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The Lisbon Treaty and EU Criminal law

A Feasibility Analysis For The Creation of Deterrent Legislation Against White-Collar Crime at EU Level

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Preface

This thesis is the end of one era but the beginning of another. I would like to thank my family and friends; it is a privilege to have you all in my life.

I want to dedicate this thesis to my loving husband David Hoey for his support, advice and companionship and moreover for his love. I’m forever grateful.
*Qui sentit commodum debet sentire et onus.*

– He who obtained an advantage ought bear the disadvantage as well.
# Table of Contents

Abstract .......................................................................................................................... 6

Abbreviations ................................................................................................................ 8

1 Introduction .................................................................................................................. 9
   1.1 Background and problem formulation ................................................................. 9
   1.2 Definitions ............................................................................................................. 11
   1.3 Question at issue and purpose ............................................................................ 11
   1.4 Method and material ........................................................................................... 11
   1.5 Delimitation ......................................................................................................... 13
   1.6 Disposition .......................................................................................................... 14

2 White-Collar Crime .................................................................................................... 16
   2.1 Introduction .......................................................................................................... 16
   2.2 Understanding white-collar crime ....................................................................... 16
   2.3 White-collar crime in the legal system ............................................................... 17

3 Anglo-Irish Bank: A Legal Crisis? ............................................................................ 20
   3.1 Introduction .......................................................................................................... 20
   3.2 Background .......................................................................................................... 20
      3.2.1 The Investigation of Anglo-Irish Bank ......................................................... 21
      3.2.2 Anglo-Irish Bank and the Quinn family ....................................................... 22
      3.2.3 The current legal position in Ireland ......................................................... 24

4 The Competence of EU Criminal Law ..................................................................... 27
   4.1 Introduction .......................................................................................................... 27
   4.2 The scope of criminal law ................................................................................... 27
   4.3 Legislative competence of the EU in criminal law ............................................. 29
      4.3.1 Article 83 TFEU ............................................................................................ 29
      4.3.2 Definition of offences and sanctions .......................................................... 31
      4.3.3 Crimes against the financial interest of the union ...................................... 33
      4.3.4 The Stockholm programme ......................................................................... 35
      4.3.5 The principles of conferral, subsidiarity and proportionality ..................... 36

5 EU Directives .............................................................................................................. 40
   5.1 Introduction .......................................................................................................... 40
   5.2 The Proposed Directive on the fight against fraud to the Union's financial interests ........................................................................................................... 40
      5.2.1 The proposed directive’s scope ..................................................................... 40
      5.2.2 Legal basis ..................................................................................................... 41
5.3 The Proposed Directive on bank recovery and resolution ............................................. 43
5.3.1 The proposed directive’s scope .............................................................................. 43
5.3.2 Legal basis .............................................................................................................. 44
5.4 Member State’s response on criminal law based on article 325 TFEU ................. 44

6 Deterrent Legislation ........................................................................................................ 47
6.1 Introduction ................................................................................................................ 47
6.2 The scope of “deterrent” ............................................................................................ 47
6.3 Practical definition ....................................................................................................... 49

7 Conclusion ......................................................................................................................... 53
Abstract

The hypothesis of this thesis is that deterrent regulation could have had prevented or, arguably, at least minimised the myriad forms of fraudulent misrepresentation at the core of the economic crisis. Therefore, white-collar crime had, and has, a central position in causing the economic crisis and deterrent regulation will be essential in reducing the risk of a crisis of this scale infecting in our legal systems again. The background has been evaluated through the definition and origin of white-collar crime and Anglo-Irish bank has been used as a demonstrative example to illustrate this hypothesis.

The EU’s competence in creating criminal law is examined, through primary law, with the aim of elucidating the boundaries that are provided in the Lisbon Treaty. Before this, however, an evaluation of the definition of criminal law is necessary to establish the relationship between criminal law and administrative sanctions. The relevant bases in the context of the EU’s competence are: article 83 TFEU, and article 325 TFEU and the EU’s outspoken goals for the Union in the Stockholm programme. Article 83 TFEU is examined as it gives the EU an explicit legal basis for the adoption of criminal directives, thereby ensuring the effective implementation of EU policies that have been subjected to harmonisation measures. Further, article 325 TFEU stipulates the EU’s priority in fighting “fraud and any other illegal activities”. Through The Proposed Directive on the fight against fraud to the Union’s financial interests the article is given a supranational character in creating criminal law on the area of law.

