

## GAPS AND INCONSISTENCIES IN LEGAL PROTECTION IN EU CRIMINAL LAW

### CM1504

# Inconsistencies in applied grounds for adopting Union-wide criminal prohibitions

*The current body of EU criminal law offers inconsistent and incomplete legal protection to European citizens. Shortcomings are found in the procedural safeguards in instruments of mutual recognition, the proposal on a European Public Prosecutor's Office and the criteria used to decide on criminalization of conduct at the EU level. In light of an expert meeting held at the European Parliament in January 2015, the Meijers Committee publishes three short notes on gaps and inconsistencies in the legal protection offered by EU criminal law. This third note concerns the use of criteria to determine whether material prohibitions are appropriate at the EU level and the role of the European Parliament therein.*

#### Introduction

The European Commission, the Council, and the Parliament have published separate documents calling for a coherent policy with regard to the adoption of Union-wide criminal prohibitions. **The institutions have developed so-called criminalization criteria in order to avoid the adoption of unnecessary and unclear harmonized definitions of criminal offences and sanctions, and to ensure a certain degree of coherence in developing EU substantive criminal law.** Bearing this aim in mind, the Meijers Committee wishes to draw particular attention to the following issues.

#### Proposals to harmonize substantive criminal law require a repeated application of criminalization criteria

**The Parliament's role in this regard should not be underestimated, given in particular the Commission's assumption that with regard to the so-called Euro-crimes (Art. 83 (1) TFEU) the listed criminalization criteria have automatically been met.** Indeed, according to the Commission, the guiding principles apply only when the proposed harmonization is based on Art. 83(2) TFEU . However, it should be stressed that the mere existence of a legal basis for harmonization with regard to Euro-crimes does not automatically legitimate the adoption of criminal prohibitions. A coherent criminal policy requires the repeated verification of those criteria that have been accepted as relevant criminalization principles. Regardless of the Commission's opinion on the assessment of all relevant criteria, **it is up to the Parliament to evaluate the need for a criminal law solution to a societal problem, on the basis of those principles to which it has previously agreed.**

#### Facilitation of judicial cooperation between Member States: a ground for criminalization?

A second concern is the **'facilitation of judicial cooperation between Member States' as one of the reasons for creating a Union-wide criminal prohibition.** See, for instance, the most recent Directive on insider dealing and market manipulation (Directive 2014/57/EU, recital no. 7). See also, before the entry into force of Lisbon, the Framework Decision on racism and xenophobia (2008/913/JHA, recitals no. 4-5, 12-13). Throughout the legislative process of these instruments, no one questioned the facilitation of judicial cooperation as a legitimate ground for criminalization. The use of such a

ground for criminalization expands the scope of substantive criminal law in the EU – and would easily **undermine the principles of subsidiarity and last resort**. The Meijers Committee invites the Union legislator to consider more carefully whether and when the facilitation of judicial cooperation constitutes a legitimate reason to adopt Union-wide criminal prohibitions.

#### 'Damage' as a ground for criminalization

It is particularly important for the Parliament to pay attention to the substantive criterion of 'harm' or 'damage'. As its own report states: only conduct 'causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals' should be criminalized. This also relates to the principle of *lex certa*: the offences shall be clearly defined and delimited to include only conduct that causes damage to society, individuals or a group of individuals.

The field of 'Euro-crimes' (Art. 83 (1) TFEU) includes terrorist crimes, which may cause very serious damage. However, FD 2008/919/JHA (amending FD 2002/475/JHA on combating terrorism) also includes several preparatory offences – **actions that could precede the actual perpetration of a terrorist act, such as provocation of terrorist crimes**. With regard to these preparatory offences, the question of actual risks of such conduct – to what extent does it create a real and actual danger that such terrorist offences are eventually committed? – is important. As the Council states, **'criminalization of a conduct at an unwarrantably early stage' should be avoided** – 'conduct which only implies an abstract danger to the protected right or interest should be criminalized only if appropriate considering the particular importance of the right or interest which is the object of protection.'

In the current debate about **'foreign fighters'**, new calls are to be expected for the criminalization of offences in the 'pre-phase' of perpetration. Even though the political urge to take action (including criminal law measures) to deal with this problem is strong, the Meijers Committee calls upon all European institutions take into account the criminalization criteria to which they have committed themselves.

A revision of certain existing instruments may also be necessary in this regard. For instance, the current wording of the offence **'provocation of terrorism'** in Framework Decision 2008/919/JHA **appears to relate to an abstract rather than an actual danger**. 'Provocation, according to the FD, concerns the distribution of messages 'with the intent to incite terrorist offences, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed'. Although it does make mention of the danger that can be caused, it does not require a clear and present danger and it obliges states to criminalize indirect advocacy of terrorist offences. **It is important to ask whether the conduct described is actually capable of creating such harm or only in exceptional situations**. If so, the prohibition should be limited only to those exceptional situations. This relates to the *lex certa* principle: the elements must be worded 'precisely in order to ensure predictability', as the EP states. This is not only the responsibility of Member States in their implementation of EU instruments, but also of the European legislature itself.

Criminalizing indirect provocation of terrorism is on the boundary of what is still an acceptable restriction of freedom of expression. Often, domestic law actually targets speakers because their speech is insulting rather than seriously capable of leading to terrorist acts. **Although conduct is sometimes criminalized on a domestic level on the grounds that it also constitutes an insult, in**

**light of the subsidiarity principle, constituting an insult should never be a sufficient reason for criminalization at the EU level.**

The amendments tabled by the European Parliament to Framework Decision 2008/919/JHA – although they were ultimately not adopted – are a good example of how the European institutions can go about dealing with these criminalization criteria: **the Parliament proposed only to criminalize conduct that clearly and intentionally advocates the commission of a terrorist offence where such conduct manifestly causes a danger that such offences are committed.**

The Meijers Committee calls upon all the institutions to pay serious attention to the question **whether the conduct criminalized causes a real and actual danger of harm, and to guard against criminalization at an unwarrantably early stage or criminalization of conduct that is merely offensive rather than harmful.**

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This note is part of a series of papers on legal protection in EU criminal law:

**CM1502 Inconsistent legal protection in mutual recognition instruments**

**CM1503 Legal Protection and the future European Public Prosecutor's Office**

**CM1504 Inconsistencies in applied grounds for adopting Union-wide criminal prohibitions**

## About

*The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.*

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