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## **EU substantive criminal law, ancillary measures and legal basis**

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## Editorial



# EU Substantive Criminal Law, Ancillary Measures and Legal Basis

In December 2021, the European Commission submitted a proposal for a new, adjusted directive on environmental crime.<sup>1</sup> At the time of writing this piece, a general approach has been adopted in the Council while the European Parliament's first reading position is being waited for.<sup>2</sup> The proposed directive seeks to strengthen the protection of the environment by means of measures in the field of criminal law. To a significant extent, these measures are proper *substantive criminal law* provisions, aiming for the harmonisation of offence definitions, penalty levels, penalty types available, and rules on jurisdiction (draft Articles 3–10, 12). Other measures are of a *different nature*, dealing with the protection of persons reporting environmental crimes or assisting in the criminal investigation of such crimes (draft Article 13), the procedural position of the public concerned (draft Article 14), and obligations with regard to prevention, sufficient resources, training of professionals, the establishment of coordination and cooperation mechanisms, the development and implementation of a national strategy, and the collection, publication, and transmission of statistical data regarding the actual fight against environmental crime (draft Articles 15–21).

The proposed directive hereby contains varied types of measures. Still, the entire proposal has been based on Article 83(2) of the Treaty on the Functioning of the European Union (TFEU), one of the EU's express criminalisation

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1 European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Brussel 15 December 2021, COM(2021) 851 final.

2 This follows for instance from Council doc. 16171/22 of 16 December 2022.

competences. In this contribution, it is questioned whether and to what extent Article 83(2) TFEU – and with it Article 83(1) TFEU – can actually serve as a legal basis for all of the proposed measures. It will subsequently be considered whether for some of these measures, other Treaty provisions could or should be relied on. In this regard, the meaning and scope of Article 84 TFEU will be examined in particular.<sup>3</sup> As a first step, however, the next section will demonstrate that the relevance of the issue goes beyond the area of environmental crime only; several other directives that were adopted on the basis of Article 83 TFEU comprise a similar variety of harmonised rules. This contribution ends with some final remarks.

## 1 Non-Substantive Criminal Law Measures in Article 83 TFEU-Based Directives

As announced, the proposed new directive on environmental crime<sup>4</sup> is not the first initiative in which it has been proposed to adopt other types of measures than proper substantive law provisions only, despite their being based on Article 83. Without meaning to be exhaustive, the following three directives illustrate this.

Directive 2014/62 provides for harmonised rules in the area of currency counterfeiting.<sup>5</sup> The first sentence of the preamble to this directive mentions Article 83(1) TFEU, which indeed mentions “counterfeiting of means of payment” as one of the crime areas in which harmonised rules of substantive criminal law can be adopted. In that vein, Articles 3–8 of Directive 2014/62 contain minimum rules on punishable conduct, sanction types and sanction levels, and the establishment of jurisdiction.

3 The potential relevance of Article 84 TFEU for the fight against environmental crime was examined back in 2015 by Grasso, Sicurella & Scalia in their report ‘Articles 82–86 of the Treaty on the Functioning of the European Union and Environmental Crime’ (Study in the framework of the EFFACE research project), Catania: University of Catania 2015. Studying this report after the submission of the draft directive on environmental crime (supra note 1) motivated me to explore the potential role of Article 84 TFEU in relation to other areas of crime in which substantive criminal law has been harmonised and could be harmonised at the EU-level.

4 Supra note 1.

5 Directive 2014/62/EU of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, OJ 2014, L 151/1.

In addition to it, Articles 9–11 cover other kinds of obligations, probably falling under what Article 1 (headed “Subject matter”) describes as “common provisions to strengthen the fight against those offences and to improve investigation of them and to ensure better cooperation against counterfeiting”. They concern obligations to ensure the availability of effective investigative tools for investigating and prosecuting authorities; to transmit *during* criminal proceedings (samples of) notes and coins to national analysis centres competent in the field;<sup>6</sup> and to transmit to the European Commission data on the number of offences and prosecuted and convicted persons, at least every two years.

