

RECENT ATTEMPTS OF SUPRANATIONALIZATION IN THE THIRD PILLAR OF THE EUROPEAN UNION

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Abstrakt v rodném jazyce

Policijná a súdna spolupráca v trestných veciach, ktorá tvorí obsah tzv. tretieho piliera Európskej únie (EÚ) sa vyznačuje niekoľkými špecifikami voči ostatným pilierom EÚ postupy. Avšak, odhliadnuc od očakávaného zrušenia pilierovej štruktúry Lisabonskou zmluvou, ktorej osud nie je v čase spísania príspevku jednoznačný, aj v súčasnosti je vývoj v tomto pilieri z právneho hľadiska pozoruhodný. Existujú totiž legislatívne návrhy, ktoré upravujú danú problematiku, no zároveň znamenajú pomerne zásadný prielom do medzivládnej povahy tohto piliera. Sú nimi návrh smernice o cezhraničnom vymáhaní dopravných priestupkov a návrh smernice o trestnoprávnej ochrane životného prostredia.

Klíčová slova v rodném jazyce

Európska únia, Pilierová štruktúra, policijná a súdna spolupráca v trestných veciach, návrh smernice o trestnoprávnej ochrane životného prostredia, návrh smernice o cezhraničnom vymáhaní v oblasti cestnej bezpečnosti, supranacionalizácia, integračný proces.

Abstract

Police and Justice Cooperation in Criminal Matters, which forms nowadays the Third Pillar of the European Union has a specific nature, compared to the other pillars. Nevertheless, not mentioning the expected repeal of the pillar structure by the Lisbon Treaty, the future of which is to the date unclear, also in present days we can observe some very interesting developments in this pillar. There are legislative proposals on the subject matter falling within the remit of the Third pillar, but they also mean a very substantial interference to the intergovernmental character of this pillar; being it the Proposal for a Directive on the protection of the environment through criminal law and the Proposal for a Directive cross-boarder enforcement in the field of road safety.

Key words

European Union, Police and Justice Cooperation in Criminal Matters, Proposal for a Directive on the protection of the environment through criminal law, Proposal for a Directive on cross-boarder enforcement in the field of road safety, Supranationalization, Integration process.

1. INTRODUCTION

Police and Justice Cooperation in Criminal Matters, which forms nowadays the Third Pillar of the European Union has a specific nature, compared to the other pillars. Nevertheless, not mentioning the expected repeal of the pillar structure by the Lisbon Treaty,¹ the future of which is to the date unclear, also in present days we can observe some very interesting developments in this pillar. There are legislative proposals on the subject matter falling within the remit of the Third pillar, but they also mean a very substantial interference to the intergovernmental character of this pillar; being it the Proposal for a Directive on the

¹ OJ C 306 of 17 December 2007, p. 1.

protection of the environment through criminal law and the Proposal for a Directive facilitating cross-boarder enforcement in the field of road safety.

The outline of this article shall be following: After brief description of the development of the Third pillar of the EU, together with envisaged reform by the Lisbon Treaty. Then, the legislative process leading to the adoption of the Proposal for a Directive on the protection of the environment through criminal law will be analyzed in more detail. An analysis of another proposal, for Proposal for a Directive on the protection of the environment through criminal law will follow, with comparison of these two legislative proposals and also with short analysis of stance of the Czech Republic on them.

2. A BRIEF OVERVIEW OF THE POLICE AND JUSTICE COOPERATION IN THE EUROPEAN UNION.

The Police and Justice Cooperation in the Criminal Matters forms the so-called third pillar of the European Union, which was established by the Treaty on the European Union,² signed in 1992 in Maastricht.³ Police and judicial cooperation was established in the Title VI of the Treaty, in the Article K.1. The Third pillar has been constructed as an intergovernmental one, of a different nature from the Community Pillar, characterized primarily by:

- A range of different legal instruments was established – joint positions, joint actions and conventions were used instead of regulations, directives and decisions;
- A construction of different decision-making structures – Directorial Committees, Coordinating Committee⁴ with Justice and Home Affairs Council formed a new structure, leaving the Commission and particularly the European Parliament and the Court of Justice with significantly less competences as in the Community pillar;
- A possibility of „communitarization“ of some of the Third pillar subject matter.

Naturally, this is not the fully exhaustive list of the distinctive characteristics of the Third pillar under the Treaty on the European Union; it is only the selection of the most important components relevant to our interest.

