of different States, in order to respect minimum common standards. It does not mean 'the complete replacement of national criminal law system by a single, uniform European criminal law, but the approximation of aspects of the different criminal law systems'

1 The principle of mutual recognition is now enshrined in Article 82 TFEU.

2 One of the most important instruments adopted to this aim has been the European Arrest Warrant (Framework Decision (2002/584/JHA)) that has replaced the extradition procedures among the Member States. See further: Fichera, 2011 and Parisi, 2012.

3 'Some stakeholders would mention the principle of mutual recognition to demonstrate that harmonization is not needed' (Long, 2010: p. 8).

4 Actually, judicial authorities face difficulties in applying provisions that differ (sometimes consistently) from their internal legislation and have broadly made use of the grounds to justify non-execution (Long, 2010: p. 8).

(Borgers, 2010: p. 348). As a consequence, harmonisation can be considered ‘a condition for smooth judicial cooperation, and especially for mutual recognition [...] necessary for the realization as well as for the legitimacy of mutual trust’ (Weyembergh, 2005: p. 1574).<sup>5</sup>

Moreover, it has also been recognised an ‘autonomous function’ of harmonisation, independent from the facilitation of judicial cooperation and related to the need of creating an equal level of response to certain crimes within the Union (Borgers, 2010: p. 348). Under this perspective, harmonisation is aimed at preventing criminals from taking advantage of ‘safe heavens’ (or better regimes of penalisation) (Weyembergh, 2005: p. 1579), but also to guarantee citizens an equal protection in the Union.

Many instruments have been adopted by the EU to achieve a grade of harmonisation in several areas of criminal law,<sup>6</sup> however, this ambitious plan, pre-Lisbon, suffered from the limited powers provided in this field to the Union. Actually, the cooperation in criminal matters belonged to the “third pillar” of the EU structure established with Maastricht, which was led by intergovernmentalism.

The Treaty of Lisbon has brought about a radical change in the EU Treaty Framework, redefining the cooperation in criminal matters as an area of shared competence, to be implemented through Directives under the ordinary legislative procedure. To understand the importance of the new legal framework, especially regarding harmonisation of criminal law, a brief overview of the evolution from the “pillar structure” to Lisbon is needed.

## 2.2. From Maastricht to Lisbon: the Evolution of the EU Approach to Criminal Law

The Maastricht Treaty introduced police and judicial cooperation in criminal matters as part of the third “pillar” of the EU, on Justice and Home Affairs.<sup>7</sup> Criminal cooperation was (and still is) regarded as a sensitive area, ‘touching closely [...] at the heart of traditional conceptions of sovereignty’ (Craig and de Búrca, 2011: p. 926), and the Treaty established that this field would have to be developed through the “intergovernmental” method, based on the unanimity voting system in the Council. The first pillar, on the other hand, lacked any competence related to criminal law.

The instruments that could be adopted in the criminal field of the third pillar were the Council’s Joint Actions, Joint Actions and Conventions, that constituted “vague” (Mitsilegas, 2009: p. 524) and not legally binding measures aimed at coordinating Member States initiatives. In general, the results of this period ‘were still modest’ (Peers, 2011: p. 293).

An important evolution of the EU competence in criminal matters was possible only thanks to the Amsterdam Treaty.<sup>8</sup> On the one hand, the Amsterdam Treaty incorporated large parts of the former third pillar into the first one<sup>9</sup> leaving only the police and judicial cooperation in criminal matters in the intergovernmental sphere,<sup>10</sup> on the other hand, it introduced new important instruments in the field of criminal law: Decisions and Framework Decisions.

In particular, Framework Decisions were aimed at approximating the laws and regulations of Member States (Art 34 Treaty on European Union) and have been approved in many fields, both to harmonise substantial criminal law and procedural

5 See also Borgers according to which ‘a certain degree of harmonisation is indispensable for mutual recognition’ (Borgers, 2010: p. 354).

6 See point 2.2. below.

7 Title V of the original TEU.

8 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, OJ C 340, 10 November 1997.

9 Visas, Asylum and immigration policies, judicial cooperation in civil matters.

10 Peers defines this structure as a ‘modified intergovernmentalism’ (Peers, 2011: p. 272).

provisions.<sup>11</sup> These new legal instruments, were binding upon the Member States as to the result to be achieved ‘with exactly the same definition as a directive, while ruling out direct effect’ (Peers, 2011: p. 273). However, even if they were formally lacking direct effect, it is important to remember that in the *Pupino* case (Case C-105/03 *Pupino* [2005] ECR I-5285) the ECJ affirmed that national courts had the duty to interpret national law in the light of the Framework Decisions, as a consequence of the principle of loyal cooperation. These instruments were thus accorded an ‘indirect effect’ ‘for the sake of effectiveness of EU Law’ (Herlin-Karnell, 2012: p. 24). Anyway, notwithstanding the *Pupino* Case, Framework Decisions were subject to the unanimity voting system and their approval often led to long and difficult negotiations, leading ultimately to compromises. Since many States used to play ‘the unanimity card in order not to have to change their law’ (Mitsilegas, 2009: p. 537) often the ‘significance of the measures was [...] watered down’ (Calderoni, 2012: p. 1369). Moreover, the ECJ jurisdiction in relation those instruments was ‘quasi absent’ (Ferraro, 2012: p. 3): the old EU Treaty did not provide for actions for infringement concerning police and judicial cooperation in criminal matters (Lenaerts, 2010: p. 266) and Member States could decide whether to accept the ECJ competence on preliminary rulings in this field, and its extent.<sup>12</sup> In conclusion, these instruments often just introduced basic minimum rules, allowing Member States not to change their legislations (Calderoni, 2012: p. 1369) and this lack of effective homogeneity among national systems created difficulties for the cooperation among national authorities and to the work of Eurojust and Europol (Long, 2010: p. 8).

However, notwithstanding the mentioned limits and the failure of the European Constitution,<sup>13</sup> the power of the EU legislator in the criminal field developed significantly thanks to the ECJ Case Law.

### 2.3. The ECJ’s Contribution to the Development of EU Criminal Law

In the famous *Environmental Crimes Case* (Case C-176/03 *Commission v Council* [2005] ECR-I-7879) the ECJ recognised that the Union could exercise a criminal law competence if this was an essential measure to safeguard the full effectiveness of EU environmental law. The Court, while acknowledging that ‘as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence’, stated that ‘when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences’ the Community legislature is not prevented ‘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>14</sup>

This judgement represents a fundamental step in the evolution of the criminal competence of the Union: formally, the EU First Pillar was lacking competence in criminal law but the ECJ recognised for the first time this implied power, relying on the “effectiveness” principle. Considering its innovative contribution, this case

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11 Those instruments have been adopted, in particular, in the field of trafficking of human beings (Framework Decision 2002/629/JHA); corruption in the private sector (Framework Decision 2003/568/JHA); illicit drugs trafficking (Framework decision 2004/757/JHA) terrorism (Framework Decision 2008/919/JHA amending the 2002 Framework Decision on combating terrorism); and organised crime (Framework Decision 2008/841/JHA).

12 They could opt for ‘full jurisdiction over references, no jurisdiction at all over references or jurisdiction over references from top courts only’ (Peers, 2011: p. 273).

13 The Treaty establishing a Constitution for Europe [2004] OJ C316/1, was signed on 29 October 2004, however, after the negative result of the referenda in France and the Netherlands, the Treaty has not been ratified. See further Dehousse, 2006.

14 ECJ, *Commission v Council*, C-176/03, para. 47-48.

sparked a wide debate over the extent and the limits of the supranational EU competence envisaged by the ECJ.<sup>15</sup>

In particular, the Commission published a Communication on the implications of the Case C-176/03 (European Commission, 2005), interpreting the judgement as the recognition of a “general” EU criminal competence, to be exercised also in the other common policies of the EU. In the following ECJ Case Law (*Ship Source Pollution Case* - Case C-440/05 Commission v Council [2007] ECR I-9097), even though the Court did not expressly uphold the vision of the Commission on the general application of the competence, it reaffirmed the position expressed in the Environmental Crimes Case. In the wake of this evolution, the Commission adopted other directives in the area of criminal law<sup>16</sup> and the principle of effectiveness ‘has become the key drive in the pursuit of the constitutional evolution of European criminal law’ (Herlin-Karnell, 2012(a): p. 2).

#### 2.4. The Lisbon Treaty

The Lisbon Treaty<sup>17</sup> has represented a revolutionary change for the Criminal Law competence of the Union, since it has ‘elevated criminal law to a central [...] position’ (Herlin-Karnell, 2012(a): p. 1), including most of the innovations of the failed Constitutional Treaty and affirming the supranational power of the Union in this field.

In the new division of competences of the Union, the Area of Freedom Security and Justice (that encompass criminal law provisions) now represents one of the “shared competences” of the Union, included in Art 4(2)j TFEU. Actually, the pillar structure of the Union and their distinctive categories of legal acts have been abolished and the former third pillar has been incorporated into the unique Treaty Body.

In particular, the TFEU now provides the EU with the legal basis to adopt directives in many key areas of criminal law,<sup>18</sup> through the ordinary legislative procedure and qualified majority voting, as general rule.<sup>19</sup>

Moreover, to complete the inclusion of this policy in the unique EU structure, the Commission now has the power to initiate infringement procedures also in this area and the ECJ has acquired full jurisdiction in the field, for preliminary rulings, actions for damages and for annulment.<sup>20</sup>

15 See further, Herlin-Karnell, 2007. Some scholars affirmed that the ECJ made an “abusive” use of the principle of effectiveness and the theory of implicit powers (Among others, Hedemann-Robinson, 2008).

16 Directive 2008/99/EC on the protection of the environment through criminal law, OJ L 328/28 of 6.12.2008; Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ L 280/52 of 27.10.2009; and Directive 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24 of 30.6.2009.

