Emberek őrzője

Tanulmányok Lőrincz József tiszteletére

Szerkesztette
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Budapest, 2014

ELTE EÖTVÖS KIADÓ

ISBN 978 963 284 516 6

ELTE EÖTVÖS KIADÓ www.eotvoskiado.hu

Felelős kiadó: az ELTE Állam- és Jogtudományi Kar dékánja
Felelős szerkesztő: Pál Dániel Levente
Tipográfia: Anders Tibor
Borító: Csele-Kmotrik Ildikó
Nyomdai munkák: Prime Rate Kft.

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Karsai Krisztina ■

Ius Puniendi of the European Union

(Az Európai Unió ius puniendije)

I. What is Ius Puniendi?

From the very beginning[1] of the discussion about European criminal law, the question of accepting or denying 'European' *ius puniendi* became the core issue not only in academic debates but also on the level of politics and policymaking.

The notion itself is a broad concept and comprises a bundle of (several) competences in criminal law which are generally applied in domestic criminal law (particularly in continental legal families),[2] while others are determinative for the framework of international criminal law[3]. In a domestic (national) context, *ius puniendi* means the public power to punish:

– the power to choose: choice between values and interests which should be protected ('whether to punish'),

– the power to use criminal law: decision to use power to punish in order to protect above-mentioned values or interests ('why to punish'),

– the power to define crime and punishment in two aspects: on the one hand, the decision about the threshold of protection (what is punishable behaviour and 'normal' behaviour); the decision about other prerequisites of punishment (age, justification, excuse etc.) in close connection with the former ('what to punish'); and, on the other hand, decision about the limitations of punishment.

■ Tanszékvezető egyetemi docens, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Büntetőjogi és Büntető Eljárásjogi Tanszék

[1] Jescheck, Hans Heinrich: Die Strafgewalt übernationaler Gemeinschaften. *ZStW* 1953. 496–518.

[2] In particular see more at Packer, Herbert: *The Limits of Criminal Sanctions*. Stanford University Press, 1968. 19–30.

[3] The question of international ius puniendi is arisen in connection with international crimes, with the universal jurisdiction in criminal matters, with the criminal responsibility of individuals upon international law and with the existence of the supranational criminal tribunals. See more at M. Nyitrai Péter: *Nemzetközi és európai büntetőjog,* Osiris, 2006; Bassiouni, Cherif: *International Criminal Law* I–III. Brill, 1999.

– the power to be severe: decision about the severity of the punishment, choice between (theoretically infinite[4]) possibilities of punishment ('how to punish'),
– the power execute punishment: performance of punishment, i.e. the entire process of penal execution.

The justification of any criminal legal framework is the presumption that any State disposes of a power of *ius puniendi* as part of the public power it exercises. The fundamental principles of criminal law are enshrined in constitutions, which control the States' power by designing and enforcing criminal law. The scope and margin of accepted restrictive principles diverges in modern criminal law systems globally, but there are common values embodied in common or similar principles that can be deducted from national criminal laws. In Europe, the principle-guided limits of criminal law are more convergent due to the influence of the common constitutional heritage of the states and to the regionally 'unified' development of fundamental rights protection.

On the international level, *ius puniendi* does not fully exist nor is entirely acknowledged. It shall be underlined that *ius puniendi* on the international level is born by the partial transfer of States' power to international communities or bodies. If we look for *ius puniendi* on the EU-level, no doubt, we will find splits ("*horcruxes"*[5]) transferred from MS to the European Union thus demonstrating a 'European' character. The questions to be answered are the following in this regard: 1) Does this new character change the nature of *ius puniendi*? 2) Are the principle-guided limits of domestic *ius puniendi* valid – even partially – on the European level as well? 3) Are the more or less comparable criminal law principles of EU MS subject to a hidden unification process due to the Europeanization?

[4] International human rights protection and the respective constitutional requirements limit this „infinity" obviously.

[5] In the famous bestseller series by J. K. Rowling (*Harry Potter*), the *horcrux* is a magical object used to store a part of a person's soul. The soul is split by magical methods and these splits can be placed in any normal object. The owner of the *horcrux* can be resurrected from a split of his/her soul in case his/her body dies.