Very important developments were enacted by the Treaty of Amsterdam,⁵ signed in 1997. Judicial cooperation in civil matters was transferred into the Community pillar and the Third pillar was shrunk to its present form encompassing police and judicial cooperation in criminal matters.⁶ The Third pillar was shaped into its present-day form, with only minor

² OJ C 191 of 29 July 1992, p. 1.

³ The author is fully aware of fact that European cooperation in police and justice matters, both civil and criminal, dates well back before 1992, with 1970s TREVI group, as well as the Schengen conventions. Nevertheless, since these developments are described in detail elsewhere, this article primarily focuses on the most recent developments.

⁴ Know also as „K.4 Committee“.

⁵ OJ C 340 of 10 November 1997, p. 1.

⁶ Although there were suggestions for the communitarization of the entire pillar. For a throughout reflection of the negotiations leading to the adoption of the Treaty of Amsterdam, see eg. Moravcsik, A., Nicolaidis, C.: Explaining the Treaty of Amsterdam: Interests, Influence, Institution, Journal of Common Market Studies, 1999, Vol. 37, Issue, 1, pp. 59-85, ISSN 1468-5965.

developments introduced by the Treaty of Nice⁷ concerning primarily the introduction of the European Judicial Cooperation Unit, known as Eurojust, as well as amendments to the provisions concerning enhanced cooperation among the Member States.

Under the Article 29 of the Treaty on the European Union amended by the Treaty of Nice, „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.“ This objective is to be achieved by closer cooperation between competent police and justice authorities through the European Police Office (Europol) and Eurojust, as well as, by „approximation, where necessary, of rules on criminal matter in the Member States“.⁸

As we see, under these provisions, the approximation of criminal law shall be conducted under the provisions of the Title VI of The Treaty on the European Union amended by the Treaty of Nice. Article 31 provides for more details, stipulating that common action shall include inter alia ensuring compatibility in rules applicable in the Member States, as well as progressive adoption of „measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties.“⁹ But, what is important, this progressive adoption of aforementioned rules shall be, if we interpret wording of the Article 31 as *numerus clausus*, limited to the fields of organized crime, terrorism and illicit drug trafficking.

After the reform by the Treaty of Amsterdam, the Council, acting solely and without direct engagement of the other institutions of the EU, may adopt measures in the form of common positions, framework decisions, decisions and conventions, to achieve aforementioned aims. And if a Member State makes a declaration under the Article 35 of the Treaty on the European Union amended by the Treaty of Nice, the Court of Justice shall have jurisdiction „to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions“ and „on the validity and interpretation of the measures implementing them“.¹⁰

As we see, under the provisions of the Treaty on the European Union amended by the Treaty of Nice interpreted in the purely legal point of view, the field of criminal law is to remain largely intact by the law of the EU. Only some precisely defined and specific areas of it shall fall under the remit of the EU, with primarily only the Council of ministers acting to adopt the EU-wide measures. But, the reality of the integration process, as we were able to observe many times before, is somewhat different. Next section will explore it to the further detail, but before it, a few words on the Lisbon Treaty.

The Lisbon Treaty will bring, if coming into the force, a substantial reform of the Third pillar, as it abolishes completely the pillar structure of the EU. This means extension of the

⁷ OJ C 80 of 10 March 2001, p. 1.

⁸ Art. 29 of the Treaty on the European Union, amended by the Treaty of Nice. OJ C 321 E of 29 December 2006, p. 1.

⁹ Art. 31 of the Treaty on the European Union, amended by the Treaty of Nice. OJ C 321 E of 29 December 2006, p. 1.

¹⁰ Art. 35 of the Treaty on the European Union, amended by the Treaty of Nice. OJ C 321 E of 29 December 2006, p. 1.

procedures¹¹ and review mechanisms of the present-day Community pillar also to the police and justice cooperation in criminal matters. The respective provisions are laid down in the Title V (Area of Freedom, Security and Justice), in the Chapter 4 (Justice Cooperation in Criminal Matters) and Chapter 5 (Police Cooperation) of the Lisbon Treaty. The reform of primary law also envisages for the possibility of establishment of minimal rules concerning definitions and sanctions for criminal offences¹² by the directives of Parliament and the Council, enacted by the ordinary legislative procedure.¹³ Also, if there is a need for harmonization of criminal laws for effective implementation of a Union policy, directives can set minimal rules for definition of offences and sanctions.¹⁴

3. PROPOSAL FOR PROTECTION OF ENVIRONMENT THROUGH CRIMINAL LAW

3.1 LEGAL BASE AND EARLY ACTIONS

According to the aforementioned provisions of the EU primary law, it would be expectable for a proposal on criminal protection of the environment if it even would be adopted at all, to be in a form of the Third pillar act. As a practical example of a Proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007)51 final)¹⁵ shows us, reality of the integration process is somewhat different.