17 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.

18 See TFEU, Part Three, Title V (“Area of Freedom, Security and Justice”), Chapter 4 (“Judicial cooperation in criminal matters”), which specifies the areas in which the EU has the competence to adopt legislative measures, respectively, in the area of criminal procedure (Article 82), substantive criminal law (Article 83), crime prevention (Article 84), the functioning of Eurojust (Article 85), the establishment and functioning of the European Public Prosecutor’s Office (Article 86) and the area of police cooperation (Article 87).

19 For the establishment of the European Public prosecutor (Article 86(1)) the Council shall act unanimously after obtaining the consent of the European Parliament. The same procedure is requested in Article 87(3) and 89. Moreover, Article 83(2) states that the directives aimed at harmonise substantial criminal law of Member States in areas that have already been object of harmonisation measures ‘shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question’.

20 However, the Protocol n. 36 on transitional provisions specifies that, for the acts that has been adopted under the old Treaties Framework the Commission shall not promote actions for infringement and the jurisdiction of the ECJ shall not change, for a period of five years after the entry into force of the Lisbon Treaty. Anyway, according to Article 276 TFEU the ECJ does not have jurisdiction ‘to review the validity or proportionality of operations carried out by the police or other

Of course, the exercise of the new EU legislative powers will require time. Meanwhile, according to Art. 9 of Protocol 36 to the Lisbon Treaty, the existing Framework Decisions will be preserved until those acts are repealed, annulled or amended. Lastly, it is worth noting that, according to Protocols 21 and 22, the United Kingdom and Ireland shall take part in the adoption and application of all measures under Title V only after a decision to "opt in" while Denmark is not participating to AFSJ measures (See further Peers, 2008-2009).

### 2.5. The New Legal Basis of Article 83 TFEU

The TFEU deals with the legal basis on substantive and procedural criminal law in Part Three, Title V ("Area of Freedom, Security and Justice"), Chapter 4 ("Judicial cooperation in criminal matters").

In particular, in relation to the approximation of law, Article 82(1) TFEU states that '[j]udicial cooperation in criminal matters [...] 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 legal basis related to substantive criminal law is to be found in Article 83.

Article 83(1) states that for 'particularly serious crime with a cross-border dimension [...] the Union can adopt directives under the ordinary legislative procedure to 'establish minimum rules concerning the definition of criminal offences and sanctions'. The same Article 83(1) provides a list of those crimes,<sup>21</sup> but the Council, considering the "developments in crime" may unanimously identify other areas that meet the criteria provided by Article 83(1), after obtaining the consent of the European Parliament.

Article 83(2) represents the core of this chapter and will be analysed in more detail in the following paragraphs. It empowers the Union to introduce the approximation of criminal laws and regulations if this proves essential 'to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'.

It is possible to notice that Article 83 TFEU reflects the 'double' evolution of EU criminal law outlined in the previous paragraphs: the 'autonomous' harmonization of certain behaviours under the third pillar (83(1)) and the 'auxiliary' harmonisation as a tool to ensure the effectiveness of other EU policies, as defined by the ECJ Case Law (Giudicelli-Delage and Lazerges, 2012: p. 20). However, Article 83 now provides a single legal basis for the criminal measures adopted at Union level, which are not anymore divided between the first and third pillar.

Lastly, Article 83(3) and 83(4) foresee an "emergency break" procedure. According to these paragraphs, if a member of the Council considers that a draft directive aimed at harmonising criminal law provisions 'would affect fundamental aspects of its criminal justice system' it may request the referral of the draft directive to the European Council and the suspension of the ordinary legislative procedure. In case of consensus, the European Council shall refer the draft back to the Council, while in case of disagreement nine Member States can decide to establish an enhanced cooperation on the basis of the draft directive concerned.

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law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

21 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.

## 2.6. The Special Features Article 83(2) TFEU

### *2.6.1. The Origins*

If Article 83(1) can be considered an extension of the provisions of Article 31 of the previous Treaty on European Union,<sup>22</sup> Article 83(2), conversely, is new in comparison to the previous treaty framework and represents the codification of the ECJ Case Law.

It is important to recall the text of Article 83(2): '[i]f 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.'

The same provision formed part of the Constitutional Treaty (Article III-271) and it is important to remind the position of the Convention on the Future of Europe on this issue (Working Group X on 'Freedom, Security and Justice): '[t]he Working Group [...] considers it opportune to include a legal base in the new Treaty permitting the adopting of minimum rules [...] where the crime is directed against a shared European interest which is already itself the subject of a common policy of the Union (e.g. counterfeiting the Euro, the protection of the Union financial interest), approximation of substantive criminal law should be part of the toolbox of measures for the pursuit of that policy whenever non-criminal rules do not suffice'.<sup>23</sup>

In other words, the Convention already envisaged a "general" criminal competence as part of the EU toolbox, but such a revolutionary change was blocked together with the other innovations included in the failed Constitutional Treaty. However, the Union did not have to wait until the entering into force of the Lisbon Treaty to exercise the power envisaged by the Convention. Actually, as explained above, notwithstanding the failure of the Constitutional project, the ECJ Case Law affirmed the legitimacy of criminal measures as part of the EU action.

In Art 83(2) we can find the legacy of this process and the transformation of the principle envisaged in the ECJ case law in a specific conferral of powers: the EU intervention under Art 83(2) represents part of the effective pursuit of a policy of the union, whenever such intervention is to be considered essential. Actually, the article 'enshrines a broad interpretation of the previous jurisprudence' (Craig and de Búrca, 2011: p. 942), covering all the different Union policies that have been the object of harmonisation measures and expressly enabling the Union to legislate also on the definition of sanctions.<sup>24</sup>

This competence appears clearly much wider also in comparison to the one enshrined in Article 83(1). Actually, the competence of Article 83(1) is related to a specific list of nine crimes, which can be integrated only through a decision taken by unanimity by the Council and after obtaining the consent of the European Parliament. In other words, this article requires the approval of all the Member States and the 'democratic control' of the Parliament (Bernardi, 2011: p. 10). Conversely, the competence included in Article 83(2) can potentially expand in parallel with the evolution of any other area of the Union action and without the

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22 With an important extension of the crimes previously covered by Article 31 Treaty on European Union.

23 Final report of Working Group X "Freedom, Security and Justice", CONV 426/02, 10.

24 Conversely, in the *Commission v Council (Ship Source Pollution)* Case C-440/05 [2007] ECR I-9097, the ECJ excluded that the Union could determine the type and level of criminal penalties to be applied.

need of being ‘areas of particularly serious crime with a cross-border dimension’, as required in Article 83(1) (*ibid*: p. 11). Considering the far-reaching extent of the power conferred in Article 83(2) both the Member States and many scholars are ‘on the alert’ (*ibid*: p. 10) and have raised concerns on the limits of this new competence (*ibid*: pp. 9-10). In this context, the conditions for criminalisation have the fundamental function of defining the limits of the powers conferred to the EU Legislator and therefore deserve a deeper analysis.

### 2.6.2. *The Limits of the Power Conferred on the Union*

The competence of the EU to legislate on the basis of Article 83 TFEU is subject to the requirement of a proven “essential” need of the approximation of criminal law in order to ensure the “effective implementation” of those policies. Consequently, to understand the limits of the EU competence we have to define more precisely the two concepts of “effectiveness” and “essentiality”.

In general, the concept of “effectiveness” of an EU policy has been defined, with reference to the ECJ Case Law, as an ‘umbrella label which [...] requires that national remedies and procedural rules must not [...] render their beneficiaries’ enjoyment of Community rights excessive difficult’ (Herlin-Karnell, 2012(a): p. 46) and thus shall be read in conjunction both with the principle of sincere cooperation of Article 4(3) TEU and the duty of Member States to provide remedies ‘sufficient to ensure effective legal protection in the fields covered by Union law’ (Article 19 TEU).

However, this concept is rather open and lacks of a clearer definition, also in the ECJ case law (*ibid*: p. 71). For this reason, it is important to apply the concept of effectiveness in a concrete way. In other words, to assess if the harmonisation of criminal measures is needed to ensure the effectiveness of an EU policy, it is important to identify concrete shortcomings in the EU law enforcement related to this lack of harmonisation. As a consequence, the legislator should not rely on the abstract, symbolic and dissuasive power of criminal law to affirm that this is the best tool to guarantee the effectiveness of an EU Policy, but on concrete evidence on the role and adequacy of criminal law to tackle the specific phenomena addressed. It has been correctly affirmed that ‘if it is ‘enough to see European criminal law as a ‘symbol’ in order to fulfil the requirement of effectiveness, it contradicts the EU law assumption that the principle of effectiveness should be based upon objective criteria’ (*ibid*: p. 58). Actually, ‘there appears to be a belief that the mystique surrounding criminal law will ensure its effectiveness automatically. It might be disappointing news for the EU legislator [...] that [criminal law] is far away from always “effective”’ (*ibid*: p. 108).

In this context, to avoid a legislative inflation caused by an ‘excessive instrumentalisation of penal law, through its symbolic and dissuasive functions [...] principles guiding the adoption of European criminal law need even greater consideration’ (Perrine, 2012: p. 245) and Article 83(2) provides such safeguards.

Actually, the principle of effectiveness must be read in conjunction with the requirement of “essentiality”, that has been considered the key requirement of the provision (Perrine, 2012: p. 250). It has been noticed (*ibid*) that the term “essential” is not defined. However, it could be argued that the respect of this standard entails both the safeguarding of the principle of proportionality (in the meaning of *ultima ratio* - last resort nature - of criminal law) and the safeguarding of the Member States’ competences in the sensitive field of criminal law (subsidiarity).

Under the first point of view, it is important to recall, first, that the principle of proportionality means ‘the proportionality of the content and form of Union action between the means employed and the objectives to be achieved’ (*ibid*: p.