Directive 2011/36 concerns the crime of trafficking in human beings, also explicitly mentioned in Article 83(1) TFEU. This time, the preamble’s first sentence names both Article 83(1) and Article 82(2) TFEU.<sup>7</sup> It explains why Directive 2011/36, firstly, contains harmonised rules of substantive criminal law (Articles 2–7 and Article 10 give minimum rules regarding punishable conduct, sanction types and sanction levels, and the establishment of jurisdiction), but, secondly, also provides for minimum rules regarding the rights of victims of human trafficking. As far as I am concerned, these latter rules can be found across Articles 11–17 of the directive. While it is true that these provisions have been formulated in terms of prescriptions addressing the Member States, and therefore do not clearly attribute rights to the victims of human trafficking,<sup>8</sup> the majority of them obviously reflect the competence laid down in Article 82(2), sections b and c, TFEU.<sup>9</sup> These provisions can indeed be considered adopted on the basis of Article 82(2) TFEU.

At the same time, however, some of the many rules that were harmonised by means of Articles 11–17 of Directive 2011/36 fail to sufficiently reflect any part of Article 82(2) TFEU, for instance because they solely envisage Member States’ action without any implied entitlement for victims of human trafficking – see for instance the obligation laid down in Article 11(4) to “take the necessary

6 Such as the Royal Dutch Mint (<https://www.royaldutchmint.com/vision-and-mission/en/page/2368/>) and De Nederlandsche Bank (DNB, <https://www.dnb.nl/en/>) in the Netherlands.

7 Directive 2011/36 of 5 April 2011 on prevention and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA, OJ 2011, L 101/1.

8 See for instance Article 11(2) of Directive 2011/36: “Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3”.

9 I.e., respectively, the competence to adopt minimum rules with regard to “the rights of individuals in criminal procedure” (section b) and “the rights of victims of crime” (section c).

measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations". And because it concerns rules that neither fall within the ambit of substantive criminal law, it remains unclear which precise legal basis they actually have. The same applies to Articles 9, and 18–20 of the directive at hand, compelling Member States, amongst other things, to ensure the availability of effective investigative tools to investigating and prosecuting authorities; to make the combat of human trafficking not dependent on reporting or accusations by victims; to ensure that the responsible persons and organisations are sufficiently trained; to take measures for the purpose of preventing human trafficking (such as education, training, awareness-raising campaigns, research); to establish national rapporteurs or equivalent mechanisms and to task them with carrying out assessments, gathering of statistics and reporting; and to facilitate the tasks of an anti-trafficking coordinator, such as the coordinator's duty to gather information and to report to the European Commission, every two years, the progress made in fighting human trafficking.

Directive 2011/93 contains harmonised rules in the field of sexual exploitation of children, an area of crime that, too, has been named in Article 83(1) TFEU. Like the preamble to the aforementioned Directive, the first sentence of the preamble to Directive 2011/93 also names both Article 83(1) and Article 82(2) TFEU.<sup>10</sup> Substantive criminal law measures have been laid down in Articles 3–9, 11–14 and 17 (dealing with punishable conduct, sanction types and sanction levels, and the establishment of jurisdiction) whereas Articles 18–20 regulate the rights of victims.

The remaining provisions of Directive 2011/93 cover issues that fall outside the scope of substantive criminal law, but also fail to count as measures regulating the rights of individuals or, in particular, victims of crime. Instead, most of the obligations laid down in Articles 10, 15–16, 21–25 steer towards the prevention of sexual crimes committed against, or otherwise involving children, such as the obligations to enable disqualifications from exercising activities of certain professions after criminal convictions, and to exchange information for that aim; to ensure the availability of effective investigative tools for investigating and prosecuting authorities; to make the combat of crimes in this area not dependent on reporting or accusations by victims; to prevent or prohibit the advertisement of abuse opportunities and child sex tourism; to remove, or block access to websites containing or disseminating child pornography; and

<sup>10</sup> Directive OJ 2011/93 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, OJ 2011, L 335/1.

to provide for education, awareness-raising, training, research as well as intervention programmes or intervention measures.

## 2 Why Article 83 TFEU Should only be Relied on for Substantive Criminal Law ‘Proper’...

The previous examples show that directives based on Article 83 TFEU occur to include harmonised norms (just like has been proposed in the draft directive on environmental crime<sup>11</sup>) that, strictly speaking, fall outside the remit of the wordings used therein, namely ‘definition of criminal offences’ and ‘sanctions’. These other harmonised norms mainly concern obligations in the preventive sphere and obligations to make the fight against the crime at hand practically possible, e.g. by means of providing sufficient resources and manpower. Not even if the terms ‘definition of criminal offences’ and ‘sanctions’ would be used in a broad sense, could these norms be classified as such, let alone that they could count as norms of ‘substantive criminal law’. It raises the question whether and why (or why not) Article 83 TFEU can nevertheless be relied on for the Union-wide adoption of such rules.