The Proposed Directive on the fight against fraud to the Union’s financial interest and The Proposed directive on bank recovery and resolution have been found, through their scope and legal bases, to cover what could be argued to be different essential tools in the fight against white-collar crime. The first proposed directive presents a wide range of offences and holds both natural and legal persons liable by “deterrent” legislation i.e. minimum prison sentences. The second proposed directive is presented as a tool for the prevention of the occurrence of another economic crisis utilising the means of administrative sanctions in article 114 TFEU. However, whilst not classified as a “deterrent” (in accordance with the interpretation of deterrent found in article 325 TFEU), administrative sanctions has been given the competence to have a
“punitive character” and therefore a controlling function without the competence of criminal law. However, in order to prevent and deter crimes of the magnitude of those that occurred at Anglo-Irish bank, it is argued that its legislation must be made sufficiently “deterrent” by incorporating a fear of being caught, given lengthy sentences and public shaming by thorough criminal investigations, proceedings, trials, convictions and/or a criminal records.
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>COM</td>
<td>Communication from the Commission</td>
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<td>Commission</td>
<td>The European Commission</td>
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<tr>
<td>Council</td>
<td>The European Council</td>
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<td>Parliament</td>
<td>The European Parliament</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
<td>European Union</td>
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<td>GDP</td>
<td>Gross domestic product</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>The Garda</td>
<td>The police force of Ireland</td>
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<td>SWD</td>
<td>Commission staff working document</td>
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1 Introduction

1.1 Background and problem formulation

The collapse of banks and corporations, amid revelations of false accounting and fraudulent activity, has been felt around the world. These crimes have directly affected the citizens of EU states in the form of billion Euros bailouts that are still being paid off. This impacts the citizens of these states in the form of tax increases and the reduction, or complete cessation, of some public services.\(^1\) Through the world's hundred largest economic entities, fifty-one are companies and forty-nine are countries. This implied power should be reflected per safeguards and legislation.\(^2\)

Typically, the fines and penalties for white-collar crime are disproportionately more lenient than the punishment for offences committed by the “average citizen”.\(^3\) Judgment and punishment of white-collar crime will vary depending on the accepted norms of the community in which the crime is being perceived. Punishment is a societal decision that is coloured by societies perceptions, experiences and acceptance.\(^4\) However, without a social desire for change no change can be effected or implemented. Hence societal acceptance and apathy towards white-collar crime can be seen to be both symptomatic and indeed causal of the crimes themselves. Regulators and prosecutors face enormous difficulties in attributing criminal blame and punishment is limited, as corporations cannot be sent to jail. Fines have been shown to be woefully inadequate as a deterrent, often being an insignificant fraction of the companies overall assets.\(^5\)

At present, regulations in this area of law are generally made and applied within nation-states. These regulations then apply only within the borders of this nation-state and are, at present, not binding over the entire EU. A multinational corporation can use the fact that these regulations are limited by borders to ‘shop’ for a jurisdiction that best suits their agenda while also allowing them to operate freely in the rest of the EU.

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\(^1\) Economic Adjustment Programme for Ireland, European Commission and Summary of 2013 Budget Measures Policy Changes, December 5, 2012, Ireland.
\(^2\) Voiculescu, p 81.
\(^3\) Friedrichs, p 360 and Croall, p 114.
\(^4\) Reiman, p 53 et seq.
\(^5\) Voiculescu, p 89.
The introduction of the Lisbon Treaty in December 2009 entailed that the power of creating criminal law, which was under the former third pillar, had emerged into the EU’s competence under the first pillar. This relocation of competence has raised numerous questions with regard to the width of the criminal law competence of the EU. This thesis aims to analyse The Proposed Directive of the European Parliament and the Council on the fight against fraud to the Union's financial interests by means of criminal law (from here on named The Proposed Directive on the fight against fraud to the Union’s financial interests) which is one of the first directives in criminal law that has been proposed in the aftermath of the economic crisis.7 The proposed directive is the first to have its legal basis in article 325 TFEU, the aim of which is to fight fraud against EU interests. The proposed directives legal basis of article 325 TFEU is controversial and article 83 TFEU has been proposed as being applicable within the proposed directive’s scope. Misconduct under the purview of the proposed directive is argued to be applicable under the legal auspice of organised crime and fraud. The Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms (from here on called The proposed Directive on bank recovery and resolution) is the EU’s outspoken solution, aimed at preventing any future economic crisis from having the legal grounds to occur.8 This proposed directive has its legal foundation in article 114, which aims to regulate financial institutions through administrative sanctions. The contribution of these two directives could demonstrate the feasibility of contemporary solutions for white-collar crime through an examination of the legal bases of criminal law, administrative sanctions and deterrent found in article 83 TFEU, article 114 TFEU and article 325 TFEU respectively.