253). More precisely, the principle of proportionality includes the principle of *ultima ratio* of criminal provisions (Bernardi, 2011: p. 18), according to which ‘criminal law should be reserved for the most serious invasion of interests since less serious misconduct is more appropriately dealt with by civil law or by administrative regulation’ (Herlin-Karnell, 2009: p. 355).<sup>25</sup>

In the area of EU criminal law, already in the ECJ Case Law (point 48 of the *Environmental Crimes Case* and point 66 of the *Ship Source Pollution Case*) it is possible to find a reference to the principle of proportionality. Actually, the ECJ specified that the essential need for the introduction of criminal sanctions shall be assessed also in relation to the seriousness and the object of the infringement at stake, and similar considerations can be found in the directives approved on the basis of this case law, before the Lisbon Treaty entered into force (Bernardi, 2011: pp. 19-20).<sup>26</sup>

However, the Lisbon Treaty represented the occasion for a deeper reflection on this issue. Looking, first, at the general framework set by the TFEU for the harmonisation of substantive criminal law, we can notice that Article 67 TFEU (that opens the TITLE V on AFSJ) underlines that the Union shall ‘endeavour to ensure a high level of security’ through, among other measures, ‘the mutual recognition of judgements in criminal matters and, if necessary, through the approximation of criminal laws’.

In other words, ‘the focus will remain primarily on mutual recognition and the harmonisation of offences and sanctions will be pursued for selected cases’ (European Commission, 2010a: p. 5). Bearing in mind, anyway, the close relation between mutual recognition and harmonisation in the EU<sup>27</sup> what is important to notice, is the acknowledgement that the harmonisation tool is a different one and must be carefully considered among the possible choices of intervention.

Moreover, in September 2011, the Commission published the Communication *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law* (European Commission, 2011a) with the aim of presenting the framework in which the new EU Competence is to be exercised. The Commission identifies the justification for the EU intervention in its “added-value”, a concept substantially related to the fight against serious trans-border crime and the need to ensure the effective implementation of EU policies. But the Communication is particularly important with regards to the conditions and limits of the exercise of this new competence: considering that criminal law measures ‘comprise intrusive rules’ (*ibid*: p. 4) and can still be regarded as a ‘sensitive policy field’ (*ibid*: p. 2), the role of EU criminal law is defined ‘as a complement to the national law systems’ (*ibid*: p. 3) in the framework provided by the Lisbon Treaty. As a consequence, ‘criminal law must always remain a measure of last resort’ (*ibid*: p. 6) and the Communication outlines the process that must be followed to assess the need to adopt criminal law measures, and, in case of positive answer, what kind of criminal measures. Recalling the wording of the Convention on the Future of Europe<sup>28</sup>, the Commission specified that ‘the legislator needs to analyse whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation [...] This will require a thorough analysis in the

25 Perrine affirms that the principle means ‘using criminal law only as the ultimate resort and it is based on the assumption that punishment is the State’s most intrusive means of enforcement in the case of illegal conduct’ (Perrine, 2012: p. 255). The author underlines also that the principle implies ‘an assessment of the necessity or the need to use criminal punishment’.

26 The author noted that, in particular, the directives 2009/52/CE and 2009/123/C required to the Member States to criminalise only the most serious infringements from the subjective and objective point of view.

27 See 2.1.

28 Final report of Working Group X “Freedom, Security and Justice”, CONV 426/02, p. 10. See point 2.6.1.

Impact Assessments preceding any legislative proposal, including for instance [...] an assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground' (European Commission, 2011a: p. 7).

The Commission also specifies the elements that 'must be taken into account' (*ibid*: p. 11) in assessing the necessity of criminal sanctions: the seriousness and character of the breach of law; the importance to stress strong disapproval in order to ensure deterrence; the extent to which and the reasons why existing sanctions do not achieve the desired enforcement level. Moreover, the Commission underlined that the institutions 'need to be able to rely on clear factual evidence' (*ibid*: p. 8) regarding the need for the intervention.

The same perspective has been expressed by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament. In its Report on 'an EU approach to criminal law' of 24 April 2012 (European Parliament, 2012a), the LIBE Committee specifies that 'taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (*ultima ratio*) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals' (*ibid*: p. 4).

In brief, taking into account the point of view of the ECJ, of the Commission and of the European Parliament, we can affirm that the essentiality requirement can be considered in respect of the principle of proportionality, in the meaning of *ultima ratio*.<sup>29</sup>

An interesting analysis of this issue can be found in a ruling on the Lisbon Treaty of the German Federal Constitutional Court in 2009.<sup>30</sup> The Court highlighted that the competence provided in Article 83(2) represents a 'serious extension of the competence for the administration of criminal law as compared to the current legal situation' and that 'this competence in criminal law-making carries the threat that it could be without limits'.<sup>31</sup>

However, the Court affirmed the possibility of a constitutional interpretation of this article, precisely because of the narrow formulation of the standard of Article 83(2). The *Bundesverfassungsgericht* believes that it '[must be] demonstrably established that a serious deficit as regards enforcement actually exists and that it can only be remedied by a threat of sanction'.<sup>32</sup>

This issue presents a clear and close link to the principle of subsidiarity. According to this principle, the Union's intervention must be justified by its better adequacy to achieve the desired objective.<sup>33</sup> This principle leads us to analyse the Member States' point of view and the role of the essentiality principle in a more general and 'constitutional' perspective.

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29 Perrine specifies that 'a two-step approach of "proportionality" *sensu lato*, including the use of criminal law as an *ultima ratio* and proportionality of the penalties to the criminal offence is drawn' (Perrine, 2012: p. 256).

30 Federal Constitutional Court, 2 BvE 2/08 of 30 June 2009 – Lisbon.

31 Federal Constitutional Court, 2 BvE 2/08 of 30 June 2009 – Lisbon, marginal number 361.

32 Federal Constitutional Court, 2 BvE 2/08 of 30 June 2009 – Lisbon, marginal number 362.

33 The principle of subsidiarity is enshrined in the Article 5(3) of the Treaty on the European Union (Consolidated version, OJ C 326, 26.10.2012). According to this Article 'in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...] but can rather [...] be better achieved at Union level'. Consequently, according to Article 5 of the Protocol n.2 on the Application of the Principles of Subsidiarity and Proportionality '[t]he reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators'. For a deeper analysis of the Principle of Subsidiarity in EU Criminal Law see De Hert and Wieczorek 2012.

As some scholars (Herlin-Karnell, 2009: p. 351) affirmed, consistent analysis and impact-assessments on the respect of the subsidiarity principle have been absent, in general, in the legislative initiatives related to EU criminal law, however, they also correctly underline the need for a stronger application of this principle in this area (*ibid*: p. 361). An interesting position related to this aspect was expressed by the German Parliament (the '*Bundestag*'), that, in its resolution of 23 May 2012 (precisely on the Proposal for a Directive on criminal sanctions for insider dealing and market manipulation) it affirmed that 'with regard to the principle of subsidiarity (Article 5(3) of the Treaty on European Union), it should be noted that criminal law is closely linked with the sovereignty of the Member States. As a result, particularly strict requirements apply to the necessity of law-making at the EU level. This automatically demands a higher level of substantiation when explaining this necessity' (*Bundestag* Opinion, 2012: p. 4).

In other words, the special link between criminal competence and sovereignty gives the principle of subsidiarity an important role in the exercise of the harmonisation competence of the Union. Some scholars even affirmed that the necessity of the EU intervention 'in essence means the application of the subsidiarity principle' (Klip, 2012(b): p. 6) and that the criteria of criminalisation included in Art 83(1) and 83(2) 'must be regarded as a more detailed version'<sup>34</sup> of the principle (Klip, 2012(b): p. 7). In conclusion, criminal law 'should not be regarded as just another instrument in the EU legal toolbox' (Herlin-Karnell, 2009: p. 356) and the concept of essentiality shall be seen as the essential need to intervene at EU level, according to the principles of *ultima ratio* and subsidiarity. We can affirm that the "essentiality" standard consists in a strict respect of these two principles, which operates in this field with a special and 'reinforced' power in comparison to the other sectors of the Union's action (Bernardi, 2011: p. 31).

Bearing in mind the limits of the EU's competence of Article 83(2), is important to analyse the consequences of the respect of the essentiality requirement in relation to the legality principle and the coherence of the EU's legislation.

### 2.6.3. Essentiality Requirement: Legality, Consistency and Practical Consequences

From the point of view of the legality of the EU legislation, since respect for the conditions set in Article 83(2) guarantees the legitimacy of the exercise of the powers conferred to the Union, it also guarantees the respect of the principle of legality of criminal provisions, expressed in the Article 49 of the Charter of Fundamental Rights of the European Union. In other words, if a competence has been conferred to the Union depending on the respect of certain standards (in this case the 'essentiality' requirement), only the respect of those standards entails the respect of the principle of legality of the measures adopted.

From the point of view of the consistency of the EU legislation, can be affirmed that the rigorous interpretation of the prerequisites of criminalisation can avoid an incoherent use of Article 83(2). In other words, if we affirm that the Union legislator has the duty to engage in a deep reflection on the essential need of criminal measures, it will be prevented, on the one hand, to make an indiscriminate use of this new legal basis in every area that has been subject to harmonisation measures (*ibid*: p. 12), and, on the other, to select the areas of its intervention on other reasons (e.g. the will to react to specific emergencies<sup>35</sup> or

34 A different opinion is expressed by Perrine that affirms that 'for both provisions of Article 83, the role of the subsidiarity principle appears quite limited', while 'the proportionality test could however be more useful' (Perrine, 2012: p. 253).

