



Uniwersytet
Wrocławski

EU Criminal Law

Lecture **Harmonisation of Substantive Criminal Law**

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Treaty provisions:

Treaty of Amsterdam

Article 29

Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

Treaty provisions:

Treaty of Amsterdam

Article 29

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular **terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:**

- **approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).**

Treaty provisions:

Treaty of Amsterdam

Article 31(e)

1. Common action on judicial cooperation in criminal matters shall include:

(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

Treaty provisions:

Treaty of Lisbon (TFEU)

Article 82

Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 (*criminal procedure rules*) and in Article 83 (*substantive criminal law*).

Treaty provisions:

Treaty of Lisbon (TFEU)

Article 82

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



Treaty provisions:

Treaty of Lisbon (TFEU)

Article 83

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

Treaty provisions:

Treaty of Lisbon

Article 83

These areas of crime are the following:

- ❖ 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,
- ❖ organised crime.

Treaty provisions:

Treaty of Lisbon

Article 83

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the **effective implementation of a Union policy** in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question

Dimensions of cooperation in the area of substantive criminal law

- 1) Negative harmonisation – side effect of four freedoms**
- 2) Positive harmonisation**
 - Framework decisions**
 - Directives**

Dimensions of cooperation in the area of substantive criminal law

1) Negative harmonisation – side effect of four freedoms

Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995

37 *It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it*

Dimensions of cooperation in the area of substantive criminal law

2) Positive harmonisation – racism and xenophobia

Joint action/96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.

Dimensions of cooperation in the area of substantive criminal law

2) Positive harmonisation – racism and xenophobia

- **Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law**
 - the Race Equality Directive - Council Directive 2000/43/EC of 29 June 2000 prohibiting discrimination on the grounds of racial or ethnic origin in several walks of life;
 - the Employment Equality Directive - Council Directive 2000/78/EC of 27 November 2000 prohibiting discrimination for instance on the ground of religion in employment;

Dimensions of cooperation in the area of substantive criminal law

2) Positive harmonisation – racism and xenophobia

- the Audiovisual Media Services Directive - Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services - banning incitement to hatred in audiovisual media services and the promotion of discrimination in audiovisual commercial communications;
- the Schengen legislation - prohibiting discrimination at border controls.

Dimensions of cooperation in the area of substantive criminal law

2) Positive harmonisation – human trafficking and sexual exploitation of children

Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children

Dimensions of cooperation in the area of substantive criminal law

2) Positive harmonisation – human trafficking and sexual exploitation of children

Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography

Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings

Dimensions of cooperation in the area of substantive criminal law

2) Positive harmonisation – human trafficking and sexual exploitation of children

DIRECTIVE 2011/93/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

Why there is a need to harmonise substantive criminal law?

1. Complimentary measure to mutual recognition of decisions in criminal matters (harmonised criminal law makes it easier to accept foreign decisions in criminal cases and execute them; enhances mutual trust, particular importance in cases where double criminality principle is not applicable).
2. Protection of EU financial interests and effectiveness of EU policies (EU Directive on the protection of the euro, PIF Directive – combating fraud).

Why there is a need to harmonise substantive criminal law?

3. **Safeguarding citizens well-being in the area of freedom, security and justice and basic values of the EU (e.g. fight against terrorism, human trafficking, sexual exploitation of children).**
4. **Strengthening the ability to effectively combat crime at national level in cases of transnational criminality.**

Harmonisation of substantive criminal law

1. Obligation to criminalise certain acts

Article 3 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 6 is punishable.
2. Causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual activities, even without having to participate, shall be punishable by a maximum term of imprisonment of at least 1 year.
3. Causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual abuse, even without having to participate, shall be punishable by a maximum term of imprisonment of at least 2 years.
4. Engaging in sexual activities with a child who has not reached the age of sexual consent shall be punishable by a maximum term of imprisonment of at least 5 years.