Indeed, the same question can be asked in relation to Article 82(2) TFEU which has been used as a legal basis too, in two of the previously described directives. Article 82(2) TFEU creates competence in specific areas of procedural law, i.e. mutual admissibility of evidence, rights of individuals in criminal procedure, and rights of victims of crime. Not seldom has it been the only legal basis explicitly referred to, for instance in directives harmonising defence rights.<sup>12</sup> Whether in such situations other types of measures, or measures dealing with other aspects of procedural law can be adopted on that basis, is obviously a relevant question as well. Yet, the focus of this contribution is limited to the scope of Article 83 TFEU, and in that regard, the validity of non-substantive criminal law measures.

Well, could Article 83 TFEU be invoked for the adoption of non-substantive criminal law measures (such as preventive measures), accompanying harmonised definitions of offences and rules on sanctions?

<sup>11</sup> Supra note 1.

<sup>12</sup> This is for example the case in Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013, L 294/1.

In the absence of any indication otherwise, the short and simple answer to that question can in my view only be negative. Following, first, a textual interpretation of Article 83 TFEU, the competence laid down in both of its paragraphs is literally limited to the harmonisation of definitions of crime and sanctions (the latter logically including both sanction types and sanction levels). True, in the second instance there is a logical reason to follow an interpretation of Article 83 TFEU that goes somewhat further, i.e. to also read in the power to adopt norms relating to the general part of substantive criminal law (requiring for instance the criminalisation of inchoate acts) as well as provisions establishing national jurisdiction over harmonised offences (prescriptive jurisdiction, regulating the applicability of criminal law). Both of these matters comprise aspects that are inextricably linked with definitions of offences and rules on sanctions, and it is, hence, oftentimes impossible to fully avoid the inclusion of rules dealing with these aspects in legislative proposals based on Article 83 TFEU.<sup>13</sup> Therefore, and in default of interpretations otherwise, it seems only logical and safe to interpret the scope of Article 83 TFEU as to imply that it can be used to adopt measures related to the general part of substantive criminal law as well as to measures establishing national jurisdiction over crimes falling under that article (prescriptive jurisdiction). But, even under this broader interpretation of the harmonisation competence laid down in Article 83 TFEU, it still encompasses only substantive criminal law ‘proper’.

Nowhere have I seen interpretations under which the scope of Article 83 TFEU has been argued to also cover measures going beyond substantive criminal law – neither throughout the scholarly literature that I know nor across EU legislative and policy documents. In those circumstances, no other answer than a negative one can in my view be permitted to the question this paragraph starts with. Thus, it must be assumed that Article 83 TFEU *cannot* be invoked for the adoption of non-substantive criminal law measures (such as preventive and merely practical measures).

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13 Concerning issues related to the general part of criminal law, Klip states that “[...] it will be inevitable to deal with general part related issues if one deals with both definitions and sanctions”, see A. Klip, *European Criminal Law. An Integrative Approach* (4th ed.), Intersentia 2021, p. 232. With regard to jurisdiction, Peers concludes that Article 83 TFEU can be used to adopt measures on jurisdiction “since such measures are ancillary to the definition of offences and do not fall within the scope of the power in Article 82(1) TFEU to prevent and settle such conflicts, except to the extent that they included rules on priority jurisdiction”, see S. Peers, *EU Justice and Home Affairs Law. Volume 11: EU Criminal Law, Policing and Civil Law* (4th ed.), Oxford University Press 2016, p. 169.

### 3 ...and why it's Time to Clarify the Legal Basis for Ancillary Measures

The conclusion that Article 83 TFEU cannot be relied on for the adoption of non-substantive criminal law measures does not change the reality in which already adopted directives that were wholly or partly based on this article, do include a variety of such measures<sup>14</sup> – an approach that, moreover, is currently being continued witness the pending proposal for a directive in the field of environmental crime.<sup>15</sup> This raises two related questions: how problematic is it really, and which other Treaty provision(s) could be relied on for non-substantive criminal law measures of the sort described?