35 The risk of such an incoherent use of the tool of harmonisation can be explained also looking at the past intervention of the Union's legislator (Weyembergh, 2005: pp. 1586-1587).

the presence of a public support to address some phenomena<sup>36</sup>). Only a rigorous respect of the essentiality requirement can guarantee more coherent use of Article 83(2) and be beneficial to the whole phenomenon of EU criminal law.

In conclusion, it is important to reject any concept of an 'evident' appropriateness at European level to deal with criminal issues and affirm particularly the strict nature of the requirement set in Article 83(2), also to guarantee the respect of the legality principle, as well the consistency of the EU action.

From this important aspect derive specific practical consequences. The EU legislator is required to provide consistent justification on the essential need of its intervention, based on empirical impact assessments, actually the Article 83(2) expressly specifies that the approximation of criminal law can be considered '[i]f [...] [it] *proves* [emphasis added] essential to ensure the effective implementation of a Union policy'.

On the other side, the national Parliaments are required to exercise an in-depth control on the respect of the principles of subsidiarity and proportionality. In fact, according to the Art 69 TFEU '[n]ational Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality'.

In this regard, it is worth recalling that the Protocol (N.2) on the Application of the Principles of Subsidiarity and Proportionality facilitates the control of the National Parliament in the AFSJ field.

Actually, the Protocol provides (Article 7.2) that to obtain the review of draft legislative acts in the field of AFSJ, the reasoned opinions approved by the national Parliaments (on the non-compliance of the act with the principle of subsidiarity) shall represent a quarter of all the votes allocated to the national Parliaments, while in case of legislative acts in other fields the necessary threshold amounts to one third of the votes. Notwithstanding the fact that the national Parliaments cannot expressly block the legislative procedure (Bernardi, 2011: p. 12), the role attributed to them is of particular importance, considering that in the passage from the unanimity to the qualified majority voting system the position of a single State has lost its importance.

Lastly, the utmost safeguard for the respect of the principles of subsidiarity is guaranteed by the ECJ. According to the Article 8 of the Protocol n.2, the ECJ shall have jurisdiction in actions under Article 263 TFEU on grounds of infringement of the principle of subsidiarity by a legislative act, brought by a Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.<sup>37</sup>

## 2.7. Article 83(2) TFEU in its Practical Application

The Article 83(1) TFEU has already been used as a legal basis to adopt the Directive 2011/36/EU on preventing and combating trafficking in human beings, and

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36 Herlin-Karnell noticed that the 'public often tends to be in favour of a more severe criminal law system [...] despite the fact that further legislation does not always reflect the effectiveness of a system' and gave the example of the Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (Herlin-Karnell, 2009: p. 354).

37 However '*it is, of course, an open question as to how thorough-going such a review by the Court could and ought to be in terms of substantive reasoning*' (Herlin-Karnell, 2012(a): p. 119). The same concern is raised by De Hert and Wieczorek, 2012: p. 411.

represents the basis of other proposals,<sup>38</sup> the provision of Article 83(2) TFEU has only been invoked in the proposal for a Directive on criminal sanctions for insider dealing and market manipulation. This proposal will be analysed further in the following chapters.

However, to conclude this first part, it is important to notice that the application of the Article 83(2) emerged also during the legislative procedure concerning the proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law (European Parliament, 2012b). This proposal sets out harmonised criminal law provisions (e.g. definitions of offences, imprisonment thresholds, types of sanctions, liability for legal persons) in the fight against fraud and other aspects if the protection of the Union's financial interests requires. However, the proposal is based on Article 325(4) TFEU (prevention of and fight against fraud affecting the financial interests of the Union) and not on Article 83(2) TFEU. The proposal is awaiting the conclusion of the European Parliament's first reading, but has already been the subject of an opinion adopted by the Legal Affairs Committee of the European Parliament, that provides some interesting reflections on the use of Article 83(2) as a legal basis.

The Committee decided to take up on its own initiative, the question on the appropriate nature of the legal basis chosen by the Commission and on the possibility of replacing Article 325(4) TFEU with Article 83(2) TFEU. On 14 December 2012 the Committee issued its opinion (*ibid*), deciding to 'recommend that the appropriate legal basis for the proposal [...] should be Article 83(2) TFEU' (*ibid*: p. 6).

The Committee underlines that 'the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure' and observes that the main purposes of the Directive are the strengthening and the harmonisation of criminal law provisions of the Member States, together with a clarification and tidying-up exercise (*ibid*: p. 3). The Committee affirms that in this case, in comparison to Article 325(4), Article 83(2) represents 'a *lex specialis* as regards the conferral of competence for substantive criminal law'<sup>39</sup> and thus represents the correct legal basis.

Alongside these rather 'technical' considerations, the Committee adds an interesting analysis of the 'opportunity' of the choice of the Article 83(2). It highlights that Article 83(2) 'contains specific requirements [...] and limits the content of the rules that can be based on this provision' and recalls the specific mechanism of an emergency brake provided for in Article 83(3). As a consequence 'it would be surprising if these limitations could be circumvented by recourse to another substantive legal base. To allow recourse to different potential legal bases on substantive policies would also hamper the coherent development of future legislation in the area of criminal law harmonisation. This could not have been intended under the Treaty of Lisbon' (European Parliament, 2012b: p. 5). In conclusion, the EP correctly underlines that the standards set in Article 83(2) have a substantial importance in the Lisbon framework, since the choice of this legal basis can affect in a relevant manner the EU legislator.

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38 The Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims has been the first instrument adopted under Article 83(1) TFEU. Another positive step is the Commission's proposal for a Directive on the freezing and confiscation of proceeds of crime (COM(2012)85 final). It is also worth noting the Proposal for a Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA (COM(2010) 517 final).

39 'There is evidence in the materials of the Convention that the inclusion of a legal basis in the Treaty permitting the adoption of minimum rules on criminal substantive law was considered appropriate in the context of the protection of the EU financial interests' moreover 'Article 86 TFEU contains a provision on the establishment of a European Public Prosecutor's office 'in order to combat crimes affecting the financial interests of the Union' [...] This shows that not all measures related to combating fraud and other activities affecting the financial interests of the Union are exhaustively regulated by Article 325 TFEU, which leaves room for Article 83(2) TFEU regulating substantive criminal law organisation to this end' (PE Opinion on the proposed Directive on fight against fraud, 2012: pp. 4-5).

The position of the Committee is reflected also in the Reasoned Opinion submitted by the Swedish Parliament (*Riksdag*) on 17 October 2012. More precisely 'The *Riksdag* questions the legal context of the proposal and considers that there is reason to ensure that the EU's competence to adopt legislation in the field of criminal law should be exercised in accordance with Article 83.2 of the TFEU. The *Riksdag* notes that the scope for legislation is more restrictive under Article 83.2 than it is in Article 325.4 [...] It cannot be ruled out that the risk that the proposed measures go beyond what is necessary to achieve the desired objectives, will increase by referring to a legal context that gives greater scope for legislative measures at Union level' (Reasoned opinion of the *Riksdag*, 2010: p. 1).

These considerations (especially if it will be shared in next steps of the procedure) could become an important element to guide the legislator in the choice of the privileged *lex specialis* of Article 83(2). Moreover, it is also worth noting that the choice of Article 325 as a legal basis will entail an important consequence for the United Kingdom and Denmark; their opt-in clause would not apply.

Lastly, to conclude the analysis of the Article 83(2) as a legal basis, it is worth noting that this Article can stand as a sufficient legal basis and that a dual legal basis (including the one on which the previous "harmonisation measures" were based) is not necessary. Actually, a 'temporary answer is brought by the recent proposal on criminal sanctions for insider dealing and market manipulation: the directive is based on Article 83(2) only' (Perrine, 2012: p. 251).

## 2.8. Conclusions

The aim of this chapter was to discuss briefly the evolution of the EU Criminal Law framework, focusing on the "ratio" and the conditions for the approximation of substantive criminal law in the Lisbon Treaty. The conclusion is twofold: on one hand, the exercise of the new powers provided in Article 83(2) TFEU require a rigorous respect of the principles of subsidiarity and *ultima ratio* and a consistent justification of the intervention of the Union's legislator; on the other hand, Article 83(2) is the special legal basis to be chosen to harmonise criminal law for the effectiveness of an EU policy.

Without this rigorous approach, both the principle of legality and the coherence of the Union's action would be hampered. Actually, only the assessment of the essential need of an EU action (in the meaning outlined before) can guarantee the respect of Article 83(2) and a coherent choice of the areas interested by the harmonisation process, preventing the legislator to choose on the basis of other grounds. These specific requirement and limits cannot be circumvented through the choice of another legal basis, as has been correctly underlined by the European Parliament.

Bearing this in mind, we should now analyse the proposed Directive on criminal sanctions for insider dealing and market manipulation. Chapter II will try to assess if, notwithstanding the special 'symbolic' function of this proposal in the financial crisis, it can be considered in compliance with the essentiality requirement set by Article 83(2) TFEU. This requirement will be addressed as a unique criterion, encompassing both the subsidiarity and the *ultima ratio* principles.

### 3 The Proposal for a Directive on Criminal Sanctions for Insider Dealing and Market Manipulation: Is the Proposal Consistent with its Legal Basis?

#### 3.1. Introduction

As it was highlighted in Chapter I, the provision of Article 83(2) has been invoked as a legal basis for the first time in the proposal for a Directive on criminal sanctions for insider dealing and market manipulation (European Commission, 2011b). Bearing in mind the importance of the essentiality standard set by the Article 83(2) TFEU and its practical consequences,<sup>40</sup> it is interesting to assess if the Union's legislator has respected this requirement. However, before analysing the proposed directive and to better understand its context, is important to outline the evolution of the EU approach to market abuse.