Harmonisation of substantive criminal law

1. Obligation to criminalise certain acts

Article 6 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

- 1. Member States shall take the necessary measures to ensure that the following intentional conduct is punishable:**

the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6), where that proposal was followed by material acts leading to such a meeting, shall be punishable by a maximum term of imprisonment of at least 1 year

Harmonisation of substantive criminal law

1. Obligation to criminalise certain acts

Article 1 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

... 'child' means any person below the age of 18 years;

In 2014 Polish Criminal Code (Article 202) was amended in order to implement the Directive

Description of prohibited acts related to possession, production, access, distribution of pornography involving children under 15 were modified in order to cover children below the age of 18.

Harmonisation of substantive criminal law

2. Discretionary power in harmonisation

Article 8 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

1. It shall be within the discretion of Member States to decide whether Article 3(2) and (4) apply to consensual sexual activities between peers, who are close in age and degree of psychological and physical development or maturity, in so far as the acts did not involve any abuse.
2. It shall be within the discretion of Member States to decide whether Article 4(4) applies to a pornographic performance that takes place in the context of a consensual relationship where the child has reached the age of sexual consent or between peers who are close in age and degree of psychological and physical development or maturity, in so far as the acts did not involve any abuse or exploitation and no money or other form of remuneration or consideration is given as payment in exchange for the pornographic performance.

Harmonisation of substantive criminal law

3. Obligation to criminalise various forms of committing an offence

Article 7 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

- 1. Member States shall take the necessary measures to ensure that inciting or aiding and abetting to commit any of the offences referred to in Articles 3 to 6 is punishable.**
- 2. Member States shall take the necessary measures to ensure that an attempt to commit any of the offences referred to in Article 3(4), (5) and (6), Article 4(2), (3), (5), (6) and (7), and Article 5(4), (5) and (6) is punishable.**

Harmonisation of substantive criminal law

4. Obligation to impose minimum level of maximum statutory penalty

Article 3 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 6 is punishable.
2. Causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual activities, even without having to participate, shall be punishable by a maximum term of **imprisonment of at least 1 year.**
3. Causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual abuse, even without having to participate, shall be punishable by a maximum term of **imprisonment of at least 2 years.**
4. Engaging in sexual activities with a child who has not reached the age of sexual consent shall be punishable by a maximum term of **imprisonment of at least 5 years.**

Harmonisation of substantive criminal law

5. Obligation to take into consideration aggravating consequences

Article 9 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

In so far as the following circumstances do not already form part of the constituent elements of the offences referred to in Articles 3 to 7, Member States shall take the necessary measures to ensure that the following circumstances may, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances, in relation to the relevant offences referred to in Articles 3 to 7:

- (a) the offence was committed against a child in a particularly vulnerable situation, such as a child with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity;**
- (b) the offence was committed by a member of the child's family, a person cohabiting with the child or a person who has abused a recognised position of trust or authority;**
- (c) the offence was committed by several persons acting together; ...**

Harmonisation of substantive criminal law

6. Obligation to impose additional sanctions and measures preventing crime

Article 10 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

- 1. In order to avoid the risk of repetition of offences, Member States shall take the necessary measures to ensure that a natural person who has been convicted of any of the offences referred to in Articles 3 to 7 may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children.**

Harmonisation of substantive criminal law

6. Obligation to impose additional sanctions and measures preventing crime

Article 10 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

- 2. Member States shall take the necessary measures to ensure that employers, when recruiting a person for professional or organised voluntary activities involving direct and regular contacts with children, are entitled to request information in accordance with national law by way of any appropriate means, such as access upon request or via the person concerned, of the existence of criminal convictions for any of the offences referred to in Articles 3 to 7 entered in the criminal record or of the existence of any disqualification from exercising activities involving direct and regular contacts with children arising from those criminal convictions.**

Harmonisation of substantive criminal law

6. Obligation to impose additional sanctions and measures preventing crime

Article 11 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography

Article 11

Seizure and confiscation

Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in Articles 3, 4 and 5.

Harmonisation of substantive criminal law

7. Obligation to impose criminal liability on legal persons

Article 12-13 DIRECTIVE 2011/93/EU abuse and sexual exploitation of children and child pornography (criminalisation + sanctions)

- 1. Member States shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Articles 3 to 7 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:**
 - (a) a power of representation of the legal person;**
 - (b) an authority to take decisions on behalf of the legal person; or**
 - (c) an authority to exercise control within the legal person.**