While examining whether and why the current situation must be regarded as a problematic or at least undesirable situation, it must first be acknowledged that in none of the examples given above, Article 83 TFEU has expressly been put forward as the only legal basis relied on for the therein harmonised rules. Instead, the preambles to the (proposed) directives piece by piece make a general reference to the TFEU first, and subsequently indicate Article 83 TFEU *in particular* (where relevant together with Article 82(2) TFEU). This usually reads as follows: “Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1) thereof [...]”.<sup>16</sup> It is a wording of common usage that could be understood as a recognition of the (potential) applicability of other TFEU articles. But should it be understood like that? There is no clear answer to that question.

Worth noting in a similar vein is the express recognition in each first article of the described directives (commonly entitled ‘Subject matter’) that also measures *other* than offence definitions and sanctions have been included in the respective directives. For instance, Article 1 of Directive 2011/93 (on child sexual abuse)<sup>17</sup> states that

“[t]his Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of those crimes and the protection of the victims thereof”.

14 See Section 1.

15 Supra note 1.

16 Taken from the first sentence of the preamble to Directive 2014/62 on counterfeiting, supra note 5. With only minor deviations, the same wording is used in the preambles to Directives 2011/36 and 2011/93 as well as in the draft preamble to the proposed directive on environmental crime, COM(2021) 851 final.

17 Supra note 10.

When read in conjunction with the standard wording in preambles, this could be taken as a confirmation that the (potential) applicability of additional legal bases, though without specifically indicating them, has been recognised. At the same time, one may wonder how well thought out all these formulations actually are, hence how much weight should be attached to them – not least because it has not been examined if these formulations have been used consistently in all of the Article 83 TFEU-based directives. In this regard it strikes that a much less ambiguous wording has been used outside the draft preamble to the proposed directive on environmental crime. In its Explanatory Memorandum accompanying the proposed directive, the European Commission indicates Article 83(2) TFEU as “[t]he legal basis for the proposed Directive”,<sup>18</sup> thereby suggesting that Article 83(2) TFEU is in fact relied on as the single legal basis for the newly proposed measures. It has, moreover, been observed that the first article that has been drafted for this proposed directive (also entitled “Subject matter”) merely mentions norms of substantive criminal law ‘proper’:

“This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in order to protect the environment more effectively”.

The previous observations lead to the heart of the issue, uncovering that for a considerable number of provisions included in the directives cited, it is unclear what their exact legal basis is. The sole clear thing is that Article 83 TFEU cannot serve as their legal basis. And it is precisely this lack of clarity that must be considered problematic for a number of obvious reasons, the first reason being that legitimacy of law(-making) requires transparency with regard to the very existence of legislative powers and the use of these powers in individual cases of law-making. Secondly, not knowing on what legal basis EU measures rest, bears the risk of fogging over the legal basis that in fact has been in the mind of the legislator, how it interprets the scope of that legal basis, and for what reasons it was invoked. This, in turn, renders it much more complicated to discuss legislative choices in the course of legislative procedures (both internally and with external actors such as NGO’s) – with all its potential consequences for the quality of legislation and the development of the law.

As far as it concerns non-substantive criminal law provisions that aim to accompany Article 83 TFEU-based substantive criminal measures, the problematic situation could be tackled by bringing greater clarity to the legal foundations of such non-substantive criminal law provisions. The next and

<sup>18</sup> Supra note 1, Explanatory Memorandum, par. 2 on p. 3.

final part of this contribution takes a first small step towards this by exploring whether legal foundations can be found outside Article 83 TFEU, though elsewhere in the TFEU's chapter on judicial cooperation in criminal matters (Title V, Chapter 4, TFEU) – and with the focus on obligations in the preventive sphere and obligations to make the fight against the crime at hand practically possible. After all, it followed from the introduction and Section 1 that most of the ancillary obligations in (draft) Directives based on Article 83 TFEU require Member States to undertake action to *prevent* that the harmonised offences take place and to facilitate, by means of *practical arrangements*, the actual fight against such offences.<sup>19</sup>