It is with this background that this thesis will evaluate if it is feasible to create deterrent regulation at EU level utilising the Lisbon treaty, which has provided enhanced competence within criminal law to create effective sanctions against white-collar crime.

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6 Asp, p 14.
8 COM (2012) 280 final
1.2 Definition of Feasibility

Throughout this thesis the word “feasibility” is used. For the sake of brevity and expediency within the main text the definition of feasibility applicable within the context of this thesis’ subject matter is found here. It is as follows:

Feasibility: Defined as aiming to provide an evaluation of whether the legal requirements that are set by the hypothesis are applicable in the relevant legal system. In this case EU law.

1.3 Question at issue and purpose

It is the intention of this thesis to answer the question of whether it is feasible to create deterrent legislation against white-collar crime at EU level. This thesis accordingly aims to evaluate the possibilities for creating criminal law and to examine the possibility of creating deterrent sanctions in the fight against white-collar crimes. For the purpose of understanding the background of the hypothesis, The Proposed Directive on the fight against fraud to the Union’s financial interests and The Proposed Directive on bank recovery and resolution will be explained through one given example - Anglo-Irish Bank, which will demonstrate the lack of legislation in place to counteract white-collar crime. The proposed directives have been chosen because their foundation rests on criminal law, administrative sanctions and the definition of “deterrence” As the proposed directives are based on the EUs competence in creating criminal law through article 83 TFEU, article 114 TFEU and article 325 TFEU, an analysis of their respective legal positions is necessary in order establish the boundaries for criminal law competence.

1.4 Method and material

To evaluate applicable law and to describe the EU’s criminal law competence a traditional legal dogmatic method is being used. This method involves relevant material from the EU in forms of regulation, treaties, preparatory acts and legal theory. The material is being used to interpret applicable law as well as systematically present applicable law. The material is valued and analysed in relation to the legal issue at hand.
Aside from the aforementioned legal method, theories from criminology have been used to explain why there is a current lack of regulation for white-collar crime. These theories are being used in order to create an understanding of the current legal situation in the world and to define white-collar crime with the purpose of providing a greater understanding of the harm that white-collar crimes create. This will illustrate the necessity for the creation of deterrent legislation.

The amount of literature on The EU’s competence is growing because of the introduction of the Lisbon Treaty. However, there is a lack of material on the subject of white-collar crime in the EU. As a result, literature produced in the USA is being used to provide for the criminology theories regarding the definition and background of white-collar crime. This material should be seen as having gravitas as it comes from recognised authors and sources.

Although there have been many cases across the world of irresponsible and reckless management of banks and financial institutions, such as the Kaupthing Bank (Iceland) and Lehman Brothers (USA), for the purposes of illustrating my argument I have chosen to discuss Anglo Irish Bank. This bank suffered the most extreme losses, resulting in it being nationalised and then wound up by the Irish government. The purpose is to show how white-collar crime has evolved due to a receptive climate, which resulted in a world crisis with countless victims. As Ireland is a member of the EU the case of Anglo Irish Bank will show that an effectively deterrent EU legislation is much needed and that it would lead to more detailed and impactful legislation on a national level. In this context, the case study of Anglo-Irish Bank sets out the requirements for the proposed directives need to be “deterrent” and efficient. The definition of “deterrent” legislation is discussed through:

(i) Foremost, article 325 TFEU’s criterion for deterrent legislation will be used through the Commission’s proposed measurements. 9 Throughout the Lisbon Treaty a specified criterion of deterrent is only to be found in article 325 TFEU.

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(ii) The scope of criminal law will provide an evaluation of the relationship between criminal law and administrative sanctions, thus illustrating both their differences and similarities.

For the purposes of this thesis, this will provide the basis measurements required to define deterrent legislation. The reason for choosing The Proposed Directive on the fight against fraud to the Union's financial interests is that it is to be protected by criminal law on a EU level with the aim of aligning national criminal laws. The link between the proposed directive and the synthesis of this thesis is that the money for the bailouts for Anglo-Irish Bank and other banks in Ireland has been financed by increased taxes, loans from other EU countries and the IMF, total 85 billion euro from 2010-2013.\textsuperscript{10} The bank crisis resulted in a recession, which naturally leads to a reduced GNP for Ireland, which reduces Ireland’s capacity to contribute to EU funds. The bailouts are/should therefore be of a financial interest as per the directives definition.\textsuperscript{11} The Proposal for a Directive on bank recovery and resolution will be evaluated on the basis that it is the EU’s outspoken measure for preventing a reoccurrence of such an economic crisis again.