II. The Hunt for "Horcruxes"

Clear criminal law competences are nowhere to be found in the text of the Founding Treaties of the European Community[6]: the first inference to 'something criminal' only appeared in Article K.1 of the 1992 Treaty on European Union above, which was not (even partial) *ius puniendi* in terms of criminal law but a competence of the newly established EU to commence joint action in the field of criminal law (exceeding the former limits of national combat against crime).

This explicit *ius puniendi* as described it by this study thus was in fact absent. However, the development of the enforcement of Community law gave rise to wide-range academic debate on the justification of rules laid down by several directives or regulations of the Commission and the Council which aimed at applying necessary sanctions against entities (natural persons or legal bodies) infringing Community law on the level of the respective national (domestic) legal orders. Said academic discourse focused on the question whether the requisite sanctions shall be criminal or the MS has discretion to decide whether to apply different punitive measures. Moreover, there was broad consensus in academic circles on the fact that many secondary legal acts contain the obligation to sanction via domestic criminal law, which would have meant that the secondary legislation in question practically uses some kind of *ius puniendi* when it obliges the MS to punish the infringement of EC-law by her criminal law framework. In my view, these opinions were not sufficiently coherent and failed to recognize the true (legal) nature of *ius puniendi*. Because the texts of these norms were permissive without exception, hence the transfer of the respective split of national *ius puniendi* could not have been granted. Today, this question not only has a new accent but also a new legal basis; therefore, new perspectives unfold with respect to the splitting and transfer of *ius puniendi* to the European level (discussed in detail below).

In case of other types of EC-regulations,[7] questions might arise from the following point of view. There were/are rules allowing the Commission to impose sanctions against subjects of Community law (particularly for infringing European competition or subsidy law). These sanctions were highly burdensome thus raising the attention of academic circles and some scholars argued that the dividing line must

[6] At this point, I do not discuss the special provisions of the Treaty on EURATOM (Article 194 paragraph 1) and the Statute of ECJ (Article 30).

[7] E.g. Council Regulation (EEC) 17/62 then replaced by the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty [OJ L 1, 4.1.2003 1–25].

be drawn between particularly disadvantageous (financial) sanctions of an EC authority (imposed as an administrative sanction) and deterrent criminal (financial) sanctions. Due to these academic debates and the jurisdiction of the ECJ,[8] the development of the non-criminal, sanctioning system within the Community took a U-turn towards a principle-guided direction: the general principles of Community law appeared within its framework. Even with this turn of events, *ius puniendi* was not clearly accepted on the European level – irrespective of what aspects thereof were brought into question beforehand.

However, legal integration in the European Union involves a duty (on the part of national bodies, authorities and courts) to enforce Community law.[9] This obligation (including the application of community law on the one hand and the interpretation of national criminal law in accordance with community law on the other) is binding on national criminal courts as well.[10] The apparent interference between community law[11] and national criminal law results in excluding criminal liability in a number of cases: the courts demonstrate a tendency to overwrite the *ius puniendi* of the national legislator by interpreting national law differently (in accordance with EU law), thus enforcing – in part – such values that are not inherently present in the body of law governing domestic procedures. This achievement of European legal integration does not constitute the transfer of *ius puniendi* in a direct manner only seems like one in its legal consequences; therefore, it is not a real split of national *ius puniendi*. It seems to be a hidden 'negative' form of ius puniendi for the Community, a de facto '*ius non puniendi'* because of the legal possibility to render certain conduct not punishable by activating the community law. This, however, is only the consequence of legal development pursuant to the loyalty principle (and the primacy doctrine), where the sole existence of comparable legal consequences does not amount to