### 3.1 *Article 82(1) TFEU and Measures Requiring Adequate Training and Education of Staff*

The relevance of Article 82(1) TFEU is quite obvious, even though Article 82 TFEU as such gives competence to enact measures in the field of judicial cooperation in criminal matters, stipulating first and foremost that cooperation is governed by the principle of mutual recognition. Besides the adoption of rules and procedures implementing mutual recognition in this area, Article 82(1) also allows for the adoption of accompanying measures, such as measures supporting the training of the judiciary and judicial staff (under c). It is further stated that judicial cooperation “shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 (regarding procedural criminal law, JO) and in Article 83”. The connection hereby made between harmonisation of substantive criminal law and judicial cooperation in criminal matters suggests that the first has to serve the latter. Consequently, it makes sense to assume that, in fact, Article 82(1) TFEU constitutes the right legal basis for the provisions in Article 83 TFEU-based directives (both those in force and those newly proposed<sup>20</sup>) pursuant to which Member States are required to ensure adequate training. In light of the previous call, it seems to me that only a small effort is required to clarify on what legal basis such provisions actually rest. Because Article 82(1) TFEU, like Article 83 TFEU, allows for the adoption of harmonisation measures too, both substantive criminal law measures and obligations regarding training can be enacted in one

19 Sometimes, these objectives overlap. For example, obligations in the sphere of training and education of staff that leads to an increased knowledge and understanding of specific criminal phenomena increases the likelihood of discovering evil plans prior to their realisation, but is also expected to be contributive to choosing the best approach in the investigation of crimes once they have been committed.

20 See Introduction and Section 1.

and the same directive, requiring only the explicit mentioning of Article 82(1) TFEU next to Article 83 TFEU thus.

### 3.2 *Article 84 TFEU and Measures in the Field of Crime Prevention*

The pertinence of Article 84 TFEU in relation to the harmonisation of substantive criminal law is less obvious, which is probably partly due to its relatively great ignorance. In the framework of this contribution, there is however reason to take a first dive into its potential relevance for non-substantive criminal law provisions. Like Article 83 TFEU, Article 84 TFEU belongs to the chapter on judicial cooperation in criminal matters (Chapter 4), as part of the legal framework that governs the EU's Area of Freedom, Security and Justice (Title V, TFEU). It concisely provides that:

“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish *measures to promote and support the action of Member States in the field of crime prevention*, excluding any harmonisation of the laws and regulations of the Member States” (italics added).

It follows that Article 84 TFEU provides the competence to adopt legislative measures pursuing the prevention of crime. The general term “measures” pronounce that such measures can be laid down in directives as well as in regulations. It concerns, however, a competence that is limited to measures facilitating the preventive actions of Member States (“measures to promote and support the action of Member States”); harmonisation measures have expressly been ruled out.

The exact meaning of this has not been crystallised yet. No particular clues have been provided for in the preparatory works leading up to the creation of Article 84 TFEU. Across the very limited number of scholarly writings dealing with Article 84 TFEU it has, however, been argued that any action based on it is “residual”.<sup>21</sup> Measures adopted under the heading of Article 84 TFEU would have to contribute to the coordination of crime prevention activities carried out by Member States, and they could for instance entail the regulation of

21 P. De Pasquale & C. Pesce, ‘Article 84 (Promotion of Crime Prevention)’, in: H.J. Blanke & S. Mangiameli (eds.), *Treaty on the Functioning of the European Union – A Commentary* (Springer Commentaries on International and European Law), Springer 2021, par. 1, under 5.

financial support, coordination of the exchange of best practices, and other types of incentives to further improve the prevention of crime.<sup>22</sup>

For further indications on the kind of measures that could be covered by the competence laid down in Article 84 TFEU, we have to rely on the pieces of EU legislation adopted on the basis of this very provision. Pre-Lisbon equivalents of these do not exist, for a provision like Article 84 TFEU was absent prior to the Treaty of Lisbon; it first appeared in Article 111-272 of the Treaty establishing a Constitution for Europe.<sup>23</sup> Since the entry into force of the Treaty of Lisbon, three regulations have been adopted on the basis of Article 84 TFEU (one regulation is no longer in force; two still are, albeit one has been modified in the meantime): 1. Regulation 1382/2013 (no longer in force); 2. Regulation 513/2014; and 3. Regulation 514/2014.<sup>24</sup> It appears that to date, Article 84 TFEU has always been invoked for the setting up of programmes for financial support and the allocation of financial resources which entail opportunities, rather than obligations, for the Member States.