#### 3.2. The Fight Against Market Abuse Before Lisbon

##### 3.2.1. The MAD

The Market Abuse Directive (MAD) 2003/6/EC<sup>41</sup> represents the current EU legislative framework in the field of insider dealing and market manipulation.<sup>42</sup>

Basing, in particular, on the previous Insider Dealing Directive (85/592/EEC), the MAD's scope is to 'ensure the integrity of Community financial markets and to enhance investor confidence' through the harmonisation of market abuse regulations among Member States (European Commission, 1999).

In particular, Insider dealing is defined in the MAD as the abuse of "inside information", that is to say, information of a precise nature, relating to issuers of financial instruments or to financial instruments, which has not been made public, and that if it were made public, would be likely to have a significant effect on the prices of those financial instruments or related derivative financial instruments.

Member States are asked to prohibit any legal or natural person who possesses inside information from the "abuse" of it, that is to say, to use them by acquiring or disposing financial instruments to which that information relates (or by trying to acquire or dispose them). Member States are also required to prohibit the disclosure of such information out of the "normal course" and the induction of others to acquire or dispose the related financial instruments.

The MAD also requires the prohibition of any natural or legal person engaging in market manipulation. Market manipulation can be realised through financial transactions or orders to trade which give, or are likely to give, false or misleading signals, or can secure the price of financial instruments at an artificial level, or employ any other form of deception or contrivance.<sup>43</sup>

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40 See 2.6.2 and 2.6.3.

41 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96.

42 The MAD was adopted as part of the Commission's Financial Service Action Plan (Communication on Financial Services, 1999), a framework of actions aimed at create a single market for financial services. A number of "Forum Groups" of market experts were created to assist the Commission in identifying the main challenges and the obstacles in the financial sector. Among them, the Forum Group on Market Manipulation was entrusted to debate the practices of market abuse. The inputs given by the Forum Group were developed in the MAD legislative procedure and eventually the Directive entered into force.

43 Market abuse also includes the dissemination of information, news or rumours which gives, or is likely to give, false or misleading signals as to financial instruments.

The issue of the definition of sanctions is addressed in Article 14 of the Directive. The Directive required the Member States to ensure that ‘the appropriate administrative Measures can be taken or administrative sanctions be imposed’ to tackle those phenomena ‘without prejudice to the right of Member States to impose criminal sanctions’. Member States are ‘only’ required to ‘ensure that these measures are effective, proportionate and dissuasive’.<sup>44</sup> It is worth also to remind that the MAD is a “framework directive” and gave the Commission the power to adopt implementing legislative measures.<sup>45</sup>

### 3.2.2. *The Implementation of the Directive in Relation to the Sanctioning Regime*

Furthermore the first Insider Dealing Directive (85/592/EEC) gave a wide freedom of choice to the Member States on the type and the level of sanctions to be introduced and this problem was underlined during the preparatory discussions for the MAD.<sup>46</sup> The MAD, however, except the duty to cover also the market manipulation practices, did not encompass a further step towards the harmonisation of sanctions, leaving to the Member States the choice between administrative and criminal sanctions and the level of those sanctions.

A first overview of the different sanctioning approaches across the Member States was elaborated in 2007 by the CESR (the Committee of European Securities Regulators). In particular, the CESR underlined that ‘[a]dministrative sanctions and measures available to CESR members range from a public or private reprimand through to monetary penalties (pecuniary fines), disqualification from management, or ownership of a regulated entity, withdrawal of licenses [...] There is also quite a divergence in the amount of administrative pecuniary sanctions available to authorities’ (CESR Executive Summary on Sanctions, 2008: pp. 2-3) and also ‘criminal sanctions may range from imprisonment to financial penalties and disgorgement of profits’ (*ibid*: p. 3).<sup>47</sup> These differences have persisted until today, as it was outlined in the Impact Assessment, accompanying the proposed regulation and directive on market abuse (European Commission, 2011c: p. 15 and subsequent pages).

## 3.3. The New “Package” Against Insider Dealing and Market Manipulation

### 3.3.1. *The Debate Over the Reform*

The financial crisis has represented the input for the EU to ‘reset the regulatory and supervisory environment’ (Moloney, 2011: p. 522) of the financial sector and propose a wide range of reforms. The ambitious reform agenda of the Commission represents an issue too wide for the purpose of this paper,<sup>48</sup> but it is important to underline that, from 2008, the Commission has initiated a process to address the main shortcomings emerged in the financial sector.

44 MAD Directive, Article 14(1).

45 Commission Directive 2003/124/EC on the definition and public disclosure of inside information and the definition of market manipulation; Commission Directive 2003/125/EC on the fair presentation of investment recommendations and the disclosure of conflicts of interest; Commission Regulation (EC) No 2273/2003 on the exemptions for buy-back programmes and stabilisation of financial instruments and Commission Directive 2004/72/EC on the accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers’ transactions and the notification of suspicious transactions.

46 The Issues Paper for the First Meeting of the Forum Group on Market Manipulation acknowledged that ‘during the negotiations on the Insider Dealing Directives it was not possible to agree on the type of sanctions (criminal vs civil) nor in the level of sanctions’ (Issues Paper for the First Meeting of the Group, 1999: p. 10).

47 However, the CESR also observed ‘that the differences that exist are largely due to the fact that Members States’ legal systems differ, and that the division of responsibilities between competent authorities in each Member State, in relation to the investigation of cases and subsequent enforcement also vary’ (p. 2).

48 A general overview of the strategy elaborated by the Commission can be found in the Communication *Regulating Financial Services for Sustainable Growth* (COM(2010) 301).

In particular, the need for more EU action in the fight against market abuse took shape in a comprehensive way at the Commission's conference on reviewing the MAD organised in Brussels on 12 November 2008.

Alongside other issues and reform perspectives,<sup>49</sup> the need to further harmonise sanctions was raised by Kurt Pribil, Executive Director of the Austrian Financial Markets Authority and Chair of CESR-Pol<sup>50</sup> and by Carmine Di Noia, Deputy Director General of Assonime, member of the European Securities Markets Experts Group (ESME) (European Commission, 2008). In particular, Di Noia underlined that 'is necessary to accommodate concerns about the diversity of measures and sanctions applied in the Member States' (Di Noia, 2008: p. 18) as a condition for a further integrated market. However, this debate did not raise concerns over the need of the harmonisation of criminal measures in particular. Moreover, Maria Velentza, Head of Unit G3 in DG MARKT and moderator of the panel, underlined that 'criminal sanctions are not appropriate in most cases for the purposes of deterring market abuses, notably because of the slowness of criminal procedures' (*ibid*: p. 4).

The discussion over the need of a MAD review received an important contribution on 25 February 2009, when the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, published a Report (2009) that represented one of the main inspirations of the reform process. In relation to the aspect of the sanctioning regimes of the abusive behaviour in the financial sector, the Report underlined the need for an urgent harmonisation and strengthening of sanction regimes in the Member States.<sup>51</sup>

In this context, on December 2010, the Commission adopted a Communication on *Reinforcing Sanctioning Regimes in the Financial Services Sector* (European Commission, 2010b) with the aim of suggesting possible actions 'to achieve greater convergence and efficiency' (European Commission, 2010b: p. 4) of those regimes in the Member States. This proposal marked 'a significant break with the convention that sanctioning is the preserve of the Member States' (Moloney, 2011: p. 525). Actually, the Communication, underlined the importance of some 'minimum common standards' at EU level and, for the first time, explicitly mentioned the possible inclusion of criminal sanctions for the 'most serious violations of financial services legislation' but only 'where it would prove essential to ensure the effective implementation of such legislation' (European Commission, 2010b: p. 11). The Commission envisaged a "sector-specific" legislative approach, 'strictly limited to certain elements of the sanctioning regime' (*ibid*).

In the wake of this Communication, on 20 October 2010 the Commission launched the "package" against insider dealing and market manipulation: the proposal for a Directive on criminal sanctions for insider dealing and market manipulation (European Commission, 2011b) in conjunction with the proposal for a Regulation on insider dealing and market manipulation (market abuse),<sup>52</sup> aimed to strengthen the administrative sanctions for those phenomena.

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49 In particular the issue of the extension of the regime to non-regulated Markets and the need to clarify the definition of "inside information" (Di Noia, 2008: pp. 3-4).

50 CESR Operational group responsible for cross-border cooperation and exchange of information.

51 In particular, the Report outlined that 'Member States sanctioning regimes are in general weak and heterogeneous. Sanctions for insider trading range from a few thousands of euros in one Member State to millions of euros or jail in another. This can induce regulatory arbitrage in a single market. Sanctions should therefore be urgently strengthened and harmonised' (de Larosière Report, 2009: p. 23).

52 COM(2011) 651.

### 3.3.2. *The Proposed Directive on Criminal Sanctions for Insider Dealing and Market Manipulation and the Legislative Procedure*

Recalling the definitions in the MAD, the market abuse offences that Member States are required to subject to criminal sanctions, if committed intentionally, are insider dealing<sup>53</sup> and market manipulation.<sup>54</sup> Also the action of inciting, aiding and abetting the defined criminal offences should be punishable,<sup>55</sup> as well as the attempt to commit some of these actions.<sup>56</sup> Moreover, Member States shall ensure that legal persons can be held liable for the criminal offences defined in Articles 3 and 4.<sup>57</sup>

The proposal requires the Member States to introduce effective, proportionate and dissuasive criminal sanctions,<sup>58</sup> without fixing the amount of penalties.<sup>59</sup> However, in its Report on the proposal, tabled on 19 October 2012, the Committee of Economic and Monetary Affairs of the European Parliament proposed, among other amendments, to set minimum levels for the maximum terms of imprisonment (between two and five years for the different crimes)<sup>60</sup> and the publication of the convictions without undue delay.<sup>61</sup>

It is also important to notice that on 25 July 2012, the Commission amended both its proposals,<sup>62</sup> including the conduct of actual or attempted manipulation of benchmarks.<sup>63</sup> This innovation is a clear consequence of the “LIBOR scandal”, which consisted in the manipulation of the interest rate cost for interbank lending in the London financial markets (the “London Interbank Offered Rate”).<sup>64</sup> On this amended proposal the Justice and Home Affairs Council<sup>65</sup> agreed on a general approach<sup>66</sup> that constitutes the basis for negotiations with the European

53 Article 3 COM(2011) 654.

54 Article 4 COM(2011) 654.

55 Article 5(1) COM(2011) 654.

56 According to Article 5(2), only the offences referred to in Articles 3(a) and 4(a), (b) and (c).

57 See Article 6 COM(2011) 654. In this regard it is worth noting the amendment (to be agreed with) proposed by the Committee on Legal Affairs of the European Parliament, according to which Member States should extend liability to legal persons, including, whenever possible, criminal liability ‘where this is compatible with the national legislation applicable’ (European Parliament, 2012a: p. 34). Therefore the Committee proposed to amend Article 3, requiring Member States to ensure that the offences listed in the directive constitute a criminal offence ‘when committed intentionally by a natural person’, ‘since the scope of corporate liability should be left to national law’ (*ibid.*: p. 36).