Protection of the environment constitutes one of the „essential objectives of the European Union,“ as the Court of Justice held,¹⁶ stipulated in Art. 2, 3(1), 6, 173 and 174 Treaty establishing the European Community as amended by the Treaty of Nice (TEC). However, studies have shown¹⁷ that sometimes only criminal penalties will have a sufficiently dissuasive effect to effectively implement this policy. This is not only because a criminal sanction demonstrates a social disapproval of a different nature from sanctions imposed under administrative or civil law, but also for sometimes other than criminal sanctions not being

¹¹ For more information on the reform of decision-making procedures in the Lisbon Treaty, see eg. Blahušiak, I.: Changes in the Decision-making Procedures of the EU in the Reform Treaty. In Days of public law : sborník abstraktů příspěvků z mezinárodní konference. 1. vyd. Brno : Masarykova univerzita, 2007. s. 900-912. ISBN 9788021044302.

¹² For the enumerated most serious criminal offences, the EU legislation can be adopted on the basis of the Art. 83, if there is a cross-boarder element of their nature, impact or a particular need to fight them on the common basis. For other offences, the Council can unanimously adopt such measures on the basis of criminal records and after consent of the Parliament.

¹³ I.e. present-day codecision procedure.

¹⁴ For a deeper reflection of the effects of the Lisbon Treaty on the present-day Third pillar of the EU, see Švarc, M.: Communitarization of the EU Third Pillar Today and According to the Lisbon Treaty. In: Sborník příspěvků z konference Cofola 2008 konané na PrF MU 13.-14.5.2008. 1. vyd. Brno: 2008, ISBN 978-80-210-4630-6, p. 391.

¹⁵ Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007)51 final). Available [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007PC0051:EN:HTML>, cit. 7. 11. 2008.

¹⁶ See eg. Case C-213/96 Outokumpu oy, para. 32.

¹⁷ For further details see European Commission: Environmental crime. Available [online] <http://ec.europa.eu/environment/crime/index.htm#studies>, cit. 7. 11. 2008.

dissuasive enough. Also, the means of criminal investigation are more powerful than those of administrative or civil law, as well as bearing an additional guarantee of impartiality.¹⁸

Thus, Europe-wide action was adopted as early as 1998 by the Council of Europe in the form of the Convention on the Protection of the Environment through Criminal Law.¹⁹ EU action followed swiftly; the European Council meeting in Tampere in 1999 asked for efforts to agree on common definitions, incriminations and sanctions for, among other sectors, environmental crimes.²⁰ In the line with the provisions of the primary law, Denmark in February 2000 presented an initiative for a Framework decision on combat with serious environmental crime. Justice and Home Affairs Council then agreed, in September 2000, that such legislation should have been established. So far, we see no deviations from a standard procedure for approximation of criminal law laid down in primary law.

3.2 FIRST PROPOSAL FOR A DIRECTIVE (2001) – A PRIME EXAMPLE OF BATTLE OF INSTITUTIONS

The „interesting“ part of the legislative process began when the Commission adopted a proposal for a directive (sic!) on the protection of the environment through criminal law, in March 2001 (COM(2001)139 final)²¹ The purpose was virtually the same as that of a proposal for the aforementioned framework decision. This proposal was then communicated to the Council and the European Parliament, the latter of which adopted its report²² with several amendments in September 2002.

However, the Council did not follow the usual pattern for the first reading of the codecision procedure, did not discuss the Commission proposal and adopted in January 2003 the Framework Decision 2003/80/JHA²³ on the protection of the environment through criminal law. Thus we can observe a clear reluctance of the Council to supranationalize any provisions of criminal law, being in direct contradiction to the approach of the Commission and the Parliament.²⁴

¹⁸ See Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007)51 final). Available [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007PC0051:EN:HTML>, cit. 7. 11. 2008, p. 2.

¹⁹ Convention on the Protection of the Environment through Criminal Law. Available [online] <http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm>, cit. 7. 11. 2008.