Regulation 1382/2013 established the Justice Programme 2014–2020 and was addressed to the European Commission, requiring it to enforce the regulation by means of establishing yearly work programmes in the course of which also Member States could apply for funding in relation to judicial cooperation in both civil and criminal matters – that is probably why Regulation 1382/2013 indicated Articles 81(1) and (2), 82(1), and 84 TFEU as its joint legal bases. The many types of actions for which funding could be requested include, amongst

22 Idem. See also Peers 2016, *supra* note 13, p. 40 and Grasso, Sicurella & Scalia 2015, *supra* note 3, p. 33.

23 OJ 2004 C 310/120. See also the ‘Tables of equivalences’, accompanying the publication of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2008, C 115/361, confirming the absence of a pre-Lisbon equivalence to Article 84 TFEU.

24 1. Regulation 1382/2013 of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020, OJ 2013, L 354/73. This regulation is no longer in force; it has been repealed by Regulation 2021/693 of 28 April 2021 establishing the Justice Programme, OJ 2021, L 156/21. Interestingly, the repealing regulation does not mention Article 84 TFEU as one of its legal bases. 2. Regulation 513/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA, OJ 2014, L 150/93. 3. Regulation 2022/585 of 6 April 2022 amending Regulations (EU) No 514/2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, (EU) No 516/2014 establishing the Asylum, Migration and Integration Fund and (EU) 2021/1147 establishing the Asylum, Migration and Integration Fund, OJ 2022, L 112/1. The consolidated text of the amended Regulation 514/2014 can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014R0514-20220412&from=EN> (last accessed on 22 January 2023).

other things, analytical activities (such as the collection of data and statistics); the development of studies, research, guidelines, educational and training materials; the development and dissemination of guidelines and other educational materials; the organisation of training activities for staff; the organisation of conferences, workshops, peer review sessions, *et cetera* (see Article 6). The Justice Programme of Regulation 1382/2013 has been repealed in 2021 by means of Regulation 2021/693, establishing a follow-up Justice Programme for 2021–2027. In this regulation, Article 84 TFEU has not expressly been indicated as legal basis, for reasons unclear to me.<sup>25</sup>

Regulation 513/2014 and Regulation 514/2014 are still in force. Together with Regulation 516/2014 they establish the Internal Security Fund, a comprehensive framework for EU financial support in relation to the implementation of the EU's 2010 Internal Security Strategy, covering police cooperation, preventing and combating crime, asylum and migration. In both Regulations, Article 84 TFEU serves as one of several legal bases – hence why crime prevention is just one of the pursued objectives of the established fund. With regard to this objective as well as for the aim of improving police cooperation and combating crime, Regulation 513/2014 determines the national actions eligible for financial support, the available resources and their distribution, whereas Regulation 514/2014 lays down rules for the administration of fundings (such as the ones foreseen under Regulation 513/2014). Pursuant to Articles 4–6 of Regulation 513/2014, part of the total budget for police cooperation, preventing and combating crime will be reserved for Union action (on the Commission's initiative). The other, most significant part of the budget is being implemented by so-called shared management; on the basis of specified criteria, resources are allocated to Member States to support national actions within the objectives of this Regulation – such as actions improving police cooperation and coordination between law enforcement authorities; projects promoting mutual confidence, the exchange of know-how, experiences and best practices; analytical, monitoring and evaluation activities; activities for awareness raising; or activities for training and education of staff and experts.

The previous account shows that existing legislation, to the extent it is based on Article 84 TFEU, already provides several opportunities for Member States to gain financial support for activities in the field of crime prevention, including those demanded through Article 83 TFEU-based directives (such as, for instance, requirements regarding education, training, awareness-raising campaigns, research, or the establishment of an anti-trafficking coordinator as

25 Neither in the preamble nor in the Commission's proposal has there been any comment on leaving Article 84 TFEU unmentioned in the new Regulation.