58 Article 5 COM(2011) 654.

59 Article 9 of the proposal specifies that ‘[b]y [4 years after entry into force of this Directive], the Commission shall report [...] on the application of this Directive and, if necessary, on the need to review it, in particular with regard to the appropriateness of introducing common minimum rules on types and levels of criminal sanctions’.

60 See amendments to Article 6, European Parliament, 2012a: p. 15. This confirms the point of view of some scholars, while affirming that ‘[t]he European Parliament, which has emerged from the financial crisis as a powerful voice in EU rule-making for financial markets and as a strong advocate of greater centralization of supervision and regulatory intervention’ (Moloney, 2011: p. 523).

61 ‘Unless such publication would seriously jeopardise ongoing official investigations’ (European Parliament, 2012a: p. 10)

62 Amended Directive: COM(2012) 420 final.

63 In the amended proposal a benchmark is defined as ‘any commercial index or published figure calculated by the application of a formula to the value of one or more underlying assets or prices, including estimated prices, interest rates or other values, or surveys by reference to which the amount payable under a financial instrument is determined.’

64 The LIBOR is one the most frequently used references (“benchmark”) for the pricing of many financial instruments globally. In 2012 an inquiry established that the benchmark had been manipulated by the Barclays Bank, to help the Bank in producing greater profits and protect its reputation during the crisis (Needham, 2012: p. 1). The effects on the market are clear if we consider, in particular, that with “a rate higher than it ought to be meant it was more expensive for banks to borrow money, and this would be passed on to retail borrowers (i.e. consumers), companies and investors” (Needham, 2012: p. 4).

65 3207th Council meeting, 6 and 7 December 2012.

66 Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) [First reading] - General approach (16820/12).

Parliament. Finally, it is worth noting that Ireland has decided to take part in the adoption of the directive, while the United Kingdom and Denmark<sup>67</sup> will not participate.

### 3.4. The Assessment of the Essential Need of Criminal Sanctions

#### *3.4.1. The Proposal*

After having analysed the meaning of the essentiality requirement of Article 83(2) and the content of the proposed directive, we have to assess if the harmonisation of criminal law in this specific field has *proved* to be essential. This means that we shall evaluate if the Commission has provided consistent arguments.

In the Proposal, the Commission recalls that ‘criminal offences and sanctions may prove to be essential in order to ensure the effective implementation of EU financial services legislation’ (European Commission, 2011b: p. 2) and that ‘this includes an assessment, based on clear factual evidence [...] of the national enforcement regimes in place and the added value of common EU minimum criminal law standards, taking into account the principles of necessity, proportionality and subsidiarity’ (*ibid*: p. 3). However, these “clear factual evidence” are substantially lacking in the proposal and in the impact assessment, as it will be explained further.

In the Proposal, the Commission affirms that ‘[m]arket abuse can occur across borders’ and ‘the divergent approaches to the imposition of criminal sanctions for market abuse offences by Member States leave a certain scope for perpetrators who can often make use of the most lenient sanction systems. [...] EU-wide minimum rules on the forms of market abuse that are considered to be a criminal conduct contribute to addressing this problem’ (*ibid*: p. 5). This argument is posed in a vague term under two perspectives. First, the Commission affirms that market abuse “can” occur across borders, but does not make a reference to concrete evidence for these arguments. In the EP Report we can also find an acknowledgment of this lack of precise data,<sup>68</sup> but the EP seems to solve the problem with a presumption: ‘although at the moment limited statistics are available about the cross-border dimension of insider dealing and market manipulation, considering the integration of financial markets inside the Union, it can be safely assumed that many of these offences are not limited to transactions in one Member State only’. However, these ‘limited statistics’ do not fit properly in the strict nature of the ‘essentiality requirement’. The proposal is also vague while affirming that EU-wide rules “contribute” to address the problem (at p. 3 is even affirmed that ‘[m]inimum rules on criminal offences [...] *can* contribute to ensuring the effectiveness of this Union policy’). In this regard, as it was correctly affirmed by the German *Bundestag* in its Opinion of 24 My 2012 (*Bundestag*, 2012), ‘merely helping to effectively implement EU policies aimed at more effectively combating market manipulation and insider dealing cannot be regarded as essential within the meaning of Article 83(2) of the TFEU’ (*Bundestag*, 2012: p. 5).

Moreover, the Commission, after noting that the sanctioning regimes among Member States are diverging and vaguely “lacking impact” and “insufficiently dissuasive” affirms that ‘minimum rules on criminal offences and on criminal

67 According to Articles 1 and 2 of Protocol (No 22) on the position of Denmark annexed to the Treaty on European Union.

68 ‘The Commission should assess the implementation of this Directive in the Member States, also with a view to assessing a possible future need for introducing minimum harmonisation of the types and levels of criminal sanctions. In particular, the Commission should seek to obtain information on the cross-border nature of many of the transactions constituting an offence according to this Directive, thus respecting the principle of subsidiarity’ (European Parliament, 2012a: p. 11) (the same amendments is proposed by the LIBE Committee, (European Parliament, 2012a: p. 26)).

sanctions for market abuse [...] can contribute to ensuring the effectiveness of this Union policy by demonstrating social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law' (European Commission, 2011b: p. 3).<sup>69</sup> This argument (that is dominant in the impact assessment, as it will be discussed further) is linked to a concept of the abstract "qualitative different" social disapproval of criminal law. However, as we have already seen in Chapter I, the concept of effectiveness must be applied in a concrete way, assessing the effectiveness of criminal sanctions in relation to the specific field at issue and not on an abstract symbolic power of criminal law.<sup>70</sup>

Another argument is that 'common minimum rules [...] facilitate the cooperation of law enforcement authorities in the Union, especially considering that the offences are in many cases committed across borders' (European Commission, 2011b: p. 3). Also this argument, however, looks rather general and abstract, without showing a specific link to the matter at issue. Then, the Proposal refers to the results of the consultations with the interested parties and to the impact assessments. However, also those instruments do not provide 'clear factual evidence'.

### 3.4.2. Consultations with the Interested Parties

The Commission took into account different documents for its proposal. Putting aside the CESR Report on administrative and criminal sanctions available in Member States under MAD,<sup>71</sup> that provided an overview of the differences among Member States, but not an evaluation on the Union's possible actions in this field, the other documents listed in the Proposal are the following: the results of the consultation launched by the Commission in its Communication on reinforcing sanctioning regimes in the financial sector; the results of the public conference held on 12 November 2008 by the European Commission on the review of the market abuse regime; the call for evidence on the review of the Market Abuse Directive launched by the Commission on 20 April 2009; the public consultation on the revision of the Directive launched on 28 June 2010 (European Commission, 2011b: p. 4).

The Commission refers, first, to the 'results of the consultation launched by the Commission in its Communication on reinforcing sanctioning regimes in the financial sector'. However, from an overview of the contributions authorised for publication<sup>72</sup> it is not possible to find a widespread support for the introduction of criminal sanctions at EU level. Actually, the same Impact Assessment of the proposed directive acknowledges that the contributions offered a 'mixed response to the option of harmonising criminal sanctions in financial services legislation' (European Commission, 2011c: p. 55). Indeed, many contributions do not refer to criminal sanctions at all,<sup>73</sup> while several others (at least 21)<sup>74</sup> raised valid concerns about the opportunity of making recourse to criminal law in the market abuse sector. In particular, the arguments provided regard: the shorter

69 The commission recalls also the stronger "media coverage" of criminal sanctions, that "help to improve deterrence" and to the fact that 'Establishing criminal offences for the most serious forms of market abuse sets clear boundaries in law that such behaviours are regarded as unacceptable and sends a message to the public and potential offenders that these are taken very seriously by competent authorities' (p. 8).

70 See paragraph 2.6.2.

71 Report on the Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive (MAD), CESR/08-099.

72 Available at the CIRCAB website [http://ec.europa.eu/internal\\_market/consultations/2010/sanctions\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/sanctions_en.htm).

73 See, among others, the contributions of Belgian trade union LBC\_NVC; UNI Europa Finance; the Hungarian Ministry of Economy; the *Riksbank* (the central bank of Sweden) and *Finansinspektionen* (the Swedish Financial Supervisory Authority).

74 See subsequent footnotes, plus the contributions of the Finnish Ministry of Finance: p. 2; ING: p. 1-3 and the UniCredit Group.

time framework of administrative sanctions and their reduced burden of proof<sup>75</sup>, the fact that ‘prosecutors are furthermore often not specialised to financial topics’<sup>76</sup> and supervision authorities are in a better position to address those behaviours<sup>77</sup>; the “inappropriate casuistry” of criminal law,<sup>78</sup> the fact that should be better not to interfere in the criminal systems of Member States.<sup>79</sup> It is interesting to note that some contributions stress that criminal sanctions may *appear* to be more dissuasive, but have not necessarily proved to be more effective to encourage regulatory compliance of financial market<sup>80</sup>. Actually, administrative sanctions ‘could potentially lead to a withdrawal of licenses or professional qualifications and thus might have an equally severe effect as criminal sanctions’<sup>81</sup>.