²⁰ See Tampere European Council 15 and 16 October 1999. Presidency conclusions. Available [online] http://www.europarl.europa.eu/summits/tam_en.htm, cit. 7. 11. 2008, points 1-10 in particular.

²¹ Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law (COM(2001)139 final). Available [online] http://eur-lex.europa.eu/Result.do?T1=V5&T2=2001&T3=139&RechType=RECH_naturel&Submit=Search, cit. 7. 11. 2008.

²² Report on the proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law (COM(2001)139 final). Available [online] <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A5-2002-0099&language=EN>, cit. 7. 11. 2008.

²³ OJ L 29 of 5 February 2003, p. 55-58.

²⁴ If we employ political theory, this is a shining example of conflict of supranational (the Commission, the Parliament) and intergovernmental institutions (the Council), each defending its obvious stance. However, what is of particular concern in this case, are the next steps of the institutions and the final outcome of the legislative process.

The Commission did not give up, though. It brought the Council to the Court of Justice in a action for annulment of Framework Decision 2003/80/JHA (Case C-176-03),²⁵ claiming that the Framework decision „encroaches upon the powers which Article 175 [T]EC confers on the Community, and, accordingly, the entire framework decision being indivisible, infringes Article 47 [T]EU.“²⁶ In the Commission’s point of view, the legal regulation contained in the disputed framework decision should have been properly adopted on the basis of Article 175 Treaty on the European Union as amended by the Treaty of Nice.

The Court held that, while „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...as an essential measures for combating serious environmental offences“ and, which is of more importance here, „from taking measures which relate to the criminal law of the Member States which it considers necessary“²⁷ in order to ensure the effectivity environmental protection. The Court went on, when ascertaining that „the competence of the Community cannot be called into question by the fact that Articles 135 and 280(4) [T]EC reserve to the Member States...the application of national criminal law and the administration of justice.“²⁸ In the light of these considerations, the Court annulled the Framework Decision 2003/80/JHA.

3.3 THE SECOND PROPOSAL FOR A DIRECTIVE (2007) – THE COURT OPENS UP THE WAY

The Commission, in the light of the Judgement, adopted in November 2005 a Communication (COM(2005)583 final/2)²⁹ outlining its views on the consequences of the case C-176/03. It considered necessary to withdraw its proposal on the protection of environment through the criminal law of 2001 and to present a new proposal. This new proposal, presented as COM(2007)51 final,³⁰ took in account the provisions of the annulled framework decision and legislative development since 2001.

Nevertheless, in the spite of the fact, that the Commission was ascertained by the Court of Justice that it did possess a right to adopt legislation on approximation of criminal laws in the EU, the predicates of this competence were still unclear. The judgement in the Case C-440/05 Commission v. the Council,³¹ regarding annulment of the Framework Decision of the Council

²⁵ Case C-176-03 Commission of the European Communities v. Council of the European Union.

²⁶ See paras. 41-53 of the Case C-176-03 Commission of the European Communities v. Council of the European Union.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgement of 13 September 2005 (Case C-176/03 Commission v Council) (COM(2005)583 final/2). Available [online] http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0583en01.pdf, cit. 7. 11. 2008.

³⁰ Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007)51 final). Available [online] http://eur-lex.europa.eu/Result.do?T1=V5&T2=2007&T3=51&RechType=RECH_naturel&Submit=Search, cit. 7. 11. 2008.

³¹ Case C-440/05 Commission of the European Communities v. Council of the European Union.

2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.³²

The Court held in its judgement, while annulling the disputed Framework Decision, that „since requirements relating to environmental protection, which is one of the essential objectives of the Community, must, according to Article 6 [T]EC, be integrated into the definition and implementation of Community policies and activities.“³³ The Community legislative may therefore decide to promote environmental protection and has a right to require Member States to introduce „effective, proportionate and dissuasive criminal penalties“³⁴ by the competent national authorities. However, this competence is not unlimited; the Court did not hold that the Community has a right to specify the type and level of the criminal sanctions.³⁵

This ruling made it clear, how the Commission can act when proposing a new legislation in the field that could fall within the remit of the Third pillar; it has a right to propose such legislation, nevertheless, only under strict conditions of effectiveness, proportionally and dissuasiveness. In the addition, the sanctions can be imposed only when a need arises when implementing a Community policy and the Commission has not right to specify the nature of criminal sanctions.³⁶

3.4 LEGISLATIVE PROCESS OF THE SECOND PROPOSAL

The Commission presented its Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007)51 final; hereinafter „the Second proposal“) before the ruling of the Court in the Case C-440/05. It included not only definitions of criminal conduct, but also laid down minimal penalties. The latter point was amended in the light of aforementioned judgement during the first reading in the Parliament, by omitting the relevant provisions.