1.5 Delimitation

This thesis focuses on the substantive criminal law competence of the EU. I have chosen to evaluate the hypothesis on a EU level due to the lack of, and varying, legislation in member states and the possibility for corporate jurisdiction shopping due to the variance in member states legislation. The EU has the resources, overlook and incentive required to create a deterrent tool that every Member State would use. This evaluation in this thesis is limited to the EU’s criminal law boundaries and the goals of the Union per the Stockholm programme. This thesis is focused on the proposed directives means to create deterrent legislation against white-collar crime. The analysis is delimited through the chosen criterion of "deterrence".

\textsuperscript{10} Economic Adjustment Programme for Ireland, European Commission.

\textsuperscript{11} The budget explained; where does the money come from, European Commission.
1.6 Disposition

The first chapter expounded upon the background, purpose and formalities of this thesis.

Chapter two provides a description of white-collar crime per its definition. The chapter also examines how white-collar crime originated with the aim of putting white-collar crime in an historical perspective. This is evaluated through different criminology theories.

Chapter three aims to highlight the legal hypothesis of this thesis, which is that the lack of deterrent legislation for white-collar crime has an inextricable link with the causation of the economic crisis of 2007. The Anglo-Irish Bank case provides a background picture for the economic crisis. Without any supervision or transparency the bank and those in it upper echelons were allowed to proceed unfettered towards the goal of continuous economical growth. The chapter further examines the contributory factors of Anglo-Irish Banks failure, which was a major contributor to the recession in Ireland.

Chapter four evaluates the competence of EU criminal law. For this reason it is necessary to provide an examination of the definition of criminal law. This will be made through the Engel criterions and the interpretations of the ECtHR and the ECJ. The cases that have emerged in the wake of the Engel case have created what is now the generally approved definition. As the competence for the EU to enact supranational criminal law is determined by the interpretation of the primary law, an evaluation of the relevant articles, policies and principles will be given. In this context, article 83 TFEU will be examined as it gives the EU an explicit legal basis for the adoption of criminal directives, thereby ensuring the effective implementation of EU policies that have been subjected to harmonisation measures. The article is also proposed next to article 325 TFEU as potentially being the correct legal basis for The Proposed Directive on the fight against fraud to the Union's financial interests as the proposed directive’s scope could be applicable under the legal auspices of organised crime and fraud. Article 325

will be evaluated as it deals with “fraud and any other illegal activities” and it the Commission’s proposed legal basis in The Proposed Directive on the fight against fraud to the Union's financial interests, which can be argued to consume a substantial part of the definition of white-collar crime. The Stockholm program, which statues crimes with particular priority, will define the priorities for the areas of freedom, security and justice and will be evaluated accordingly. The principles of conferral, subsidiarity and proportionality will sum up the EU’s competence in creating criminal law.

Chapter five evaluates The Directive on the fight against fraud to the Union's financial interests with a view to its possible application in the creation of legislation for white-collar crime. Furthermore, The Proposed Directive on bank recovery and resolution will be evaluated, as it is at present, the EU’s outspoken solution for the legal problem that caused the economic crisis. Criticism from Sweden as a Member State on The Proposed Directive on the fight against fraud to the Union’s financial interests will also be examined, as it is valuable in establishing a future positive approach toward criminal law at a EU level from the Member States.

Chapter six discusses and examines whether the directives would be successful as deterrent tools against white-collar crime in the EU using the definition of “deterrent” found in article 325 TFEU. Indeed, The word “deterrence” is only found in article 325 TFEU of the Lisbon Treaty. This definition of deterrent has been chosen with the intention of highlighting the absence of effective deterrence, which played such major causal role in the collapse of Anglo-Irish Bank and in the economic crisis of 2007. It is the hypothesis of this thesis that a lack of sufficiently deterrent legislation was a major causal factor in the unprecedented socio-economic damage caused by white-collar crime during the crisis.

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2 White-Collar Crime

2.1 Introduction

In a system where bankers and legislators are frequently interchangeable and large amounts of money are being loaned to private citizens any system in place must be supervised, transparent and capable of handling market stresses better than the current one. This chapter will provide the means for understanding white-collar crime through definition and theories illustrating how the said crimes are perceived in contemporary society.