In particular, we can highlight the opinion of the European Securities and Market Authority (ESMA), that reflects the main concerns raised in the other contributions. The ESMA affirmed that ‘criminal sanctions may also have disadvantages that should be taken into account when assessing their effectiveness to ensure regulatory compliance and enforcement. For instance, criminal proceedings generally take longer and use more resources than administrative action proceedings, whereas administrative action may promptly restore regulatory compliance if necessary. [...] Criminal procedure in some Member States may not be best suited for cases that involve complex aspects of financial markets. CAs having expert knowledge in the field may be in a better position to assess misconducts of complex nature than e.g. a court or a jury in a criminal trial’ (European Securities and Market Authority, 2011: p. 8). Therefore ‘[c]onsidering these potential disadvantages which may outweigh the benefits of a harmonised regime of criminal sanctions, the choice of whether a particular type of breach should be subject to criminal sanctions should be left to the discretion of Member States. It should be further noticed that several CAs have a positive view on the increased availability of administrative sanctions in market abuse cases since the implementation of the MAD’ (*ibid*: p. 9). In the limited space of this paper, it would be difficult to assess if those arguments are correct, but it can be affirmed that these kind of arguments appear more in line with the concept of an assessment based on concrete evidence and not on the dissuasive and symbolic nature of criminal sanctions. As it was perfectly synthesised in one of the contributions ‘the effectiveness of the sanction is the priority but not the criminalisation of the violations’.<sup>82</sup> In this regard, is interesting to notice another argument, expressed by the ECJ, and linked to the concept of the concrete effectiveness of criminal law in the field of market abuse. In the *Spector Photo Group Case*<sup>83</sup> the ECJ, referring to the MAD, noted that ‘the Community legislature opted for a preventative mechanism and for administrative sanctions for insider dealing, the effectiveness of which would be weakened if made subject to a systematic analysis of the existence of a mental element. [...] The effective implementation of the prohibition on market transactions is thus based on a simple structure in which subjective grounds of defence are limited, not only to enable sanctions to be imposed but also to prevent effectively infringements of that prohibition’.<sup>84</sup> With regards to this judgement, it has been observed that

75 Austrian Financial Market Authority (FMA): p. 2; CFA Institute: p. 1; Spanish Securities Markets Supervisory Authority (CNMV): p. 4.

76 Federation of German Consumer Organisations (vzbv): p. 6.

77 Linklaters: p. 7; Spanish Securities Markets Supervisory Authority (CNMV): p. 4.

78 Czech National Bank: p. 2.

79 Danish FSA: p. 2; Estonian Ministry of Finance: p. 3; HM Treasury (UK) and Financial Services Authority (FSA): p. 6; Slovak Government and Slovak National Bank: p. 3; Ministry of Finance of the Czech Republic: p. 3; the European Federation on Insurance Intermediaries (BIPAR): p. 3; *Gesamtverband der Deutschen Versicherungswirtschaft e. V.* (German Insurance Association): p. 5.

80 Austrian Financial Market Authority (FMA): p. 2; Italian Banking Association (ABI): p. 6.

81 European Association of Public Banks (EAPB): p. 2.

82 Contribution by the Estonian Ministry of Finance: p. 3.

83 ECJ, *Spector Photo Group Case C-45/08*.

84 ECJ, *Spector Photo Group Case C-45/08, para. 37*.

'minimum harmonisation is maximum harmonisation in this context and does not give any discretion to Member States' (Klip, 2011: p. 25).

In the proposal, the Commission refers also to the public conference held on 12 November 2008 by Commission itself on the review of the market abuse regime. However, it has been already noticed<sup>85</sup> that the conference did not raise express arguments on the need of criminal sanction, and some contributors even expressed concerns on this issue (European Commission, 2008: p. 4).

The proposal also refers to the call for evidence on the review of the MAD, launched by the Commission on 20 April 2009. However, in this case, the focus of the call for evidence was not on the sanctioning regime,<sup>86</sup> but on the scope of the MAD (extension of the regime to non-regulated markets) and on the concept of inside information and market manipulation. As a consequence, the contribution (as results from an overview of the non-confidential contributions)<sup>87</sup> does not provide evidence on the need for the introduction of EU-level criminal sanctions.

The proposal then, refers to another public consultation on the revision of the Directive, launched on 28 June 2010. However, also in this case, the Consultation Paper focused on assessing the need for appropriate administrative measures and minimum amounts of administrative fines 'without prejudice to the right of Member States to impose criminal sanctions'.<sup>88</sup> Anyway, as it is affirmed in the same Impact Assessment (European Commission, 2011c: p. 55), in the responses to the MAD public Consultation 'there was support for harmonisation of administrative sanctions at the EU level' but 'there was limited specific discussion of harmonisation of criminal sanctions [...]'. Two respondents felt that penal measures should be left to member States, while others noted the difficulties of implementing regimes in criminal law' and just 'one respondent commented that harmonisation was needed to prevent the same wrongdoing being a crime in one member state and an administrative offence in another' (*ibid*).

To conclude this paragraph, it is possible to affirm that the consultations and the conferences did not provide a 'clear factual evidence' of 'the added value of common EU minimum criminal law standards' (European Commission, 2011b: p. 3). However the Impact Assessment accompanying the proposal concluded that 'requiring Member States to introduce criminal sanctions for the most serious market abuse offences was essential to ensure the effective implementation of the Union policy on market abuse' (*ibid*: p. 4). The impact Assessment and its arguments will be analysed in the following paragraph.

### 3.4.3. The Impact Assessment

The impact assessment (European Commission, 2011c) provides the explanation for the choice of the 'policy option' included in the proposal. The vision of the Commission is that '[i]n accordance with article 83 (2) of the Treaty (TFEU), the introduction of a requirement for criminal sanctions to address market abuse is likely to lead to increased successful prosecution of market abuse offences and to contribute to ensuring the effective functioning of the internal market' (*ibid*: p. 57). However Article 83(2) TFEU specifies that harmonisation is possible when it 'proves essential' to ensure the effective implementation of the union's policy at stake, and not when is 'likely to lead to increase' it.

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85 See paragraph 3.3.1.

86 'The issue of supervisory and enforcement powers under the MAD is not being addressed in this document' (European Commission, 2009: p. 2).

87 Available at the CIRCA website  
<https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>.

88 Public Consultation on the Revision of the MAD, 2010, p. 10.

A similar ‘permissive’ approach is to be found throughout the document. In particular, the document express the same perspective resumed in the Proposal, providing some arguments that are frequently repeated in the document and can be called as the ‘forum shopping argument’; the ‘enhancement of prosecution’ and the ‘deterrent effect’.

The ‘forum shopping argument’ is the one according to with market abuse ‘*can* be carried out across borders, this divergence *can be expected* to have negative effects on the single market and *could* encourage potential offenders to carry out market abuse in Member States which have the least strict sanctions’ (European Commission, 2011c: p. 27 and p. 53). It has been already highlighted that this argument is rather vague (market abuse “can” be of cross-border nature; the legislative divergence *can be expected* to have negative effect) and lacks sound evidence<sup>89</sup>. Conversely the “proven necessity” standard should require, as it clearly says, the concrete prove of a circumstance.

The ‘enhancement of prosecution’ argument is the one according to which ‘a requirement for Member States to put in place criminal sanctions is expected to contribute to a more effective investigation and prosecution of such crimes by offering a new tool to address market abuse. This would complement administrative measures and sanctions’ (European Commission, 2011c: p. 166). This argument does not seem to add much justification, especially considering the *ultima ratio* principle. Criminal Law must be invoked when necessary and when ‘measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation’ (European Commission, 2011a: p. 7), and not to ‘complement administrative measures’. Actually criminal law ‘should not be regarded as just another instrument in the EU legal toolbox’ (Herlin-Karnell, 2009: p. 356).

Lastly, The ‘deterrent effect’ is the (well-known) one according to which ‘since criminal sanctions have a greater deterrent effect, potential offenders in Member States lacking criminal sanctions may be less likely to abstain from carrying out market abuse due to fear of criminal prosecution and possible imprisonment’ (European Commission, 2011c: p. 28). This argument is the most frequently invoked in the document (*ibid*: p. 28, pp. 52-53 and p. 126),<sup>90</sup> but, as it was explained before,<sup>91</sup>relying on an alleged ‘general feature’ of criminal law without a specific assessment of the effectiveness of criminal law in this specific field ‘contradicts the EU law assumption that the principle of effectiveness should be based upon objective criteria’ (Herlin-Karnell, 2012a: p. 58). Moreover the Commission relies on the Member States point of view rather than on the Union’s one.<sup>92</sup>

Notwithstanding this (at least) controversial scenario, the Commission claimed that a combination of the options 5.4.2 (Introduction of minimum rules on administrative measures and sanctions), 5.4.4 (specific requirement for criminal sanctions for market abuse) and 5.4.6 (improve enforcement by providing for publication of sanctions and cooperation on investigation of market abuse) ‘receive the highest score’ (European Commission, 2011c: p. 56 and p. 160).

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89 See paragraph 3.4.1. and the observations of the European Parliament.

90 The document analyses the deterrent effect at pp. 165-168 recalling the stigma attached to criminal conducts in general and the media coverage of criminal prosecutions.