The proposal itself is based on Article 175 TEC, being a compromise between the ambitious first proposal and eurosceptics opposing the supranationalization of criminal laws. It establishes a minimum set of environmental offences that should be considered criminal throughout the Community when committed intentionally or with serious negligence. Criminal sanctions shall be applied only for natural persons; legal persons should be punished with non-criminal sanctions, making the proposal easier to implement for the Member States without enacted criminal liability of legal persons, such as the Czech Republic.

The respective offences are laid down in the Article 3 of the Proposal.³⁷

³² OJ L 255 of 30 September 2005, p. 164-167.

³³ See Case C-440/05 Commission of the European Communities v. Council of the European Union , paras. 58-66

³⁴ Ibid.

³⁵ See *ibid.* a contrario.

³⁶ Compare the Art. 83 (2) of the Treaty on Functioning of the EU.

³⁷ List of offences reproduced in the wording adopted by the European Parliament. See European Parliament legislative resolution of 21 May 2008 on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007)51 final). Available [online]

- The discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants;
- The collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or a broker (waste management) which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants;
- The shipment of waste , where this activity falls within the scope of Article 2(35) of Regulation 2006/1013/EC³⁸ on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
- The operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants;
- The production, processing, handling, use, holding, storage, transport, import, export and disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants;
- The killing, destruction, possession and taking of specimens of protected wild fauna or flora species, except for cases when the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;
- Trading in specimens of protected wild fauna and flora species or parts or derivatives thereof, except in cases where the conduct concerns a negligible quantity of those specimens and has a negligible impact on the conservation status of the species;
- Any conduct which causes the significant deterioration of a habitat within a protected site;
- The production, importation, exportation, placing on the market or use of ozone-depleting substances.

As we can see, all the offences, except for the first one, require their unlawful commission, which is defined in the Art. 2 of the Proposal as infringing Community legislation listed in the annex of proposal, or a law, an administrative regulation or a decision taken by a competent authority in a Member State that gives effect to this Community legislation. In the contrast to the first Commission proposal, the new offences concerning deterioration of a protected

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0215>, cit. 7. 11. 2008.

³⁸ OJ L 190 of 12 July 2006, p. 1-98.

habitat and illegal shipments of waste were added. The Proposal does not provide for interpretation of vague legal terms of substantial damage and serious injury, which are to be interpreted according to the legal traditions of each Member State. Also, a list of aggravating circumstances is provided.³⁹ In the light of the aforementioned Court judgement C-440/05, the provision on sanctions states only that these are to be effective, proportionate and dissuasive.

The European Parliament adopted the Proposal in May 2008 in the first reading of the codecision procedure. Besides considerable changes to the definitions of the respective offences and providing for new definitions of unlawful conduct, as well as several other definitions, it omitted provisions on criminal sanctions contained in the original proposal of the Commission.⁴⁰ The Council this time did not adopt its own initiative, but also adopted⁴¹ the Commission's proposal in October 2008. In the time of writing, the final publication in the Official Journal is expected. Thus, a very complicated and lengthy legislative process is expected to be finished shortly, with the approved directive coming into force in 2010.

The directive has set an important precedent. Although its application will be limited to the cases of infringement of selected instruments of Community law and respective provisions of laws of Member states, the intergovernmental nature of the selected matters falling clearly under the scope of the Third pillar has been changed to the supranational one. And this is a very important development in the integration process, achieved even before final resolution on fate of the Lisbon Treaty. As some have already put it,⁴² it is not unimaginable that other provisions of criminal law will be supranationalized this way. Before examining of one of such examples in the next chapter, we briefly discuss the position of the Czech republic on the Proposal.

3.5 CZECH REPUBLIC AND THE SECOND PROPOSAL

The positions on the second Commission proposal in the Czech Republic can be simply characterized as divided. Some Czech Members of the European Parliament supported its adoption as necessary⁴³, while others disputed factual europeanisation of criminal law.⁴⁴ Czech Senate adopted a careful negative stance, arguing that approximation of criminal laws

³⁹ These circumstances are defined in Art. 5 and 7 of the Proposal as a particularly serious result of an offence, such as death or serious injury to a person, substantial damage to the environment as well as the commission of the offence in the framework of a criminal organization.