[8] 14/68 Walt Wilhelm and others / Bundeskartellamt, 13 February 1969; 41/69 ACF Chemiefarma NV / Commission 15. February 1970; 44/69 Buchler & Co. / Commission; 45/69 Boehringer Mannheim GmbH / Commission, 15. July 1970; 7/72 Boehringer Mannheim GmbH / Commission, 14 December 1972 (Boehringer II.); 154/78 S.P.A. Ferriere Valsabbia and others / Commission, 18 March 1980; 188/82 Thyssen Aktiengesellschaft / Commission, 16 November 1983; C-240/90 Germany / Commission 27 October 1992

[9] According to Article 4 paragraph 3 TFEU (ex Article 10 TEC or ex Article 5 TEEC) this is to be understood as a principle of loyalty. See more VON BOGDANDY, Armin: Neither an International Organisation nor a Nation State: the EU as a Supranational Federation. In *The Oxford Handbook of the European Union* (Eds JONES, Erik – MENON, Anand – WEATHERILL, Stephen) Oxford University Press, 2012 770–771.

[10] See the analysis: BAKER, Estella: Taking European Criminal Law Seriously. *Common Law Review* 1998. 361–380.

a latent transfer of the decision on 'what to punish' under the 'power to define' mentioned above.

The eventual acceptance of any '*ius non puniendi'* might justify Community decisions on the question 'whether to punish', i.e. it would require a transfer of certain aspects of MS power to punish. This is, however, lacking here. The EC legislator was willing to regulate economic issues only by not penalizing certain types of conduct within the territory of the MS, and did this acting within the clear competence patterns transferred to the EC/ECC. In other words, the Community legislator did not wish to decide on the question 'whether to punish' or not.

Meanwhile, it became clear at that time that the Union (Community) does need to make arrangements to shield its own interests, the protection of which could not be efficiently provided and realized by the MS. Hence, the need for **supranational** regulation finally became unquestionable. However, the overall (criminal law) protection throughout Europe was not realised on a truly supranational level; therefore, other means were introduced to fill in the gaps. Protections for the **financial interests** of the Community (Union) by criminal law were established by a multilateral convention of the MS[12] which called for and set forth an obligation for the contracting parties (MS) to criminalize such conduct. Said criminalization could only have taken place following ratification or signature, in harmony with the established rules of 'traditional' international law.

Not even the modifications introduced by the Treaty of Amsterdam did establish new competences of *ius puniendi*, albeit they made available an abstract power to punish in the form of framework decisions, aimed at the approximation of different MS laws in harmony with Article 34 paragraph 2 Nr b of TEU, as read together with Articles 29 and 31.

Altogether, doubts were eliminated: third pillar legislation was entitled to decide on questions of criminal law as provided by the split *ius puniendi* of the MS. In examining the elements of *ius puniendi,* it can be stated that they are mainly transferred to the third pillar in creating the possibility for legislation through FD.

The elements of the 'powers to choose and to use' (described above) were partially ensured by the possibility to take measures by the Council in the third pillar:

[11] Karsai Krisztina: *Az európai büntetőjogi integráció alapkérdései* (KJK-Kerszöv 2004)

[12] With the convention, the European Union aimed at combatting fraud affecting its expenditures and revenues by taking appropriate criminal measures, such as the criminalisation of fraud, the imposition of criminal penalties, the establishment of criminal liability for business owners and operators, and creating efficient rules of jurisdiction. Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests. OJ C 316, 27.11.1995 48–57

the Council decided about the legislative use of FD for protection or combat against certain forms of criminality and also about the further scope of FD, namely about the use of national criminal laws to support the previous objective (use the punishing power of the MS as well). The approximation of rules on constituent elements of criminal acts shelters a limited power to define; the approximation of norms shall always imply changes in case where the subject of approximation does not fit into the ideal picture (in this case, if the national criminal laws did not ensure the intended level of protection for the preferred values). These elements of *ius puniendi* are only transferred to the European level to a limited extent, because the third pillar legislator could not justify reactions for any kind of criminality with triggering the approximation of criminal laws, but only in specific cases. The decision about the severity of punishment, the choice between modalities of punishment ('how to punish') is also transferred to a limited extent if the FDs, at all, set a minimum or maximum range for imprisonment but simultaneously do not create comprehensive penitentiary frameworks through these legal measures. The power to define punishment and the power to execute said punishment are not conferred to the third pillar; they remain in the power of the MS.