91 See paragraph 3.4.1.

92 Actually, in the section dedicated to the policy Option ‘requirement for criminal sanctions for market abuse’, the Commission underlines that ‘evidence from studies and Member States shows that criminal sanctions contribute strongly to the objective of increasing deterrence. They have a deterrent effect due to the stigma attached to criminal conduct’ (European Commission, 2011c: p. 52).

#### 3.4.4. The EP Report

It is interesting also to analyse the approach adopted by the European Parliament (EP) in its first Report on the proposed directive (European Parliament, 2012a). The EP seems to share the perspective adopted by the Commission. In particular, the arguments brought in support of a Union's stronger action (especially for the definition of minimum levels for the maximum terms of imprisonment) focus more on the symbolic deterrent and dissuasive effect of criminal measures, than on the essential need of those measure in the meaning of *ultima ratio*. Actually the Report highlights that 'in light of the aftermath of the financial crisis it is evident that market manipulation has a potential for widespread damage on the lives of millions of people. The absence of common criminal sanction regimes [...] leads to lack of citizen's trust in the rule of law and the legitimacy of institutions. The imposition of criminal sanctions for the most serious market abuses will have an increased deterrent effect on potential offenders' (European Parliament, 2012a: p. 7). Moreover, the more caution approach of the Commission on the level of penalties is overtaken by simply affirming that '[i]n order for the sanctions for the offences referred to in this Directive to be effective and dissuasive, a minimum level for the maximum term of imprisonment should be set in this Directive' (*ibid*: p. 9).

It is also interesting to note that the amendments requested by the Committee on Civil Liberties, Justice and Home Affairs express an even stronger focus on the symbolic function of criminal law: 'the absence of harmonised criminal sanctions is rightly seen by citizens as creating an environment of impunity where market manipulators can thrive, taking advantage of a borderless market while operating from jurisdiction that are not prosecuting them or have deficient penal frameworks in dealing with these matters. In turn, this creates reasons for an increased societal perception of corruption and the corresponding lack of trust in the rule of law and the legitimacy of institutions' (European Parliament, 2012a: pp. 21-22).

#### 3.5. Concerns about the Respect of the "Essentiality Requirement"

Considering what has been explained in the previous paragraphs, it could be argued that the arguments provided by the Commission do not seem to represent that 'clear factual evidence' (European Commission, 2011a: p. 8) that the same Commission declared to look for, especially considering the results of the public consultations outlined in the paragraph 2.4.2.

In this context, the reasoned opinion issued by the *Bundesrat* on 16 December 2011 (*Bundesrat* Decision, 2011) and the resolution of the *Bundestag* of 23 May 2012 (*Bundestag* Opinion 2012) offer some arguments that deserve attention.

The *Bundesrat* opinion was raised on the grounds of subsidiarity, linked to the question of the respect of the legal basis of the proposal. According to the *Bundesrat*, 'the subsidiarity principle is also breached if there is no European Union competence in the area in question' (*Bundesrat* Decision, 2011: p. 1), and the reasoned opinion is based on the fact that the proposal cannot be based on Article 83(2) TFEU, since it does not *satisfy* its requirements.<sup>93</sup>

Actually the '*directive does not address the question of whether and why EU-wide minimum standards for criminal sanctions would be essential to implement EU policy of preventing the most serious forms of market abuse*' (*Bundesrat* Decision, 2011: p.

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93 According to the *Bundesrat* 'any EU legislative act based on Article 83 Sub-section 2 TFEU must satisfy the criterion of being essential'. To this aim 'it should be possible to identify shortcomings in enforcement in precisely those Member States that do not have sufficient criminal laws and regulations in the area in question' (*Bundesrat* Decision, 2011: p. 2).

3). In particular, 'arguing, as the draft directive does, that EU measures under the aegis of criminal law could contribute to overcoming a problem or could have a positive impact on attaining a goal does not constitute a substantiation of the essential nature of such measures in the sense of Article 83 Sub-section 2 TFEU'. Moreover, the *Bundesrat* lamented the absence of "concrete evidence" of the consequences of divergent sanctioning systems. In particular, 'the specific impact of differing sanction systems on criminal prosecution of market abuse is not presented; there is also no concrete evidence provided of the occurrence of such displacement of criminal activities, nor of the consequences which this would have' (*ibid*). In sum, the 'mere theoretical possibility' that perpetrators can take advantages of differences among national systems is seen as a 'general theoretical consideration', valid for all areas in which criminal national law are not harmonised and 'cannot serve to demonstrate the essential nature of the proposed measures' (*ibid*). These arguments deserve to be taken into account, actually, as it was correctly noted 'a dismissal of subsidiarity in EU criminal law matters should be much more carefully explained than simply a brief statement consisting of that perpetrators will use the system' (Herlin-Karnell, 2009: pp. 360-361).

Also the *Bundestag*, in its resolution of 23 May 2012, affirmed that 'it is unclear why, to achieve the desired aim, the proposed criminal sanctions should be considered "essential" within the meaning of a restrictive interpretation of Article 83(2)' (*Bundestag* Opinion, 2012: p. 1). Actually, '[m]ere formulaic, blanket references to differing sentences or sanctions in the Member States [...] do not satisfy these requirements' (*Bundestag* Opinion, 2012: p. 4).<sup>94</sup> In relation, in particular, to the *ultima ratio* principle, the *Bundestag* adds that 'the Commission gives no specific explanations as to why, in this particular area, no other measures can be contemplated' (*Bundestag* Opinion, 2012: p. 5).

The arguments raised by both the chambers appear in line with the need for a concrete and strict assessment of the essential need of the EU's intervention.

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94 The *Bundestag* affirms that a reference to the differences in the sanctions regimes 'cannot by itself suffice', and this 'finding would justify acting in all areas in which the criminal law systems are structured differently in the Member States' (*Bundestag* Opinion, 2012: p. 5).

## 4 Conclusions

The proposed Directive raises many concerns on this first use of Article 83(2) TFEU by the Union's legislator.<sup>95</sup> This paper focussed on the respect of the 'essentiality requirement' set by the legal basis chosen for the proposal: Article 83(2) TFEU. To conclude on this point, it is possible to share the opinion that 'the proposed Directive does not rely on classic effectiveness concerns' (Herlin-Karnell, 2012(b): p. 485).

The proposal is based more on arguments of an abstract and general nature,<sup>96</sup> without a clear reliance on empirical data on the role of criminal measures in this specific field. Conversely, arguments related to this concrete aspect are to be found in many of the reports to the consultation launched by the Commission in its Communication on reinforcing sanctioning regimes in the financial sector and in the *Spector Photo Case*, however, as it was explained,<sup>97</sup> do not seem in favour of this choice.

The perspective adopted by the Commission and the Parliament could be probably explained since the proposals 'form part of the broader rescue mission to 'save Europe' [...] in order to [...] boost trust and increase economic activity' (Herlin-Karnell, 2012(b): pp. 484-485). It appears that the urgency to respond to the financial crisis has been seen as a "justification" to adopt a less rigorous approach in use of Article 83(2) and this approach is particularly clear in the EP Report.<sup>98</sup> However, such a perspective is risky, especially since this proposal represents the first exercise of this competence and could have consequences on the future use of this legal basis. It was already underlined (in the different context of the terrorism emergency after 9/11, but with similar consequences) that an 'unsophisticated rush approach towards criminalisation [...] might prove to be a backlash to the whole phenomenon of European criminal law, i.e. also outside the specific target of combating terrorism' (Herlin-Karnell, 2009: p. 355). The situation linked to the financial crisis can be seen as a similar "rush" approach to legislation, with negative consequences for the system.

Taking into account that this measure is aimed at building confidence in the market, it has been argued that a more appropriate legal basis for this proposal could have been Article 114 (Herlin-Karnell, 2012(b): p. 485). However, also in remembering the reasoning on the "*lex specialis*" nature of Article 83(2) TFEU<sup>99</sup> and the safeguards linked to its use,<sup>100</sup> the choice of this legal basis does not seem to be questioned for the introduction of harmonised criminal sanctions. It is the *use* of the legal basis that does not satisfy properly the "essential requirement" and it is not consistent with the early "commitments" of the Commission.<sup>101</sup> Actually, the Commission "once" specified that 'the legislator needs to analyse whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation [...] This will require a thorough analysis in the Impact Assessments preceding any legislative proposal, including for instance [...] an assessment of whether Member States' sanction regimes achieve the desired result and

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95 We have already touched on the problem of the corporate liability in the footnote n.145. Moreover, the choice of proposing a double legislative initiative and tackle the same phenomenon through the proposed regulation and the directive raises the concern of the respect of the principle of *ne bis in idem*, or, in any case, the principle of the prohibition of arbitrariness (see Herlin-Karnell, 2012(b): p. 488). In this regard is interesting to notice that the European Parliament proposed an amendment according to with 'Member States should fully respect the *ne bis in idem* and the *favor rei* principles and ensure that if an administrative sanction has already been applied, no criminal sanction shall be applied in relation to the same facts, in case the administrative and the criminal sanctions are of the same nature' (EP Report, 2012: p. 23). On *ne bis in idem* see also Peltier, 2011: pp. 44-46.

96 See paragraph 3.4.3.

97 See paragraph 3.4.2.

98 See paragraph 3.4.1.

99 See paragraph 2.7.

100 Especially the "emergency break".

101 Expressed both in the Commission Communication *Towards an EU Criminal Policy* (2011) and in the Commission Communication *Sanctioning Regimes in the Financial Sector* (2010).

difficulties faced by national authorities implementing EU law on the ground' (European Commission, 2011a: p. 7).

Moreover, the Communication on *Reinforcing sanctioning regimes in the financial services sector* affirmed that the inclusion of criminal sanctions would have been considered only 'where it would prove essential to ensure the effective implementation of such legislation' (European Commission, 2010b: p. 11). Unfortunately, this rigorous approach is not found in the proposed Directive.

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