⁴⁰ European Parliament legislative resolution of 21 May 2008 on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2007)0051 final). Available [online] <http://www.europarl.europa.eu/oeil/file.jsp?id=5445232>, cit. 7. 11. 2008.

⁴¹ See Communiqué de Presse, 2899ème session du Conseil Justice et affaires intérieures, Luxembourg, le 24 octobre 2008. Available [online] <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/299&format=HTML&aged=0&lg=en&guiLanguage=en>, cit. 7. 11. 2008.

⁴² See eg. European Parliament: EU criminal law to protect environment. Available [online] http://www.europarl.europa.eu/news/expert/infopress_page/064-29450-140-05-21-911-20080520IPR29449-19-05-2008-2008-false/default_cs.htm, cit. 7. 11. 2008.

⁴³ See Zuzana Roithová: Trestněprávní ochrana životního prostředí. Available [online] <http://www.kdu.cz/default.asp?page=311&idr=135&IDCl=23653>, cit. 7.11. 2008; Jana Hybášková vítá kroky k trestněprávní odpovědnosti právnických osob. Available [online] <http://www.hybaskova.cz/hlavni/Jana-Hybaskova-vita-kroky-k-trestnepravni-odpovednosti-pravnickych-osob1%7E.html>, cit. 7. 11. 2008.

⁴⁴ See Europslanecký klub ODS: Odmítáme europeizaci trestního práva a poplatnou módní „zelenou“ ideologii. Available [online] <http://zpravy.ods.cz/prispevek.php?ID=6716>, cit. 7. 11. 2008.

shall be conducted only under provisions for intergovernmental cooperation in reasoned cases. However, under its view, the Commission did not provide for enough substantial evidence that such a harmonization is really needed in the proposed field. And, what is of our particular interest, it called for re-opening of the discussion of criminal protection of intellectual property rights.⁴⁵

Nevertheless, no substantial complications are expected in the Czech Republic during the implementation of the proposal, since relevant provisions are already reflected in the Act on Ecologic Damage, No. 167/2008 Coll.⁴⁶

4. OTHER POSSIBLE AREAS OF SUPRANATIONALIZATION. PROPOSAL ON CROSS-BOARDER ENFORCEMENT OF TRAFFIC OFFENCES

As was already mentioned above, the Directive on protection of the environment through criminal law has set an important precedent and further action is to be expected, also with the view of adoption of the Lisbon Treaty. There are several possible areas where such an action could be undertaken, with the protection of environment, intellectual property rights and transport being at the top of the imagine list.

4.1 PROPOSAL ON CROSS-BOARDER ENFORCEMENT OF TRAFFIC OFFENCES

The attention here is to be paid to a proposal in the field of transport – A Proposal for a Directive of the European Parliament and of the Council facilitating cross-boarder enforcement in the field of road safety (COM(2008)151 final, hereinafter „the Proposal“).⁴⁷ Although this proposal does not fall within the remit of criminal law and contains merely provisions of penal administrative law, it can consequently lead to the harmonization of criminal law provisions. If we perceive this proposal from a procedural point of view, it deals with cooperation of police and justice authorities of Member States which cannot be labeled as a civil one, and thus could be subsumed within the remit of the Third pillar of the EU.⁴⁸ These are the reasons why it is analyzed in more detail.

The Proposal is to help in reducing number of deaths and serious injuries by half till 2010⁴⁹ and also aims to put an end of a kind of positive discrimination of foreign drivers who are

⁴⁵ See Doporučení k vyjádření Senátu PČR k návrhu směrnice Evropského parlamentu a Rady o trestněprávní ochraně životního prostředí. Available [online] <http://www.senat.cz/xqw/xervlet/psssenat/original/40855/34526>, cit. 7. 11. 2008.

⁴⁶ Zákon č. 167/2008 Sb ze dne 22. dubna 2008 o předcházení ekologické újmy a o její nápravě a o změně některých zákonů.

⁴⁷ Proposal for a Directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety (COM(2008)151 final). Available [online] http://eur-lex.europa.eu/Result.do?T1=V5&T2=2008&T3=151&RechType=RECH_naturel&Submit=Search, cit. 7. 11. 2008.