With time, the signs of change were detected, as PEERS mentioned, the "infiltration" has begun. "The first pillar principles began to infiltrate the third pillar in particular as regards indirect effect, the scope of the court's jurisdiction and the autonomous interpretation of third pillar measures."[13] It should be admitted that the power to use criminal law received an important role in the debate on (ex) Article 42 of the TEU, on the '*passerelle'* clause. Relevant debate centred upon the question whether the Community has such values or interests, the protection (or enforcement) of which requires the use of third pillar measures as well, e.g. the use of the split *ius puniendi* in order to achieve clear Community objectives. Nonetheless, the European legislator did not try to prematurely enforce the use of this clause and found a proper 'golden mean' to create an enhanced level of protection for preferred Community interests: e.g. in case of unauthorised entry, transit and residence, the Council issued a directive (2002)[14] distinguishing legal and illegal behaviour in terms of Community law (as administrative law), at the same time a framework decision activated the criminal laws of the MS[15] in order to punish the most serious modalities of behaviour rendered illegal by afore-said Council directive.

[13] PEERS, Steve: EU Justice and Home Affairs Law (Non-Civil). In *The Evolution of EU Law* (eds: Paul Craig – Gráinne de Búrca). Oxford University Press, 2011. 277.

[14] Council directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, 17–18.

Anyway, theoretic debates on (ex) Article 42 of the TEU remained on the agenda. The Commission then contributed an added value to this 'maturing process' because, on 10th May 2006, it published that the '*passerelle'* clause shall be applied in order to enable police and judicial cooperation in criminal matters, so this field could be dealt with under the EC Treaty, with consequentially increased roles for the organs of the Community. As the Commission stated "action and accountability in some areas of policy making are hindered by the current decision making arrangements, which lead to deadlock and lack of proper democratic scrutiny. Existing Treaty provisions (Articles 42 of the Treaty on European Union and 67(2) of the Treaty establishing the European Community) allow for changes to these arrangements, which would improve decision taking in the Council and allow proper democratic scrutiny by the European Parliament; and the enhancement of the role of the Court of Justice."[16]

In the debates beforehand, the doubtful justification of the eventual entitlement (power) of the Community legislator to execute (even limited) *ius puniendi* was the main issue. It was questioned from the point of view focusing on national criminal law, of course. However, the debates were then suddenly frozen: following the aforementioned political communication of the Commission, the ECJ itself took the first step in a new direction (Case C–176/03 Commission v Council) which already entailed heavy legal consequences. Obviously, both of these steps (although of different character) already showed the future path in terms of a possible expansion of *ius puniendi* on the level of the Treaties.

Expectations, however, were low as to this vision of the future, although the decision in question was enthusiastically welcomed by the Commission; the Council and MS were - what a surprise! – less charmed by the ruling, and were unwilling to accept its broad reach. Academic reactions were also critical;[17] many authors made reference to the birth of the Leviathan or the 'Brussels Octopus'.[18] As the British Lords summarised it accurately: "Until September 2005 it was commonly understood that the Treaty establishing the European Community conferred no power to define criminal offences or prescribe criminal sanctions. The extent of the European Union's

[15] Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, 1–3.

[16] Communication from the Commission to the European Council: A citizen's agenda: delivering results for Europe. Brussels, 10.5.2006, COM(2006) 211 final, 6.