required under Directive 2001/36 on human trafficking).<sup>26</sup> But would Article 84 TFEU also enable the adoption of measures by means of which Member States would be *obliged* to take such preventive actions? For an answer to that question it is key to know whether such measures would actually amount to harmonisation measures, for these have expressly been ruled out from the scope of Article 84 TFEU. In that regard, it has to be acknowledged that in the (proposed) directives previously discussed, obligations addressed to Member States with regard to the prevention of the crime area at hand often appear to be formulated in rather abstract terms, requiring Member States only to take “appropriate measures” or “appropriate action”, or to “promote” something (see e.g. Article 18 of Directive 2011/36).<sup>27</sup> In such cases, it has not been specified what the obligation precisely entails, thus leaving it to Member States to decide what action(s) it considers suitable for the crime area at hand. Thereby, no harmonising effect is being caused. And although such abstract obligations can probably not be considered measures “to support” Member State actions in the field of crime prevention, they might be taken as “promoting” them. Consequently, with some caution I dare to conclude that for preventive measures of this kind (i.e. the ones formulated in abstract terms) Article 84 TFEU can be relied on instead of Article 83 TFEU. With regard to these preventive measures, it would therefore be justified if future legislation clarifies that Article 84 TFEU has been invoked. Would these measures continue to be laid down in directives, only the explicit mentioning of Article 84 TFEU, next to Article 83 TFEU, would be required (previous and prevailing regulations show combined references to harmonisation competences and Article 84 TFEU too). Would a regulation be preferred, a separate instrument is obviously required, for substantive criminal law provisions can only be adopted by means of minimum rules in directives.

#### 4 Final Remarks

Under the heading of Article 83(1) and (2) TFEU, quite a number of directives have meanwhile been adopted that, amongst other things, provide for common norms with regard to the definitions of offences and penalties – in accordance with the wordings of both paragraphs of Article 83 TFEU. Oftentimes, common

<sup>26</sup> Supra note 7.

<sup>27</sup> Idem. See for instance paragraph 1 of Article 18 that reads as follows: “Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings”.

provisions related to the general part of substantive criminal law as well as prescriptions for establishing national jurisdiction over the harmonised crimes have been included too, but they have been assessed as a logical fit whereas these provisions do not alter the substantive criminal law character of a directive. But that many of these directives also provide for a variety of ancillary measures that fall outside the scope of substantive criminal law 'proper' (such as obligations relating to crime prevention or sufficient resources) raises issues of transparency and quality of legislation at least (see Section 3). Following, after all, the assumption that Article 83 TFEU *cannot* be invoked for the adoption of non-substantive criminal law measures, the question has therefore been raised on what precise legal basis the many ancillary measures could be taken and should have been taken in cases where they are meant to accompany Article 83 TFEU-based substantive criminal law provisions.

Whereas an exhaustive answer to this question could not be given, it has been argued that Article 82(1) TFEU should be relied on for the creation of common obligations with regard to the training of authorities and staff. It has, moreover, been suggested that Article 84 TFEU could be relied on for obligations with regard to crime prevention, be it only for the obligations that were formulated in abstract, general terms. Explicit references to these legal bases, whenever relevant, would bring much-needed clarifications to all applicable legal foundations and their (perceived) meaning and scope.

Still, for several other types of measures ancillary to substantive criminal law provisions, the question of what their legal basis actually is remains unsolved. This applies, for example, to obligations under which Member States have to ensure the availability of effective investigative tools,<sup>28</sup> or have to establish national rapporteurs or equivalent mechanisms.<sup>29</sup> It also applies to obligations in the field of crime prevention that have not been formulated in abstract terms, but, instead, prescribe relatively clearly what Member States are supposed to do. An example of such a provision has been laid down in Article 21 of Directive 2011/93 in which Member States are required to "take appropriate measures to prevent or prohibit" the advertisement of abuse opportunities and child sex tourism.<sup>30</sup> Such and similar clearly-worded obligations<sup>31</sup> do have a harmonising

28 Draft Article 18 of the proposed directive on environmental crime, *supra* note 1; Article 9 of Directive 2014/62 on euro counterfeiting, *supra* note 5; Article 9(4) of Directive 2011/36 on human trafficking, *supra* note 7.

29 Article 19 of Directive 2011/36 on human trafficking, *supra* note 7.

30 *Supra* note 10.

31 See for another example of such a provision Article 10 of Directive 2014/62 on counterfeiting: "Member States shall ensure that during criminal proceedings the examination by the National Analysis Centre and Coin National Analysis Centre of

impact due to which Article 84 TFEU cannot be relied on. For these kind of ancillary measures too, clarity on their legal foundations is demanded. I therefore look forward to diving deeper into the matter, and to reading additional or other scholarly insights on proper legal foundations for the adoption of EU-level measures ancillary to the harmonisation of substantive criminal law.

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suspected counterfeit euro notes and coins for analysis, identification and detection of further counterfeits is permitted without delay. The competent authorities shall transmit the necessary samples without any delay, and at the latest once a final decision concerning the criminal proceedings has been reached”.