⁴⁸ Nevertheless, from a substantial point of view, which has been adopted by the Commission, the proposal lays down the regulation of international transport and thus falls within the remit of the Community pillar. Still, as it is shown below, this proposal may have in future indirect impact on criminal law.

⁴⁹ This aim was set by the White paper European transport policy for 2010: time to decide. Available [online] http://ec.europa.eu/transport/white_paper/index_en.htm, cit. 7. 11. 2008. It accompanies other proposals of the Commission – on the equipement of motor vehicles with safety systems (See Proposal for a Regulation of the European Parliament and of the Council concerning type-approval requirements for the general safety of motor vehicles (COM(2008)316 final). Available [online] <http://eur->

often not sanctioned if they commit a traffic offence in a Member State different from that one of their residence. It is not the first initiative on the European level. Besides number of bilateral agreements, there is a Commission Recommendation on enforcement in the field of road safety (2004/345/EC),⁵⁰ focused, however, primarily on best enforcement practices. Also, the Third pillar Council Framework Decision 2005/214/JHA⁵¹ on the application of mutual recognition to penalties exists in this policy field. Nevertheless, it starts to apply only when the offender was obliged to pay a fine and has not done so.

As we can see, and as it was already mentioned above, procedurally we are dealing with the Third pillar policy, with some existing legislation. After seeing a clash between the Commission and the Council on the Proposal on Directive on protection of the environment through criminal law, one would expect a similar spectacular battle of institutions and integration paradigms here.

However, this is not the case. The Commission has chosen a pragmatic stance, basing its Proposal upon Art. 71(1)c TEC stipulating that the Council shall under codecision procedure lay down measures to improve transport safety. Also, the Commission clearly manifested that the Proposal „does not interfere with the application of Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (third pillar). The proposed directive applies to the phases before a final sanction has been imposed, whereas the framework decision starts to apply when the offender has not paid the fine and a final decision has been taken obliging him to do so.“⁵²

The Proposal itself introduces technical mechanisms and legal instruments for cross-boarder enforcement of selected traffic offences. It applies to the four offences enumerated in the Art. 1 of it: Speeding, Drink-driving, Non-use of a seat-belt and Failing to stop at a red traffic light. The substance of it forms the procedure of exchange of information between Member States, starting when an offence has been committed in a Member State other than the state of registration of the vehicle. The Member state of offence sends identification number and other relevant information to the Member State of registration via electronic network. The latter will then provide the former with identification of offender. Then the State of offence sends to the offender offence notification in the standardized form, together with imposed sanction,

lex.europa.eu/Result.do?T1=V5&T2=2008&T3=316&RechType=RECH_naturel&Submit=Search, cit. 7. 11. 2008), improvement of safety of pedestrians and other vulnerable road users (Proposal for a Regulation of the European Parliament and of the Council on the protection of pedestrians and other vulnerable road users (COM(2007)560 final). Available [online] http://eur-lex.europa.eu/Result.do?T1=V5&T2=2007&T3=560&RechType=RECH_naturel&Submit=Search, cit. 7. 11. 2008), as well as road safety management (Proposal for a Directive of the European Parliament and of the Council on road infrastructure safety management (COM(2006)569 final) Available [online] http://eur-lex.europa.eu/Result.do?T1=V5&T2=2006&T3=569&RechType=RECH_naturel&Submit=Search, cit. 7. 11. 2008).

⁵⁰ OJ L 111 of 17 April 2004, p. 75-82.

⁵¹ OJ L 76 of 22 March 2005, p. 16-30.

⁵² Proposal for a Directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety (COM(2008)151 final). Available [online] http://eur-lex.europa.eu/Result.do?T1=V5&T2=2008&T3=151&RechType=RECH_naturel&Submit=Search, cit. 7. 11. 2008, p. 3.

which can be only in a pecuniary form.⁵³ As a last resort, in the case of non-payment of fine, the Council Framework Decision 2005/214/JHA will apply.

The European Parliament approved⁵⁴ the proposal in the responsible committee in September 2008, with some amendments concerning further specification of procedure in the case of non-payment of fine,⁵⁵ enforcement of protection of personal data, information of drivers when crossing borders and establishment of EU-wide procedures for traffic controls. Also, the Parliament called for revision after two years of application and possible extension of the scope of the directive on driving under influence of drugs, use of mobile phone when driving uninsured driving and driving without license.⁵⁶ Both the Parliament and the Council are expected to formally approve the Proposal in December 2008, with its coming into the force within 12 months.