[17] Craig Paul – De Búrca Gráinne: *Text, Cases and Materials* (Oxford University Press 2011)

[18] Hefendehl Roland: „Europäischer Umweltschutz: Demokratiespritze für Europa oder Brüsseler Putsch?" *Zeitschrift für Internationale Strafrechtsdogmatik* 2007/4 167. („Brüsseler Krake")

legislative competence in relation to criminal law and procedure was generally considered to be limited to the 'Third Pillar'. That Member States, or at least a majority of them, had seemingly been labouring under a misapprehension as to what they had agreed in the Treaties, and on what basis they had recently settled the text of the Constitutional Treaty, was revealed when, on 13 September 2005, the European Court of Justice (the Court) handed down its judgment in Case C–176/03."[19]

In this case, the Court **clarified the distribution of powers** in criminal matters between the first and third pillars on the basis of converging legislative power between a directive and a framework decision on protecting the environment by the criminal law. The Court asked and answered the question very clearly whether competences in criminal law can be attributed to the Community. The Court said yes, but without activating Article 42 TEU. Their conclusion amounted to a true – substantial – extension, introduction of a similar split *ius puniendi* into first pillar legislation as the one that already transpired in the third pillar. However, this extension was (legislative procedure, sanctions in case of non-implementation, deadlines etc.) quite different in its legal consequences than that in the third pillar, although, supranational (limited) *ius puniendi* was thereby acknowledged by the Court in favour of the Community.[20]

The judgement opened new margins of interpretation for the competence of the Community which were applied as part of the initiative of the Commission to replace framework decisions with new directives.[21] Two directives[22] were enacted in that

[19] The Criminal Law Competence of the European Community. Report with Evidence. House of Lords, European Union Committee, 42nd Report of Session 2005–06, 7.

[20] C-176/03 Commission of the European Communities v Council of the European Union 13 September 2005 [2005] ECR I-7879, paragraphs 41–42, 47–48, 51–53: "In this regard, while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. That competence of the Community legislature in relation to the implementation of environmental policy cannot be called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice."

[21] The Parliament expressed almost the same opinion: Implications of Case C-176/03. European Parliament resolution on the consequences of the judgment of the Court of 13 September 2005 (C-176/03 Commission v Council) 2006/2007(INI).

[22] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, Official Journal L 255,

way (already based on the TEC), thus Article 42 TEU is no longer considered to serve as legal basis for the renewed protections. Avoiding the use of the '*passerelle'* clause entails that not only the ECJ but also the European legislator saw the competence to enact directives relevant to criminal law. Even if it was an express or explicit power conveyed by the original wording of the Treaties. The development of the law reached a new phase by this new interpretation, and an apparent lack of resistance from MS prepared the next step taken by the reforms of the Union and the new Treaties.

Resolving the opaque nature of the limited *ius puniendi* discovered in the text of the TEC by the Court, the TFEU (in force since 1.12.2009) brings clarity and provides explicit competences in the field of criminal law. It abolishes the three pillar structure and unifies the legal framework of EU law by 'harmonising' the different legal norms and by building a common framework (legislative procedures, forms of legal acts, judicial remedies etc.) for every policy. The AFSJ (are of freedom, security and justice) is one of the shared competences of the Union, MS are entitled to invoke their competences only to the extent that the Union has not exercised or has decided to cease to exercise its competence. This looks like automatic pre-emption of MS action where the Union has exercised its competence, with the consequence that the amount of shared power held by the MS will diminish over time. Craig and de Búrca suggested furthermore, that "there is truth in this, subject to the following qualifications. MS will lose their competence within the regime of shared power only to the extent that the Union has exercised 'its' competence. Precisely what the EU's competence is within these areas can, be divined only by considering the detailed provisions in a particular area. The pre-emption of MS action will moreover occur only 'to the extent" that the EU has exercised its competence in the relevant area. There are different ways in which the EU can intervene in a particular area. The EU may choose to make uniform regulations, it may harmonise national laws, it may engage in minimum harmonisation or it may impose requirements of mutual recognition. The scope for any MS action will depend on which regulatory technique is used by the EU."[23]

30.9.2005. 11–21; Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, Official Journal L 328, 6.12.2008. 28–37.

[23] Craig – de Búrca (fn 17) 933.