As we can see, also this Proposal, although not dealing precisely with the matters of criminal law, at least procedurally affects the remit of the Third pillar of the EU and constitutes thus another vivid example of creeping supranationalization of it. On the contrary to the Directive on protection of the environment through criminal law, the legislative process of this proposal is by the time of writing rather swift, without any major institutional battles.

4.2 POSITION OF THE CZECH REPUBLIC ON THE PROPOSAL

The proposal has been, to the time of writing, examined by the Senate. The Committee on European Affairs asked the Committee on economy, agriculture and transport for its opinion, which was delivered in July 2008. The latter committee took a negative view on the proposal, stating that although it supports the adoption of effective and inevitable measures at the European level, it does not perceive the Proposal as such measures. It asked the Commission to further elaborate its argumentation and for the deeper assessment of economic impacts of the Proposal.⁵⁷

The Senate, nevertheless, in its resolution no. 498 of October 2008 held that it supports initiatives for better cross-border enforcement and recommended to restrict its scope to the offences detected and recorded at the place of commission, without having been solved by a control organ. It also highlighted the importance of dissemination of information among drivers when crossing the borders.⁵⁸

⁵³ That means, no administrative measures, such as withdrawal of driving licence, can be taken.

⁵⁴ See Report on the proposal for a directive of the European Parliament and of the Council facilitating cross-border enforcement in the field of road safety (COM(2008)151 final). Available [online] <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2008-0371&language=EN>, cit. 7. 11. 2008.

⁵⁵ In this case, the non-compliance will be communicated to the Member State of offender's residence, which also takes up the responsibility for enforcement.

⁵⁶ It should be noted that driving without license is in the Czech Republic criminalized in the para. 180d of the Criminal Code. See Zákon č. 140/61 Sb., Trestní zákon.

⁵⁷ 289. Rozhodnutí výboru pro hospodářství, zemědělství a dopravu. Available [online] http://www.senat.cz/organy/index.php?lng=cz&ke_dni=09.07.2008&par_2=185, cit. 7. 11. 2008.

⁵⁸ 498. Rozhodnutí Senátu. Available [online] <http://www.senat.cz/xqw/xervlet/psssenat/original/48524/41185>, cit. 7. 11. 2008.

The latter Senate resolution may seem surprisingly pro-integrational, compared to the other analyzed resolutions; however, it is in the line with official position of the Czech Republic, stated in its sectoral priorities for the Presidency in 2009, where an effort leading to the final adoption of the Proposal is stipulated.⁵⁹

5. CONCLUSIONS

As we have seen, both proposals examined in this article affect the Third pillar of the EU. Also, both proposals are being adopted by the codecision procedure, in the form of directive. This can be perceived as a clear sign of supranationalization of policy matters falling within the Third pillar remit.

Nevertheless, this supranationalization was not unnoticed at the European level in the case of the Proposal for a Directive on the protection of the environment through criminal law, with some fierce institutional clashes, with legislative process lasting several years. However, the supranational method of integration finally prevailed.

The Proposal for a Directive facilitating cross-boarder enforcement in the field of road safety is also to be perceived as a sign of prevalence of supranational method of integration. However, from a procedural point of view, its adoption is a rather different story. The legislative process in this case saw by the time of writing almost no major institutional clashes and can be labeled a very swift one, possibly lasting less than one year.

The Czech Republic adopted quite a careful stance to both proposals. In both cases, the Senate clearly stipulated its preference for retaining intergovernmental method of integration for the Third pillar matters. Nevertheless, a symptomatic shift of position can be observed in the case of the latter proposal, outspoken by the Czech delegation on the Council meeting, which can be paraphrased as „we do not support this method of integration, but we consider aim to be justified and since the majority supports it, we will complicate its adoption“.

To conclude, what does the adoption of both proposals mean for the integration process? Since both proposals can be perceived as precedents, further supranationalization of the Third pillar is to be expected, irrespectively of the fact whether the Lisbon Treaty will be adopted or not.⁶⁰

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⁵⁹ Sektorové priority předsednictví ČR v Radě Evropské unie 2009. Available [online] <http://www.mzv.cz/servis/soubor.asp?id=34651>, cit. 7. 11. 2008.

⁶⁰ And even if it is adopted, these developments will not loose their significance, because they can be at least seen as mean of smooth transition to the new structure of the EU and evidence of its viability.

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