III. Splits of Ius Puniendi in the TFEU

There are several Articles which express *ius puniendi* on the European level, but there are quite substantial differences between the rules concerning the limits of *ius puniendi*. Putting it simply, **only splits** of *ius puniendi* are transferred to the Union; therefore, we cannot come to a conclusion that a general European *ius puniendi* would exist. Three provisions of TFEU shall be mentioned as relevant to this argument: Articles 82-83 and 325. Articles 82, 83 define shared competences regarding AFSJ in the scope of judicial cooperation, but Article 325 is pertinent to the financial provisions of TFEU; it sets forth the competence to enact the necessary measures (which shall "act as a deterrent") in the fields of prevention of and fight against fraud and any other illegal activities affecting the Union's financial interests. Paragraph 4 Article 325 provides for the legislative procedure to adopt the necessary measures with a view on affording effective and equivalent protection. It also provides for a legal basis to legislate in relation to fraud and any other illegal activities affecting the Union's financial interests in the fields of the prevention and the fight against fraud. The term fraud must in this context be understood in a broad sense, including certain fraud-related criminal offences. The argument can be made that this norm entitles the EU to enact provisions with criminal law content.[24]

Article 325 is a "direct descendant" of the afore-mentioned convention on the protection of the financial interests of the Community: the missing signatures and the gentle unwillingness of the MS to ratify or apply it without delay made it indisputable that a new way shall be found for the effective protection of the supranational interests of the Union. Without analysing the entire discussion process, it is noteworthy that the new Article of TFEU already establishes this new way of enforcing interests.

Paragraph 4 contains the most exhaustive *ius puniendi* at the European level because it entitles the legislator of the Union to adopt necessary measures in order to fight fraud.[25] Only the 'power to execute' is absent from among the elements of the theoretic structure of *ius puniendi*, the Union itself does not perform penal procedures or execution. However, in the future, if the establishment of the European

[24] See also Böse, Martin: „Die Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon und ihre Bedeutung für die Europäisierung des Strafrechts" *Zeitschrift für Internationale Strafrechtsdogmatik* 2010/2. 88.

[25] There is already a proposal for a directive on agenda: Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law COM (2012) 363. Analysis of that: Commission Staff Working Document SWD (2012) 195.

Public Prosecutor[26] as such will become a reality, the last '*horcrux'* will also be transferred.

It is important to note at this point that the legislator has the right to issue **any legal act** (if the general requirements are met), *ius puniendi* is not limited, the legislator has the liberty to choose between directives and regulations as well. No doubt, the legal nature of a regulation with criminal law content might be similar to the ones enacted under domestic (MS) criminal law – that is what is really a (r)evolutionary development. Under Paragraph 1, another entitlement of the Union is codified, one to counter fraud, albeit it might be construed as an effectively weak competence due to the parallel presence of the MS as actor.

Article 83 paragraph 1 expresses *ius puniendi* in form of the 'power to define'. The second sentence covers the 'power to use', while the third sentence the general 'power to choose'.

It is an important difference between the second and third sentences, from the European point of view, that the legislative procedure covered is not the same, and the procedural rules are not relevant for identifying ius puniendi as such. This Article is a true successor of the previously analysed rules within the third pillar.

The next rule to discuss is the rule fixing the broad concept of Community competences initially originating from judicial interpretation attributing them constitutional effect. According to Article 83 paragraph 2 MS criminal law can be invoked to enforce EU policies.

In this case, the 'powers to choose' and the decision itself to activate criminal law belong to the Council. The Council disposes of the most important splits of ius puniendi over this core competence as well. The emergency brake rule introduced under paragraph 3 is a compromise easing the obstruction by MS but it fits perfectly into the "step by step protocol" of developing European criminal law.

IV. Summary

Concluding the argumentation on ius puniendi, I would like to emphasise that real ius puniendi now exists on the level of the European Union; nevertheless, it is limited and only some elements of that have been actually transferred.

In the sense of domestic criminal doctrine, this is not full ius puniendi, due to the afore-mentioned partial transfer, but the legal possibility of the Union's legislator to

[26] See more by Ligeti Katalin: *Toward a Prosecutor for the European Union. A Comparative Analysis*. Volume 1 (Modern Studies in European Law) Beck/Hart 2012.

decide on criminal law well within its rights (legal capacity) represents the true progress of legal development along with the fact that it is very important for the EU to be able to have its voice heard on criminal law issues as well.