2.2 Understanding white-collar crime

In 1940 Sutherland founded the definition of white-collar crime as “crime in the upper or white collar class, composed of respectable or at least respected business and professional men” and that it consisted of “violation of delegated or implied trust”. After Sutherland there was modification of the definition and it should be pointed out that there has been a wide variety of terms that have been used to classify white-collar crime. In 1996 the national white collar crime center gathered 15 white-collar scholars to discuss the definition and the result were as follows: “white collar crimes are illegal or unethical acts that violate fiduciary responsibility of public trust committed by an individual or organisation, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organisational gain”.

It is important to highlight, when understanding white-collar crime, that it is far more financially detrimental to a society than conventional “street crime”. For example street crime in the U.S. is estimated to cost around four billion dollars per annum, which is approximately five percent of what white-collar crime costs. The strong resistance of the legal system to viewing corporations as criminals has resulted in an

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14 Friedrichs, p 30.
15 Sutherland, White-collar criminality, p 1 et seq.
16 Helmkamp, Ball and Townsend, p 351.
17 Snider, p 141, street crime is explained as common crimes or one on one crimes see Reiman p 39.
underdeveloped legal responsibility. One reason for this phenomenon can be seen from
the politico-economic level; that business corporations represent a powerful force that
consists of enormous economic power. They are the producers, service providers,
political campaigners, owners of the media and they will consistently, and only, see to
their own interests.  

Reiman calls the criminal justice system a mirror, which reflects the society in
which we live and therefore our perceptions of evil and justice. Reiman’s view of
society is that the system serves the powerful by its failure to reduce crime and not by
its success. The reality of crime within our criminal justice system and the perception
of the general population is not just an objective threat to which the system is reacting,
it is in reality of a series of human decisions filtered through the criminal justice system,
from the lawmakers to the law enforcers. A crime becomes a crime not just out of its
objective characteristics but also through the meaning and labelling that society gives
it.

2.3 White-collar crime in the legal system

It is natural that the state has a strong interest in economic growth and accepted that
they are striving to facilitate and ensure the profitability of the private sector. The state
depends on corporations; they want to attract capital and take great care to avoid them
leaving. In a capitalist system, the centrality of capital means that the state must make it
possible for one group, who owns and control the resources for production, to generate
capital. The state gives the corporate sector grants, income tax loopholes etc. with the
intention and belief that this will make them stay and generate jobs, investments etc.
which will in turn create and uphold the wealth which is essential for the welfare state.
This system results in the state being more cautious and going out of their way so as not
to offend and potentially lose this capital. Historically, white-collar crime has not been
a prioritised concern of law enforcement agencies. This is generally attributable to a
lack of awareness, resources and jurisdiction. As a result of the lack of priority from law

18 Wells, p 178.
19 Reiman, p 1 et seq.
20 Op. cit, p 39 et seq and Sutherland, white-collar criminality, p 14 et seq.
21 Snider, p 146.
enforcement only a small percentage of white-collar crimes are prosecuted and adjudicated by the criminal justice system.\textsuperscript{22} The low level of formal processing does in turn reflect on what Reiman would have called; the mirror of society, which in this case reflects intrinsic class biases contained therein.

According to Sutherland there are three factors explaining the differential implementation of the law as it applies to white collar crime; the status of the businessmen, the trend of punishment and the resentment of the public towards white collar crime. The first one, the status of the businessmen, is based on the fact that the legislators who are in charge and responsible for the criminal justice system are afraid to antagonise businessmen. Among other consequences, such antagonism may result in funding for political campaigns etc. being cut off. More important than this fear is the cultural homogeneity between legislators, judges, administrators and businessmen. This is based on the likelihood that they are all of the same social class and background and that as a result of their appearance, mannerisms and high social status do not generally fit the perceived profile of a conventional “street criminal”. The second factor is the abandonment of extreme penalties for white-collar crime. There are still only sparse penal methods in use today for white-collar crime even though Sutherland wrote about this approximately 60 years ago.\textsuperscript{23} For example the former French president Jacques Chirac was found guilty of embezzling and misusing €1.4 million in public funds while mayor of Paris in the early 1990s. Chirac received a two-year suspended sentence and the media calls the trial historical because of his high position in society.\textsuperscript{24} The third and final factor is the relatively unorganised resentment of the public towards white-collar crime. Society’s perception is based on the fact that the definition of white-collar crime is complex and its effects diffused.\textsuperscript{25} As mentioned above white-collar crimes are not simple and not direct attacks by one person on another. White-collar crime in most cases, and sometimes only, can be appreciated by persons who are experts within the occupations in which they occur. The result is that it can take decades before these crimes are revealed.

\textsuperscript{22} Friedrichs, p 249 et seq.
\textsuperscript{23} Sutherland, p 56 et seq.
\textsuperscript{24} Irish Times, Judging Chirac, December 19, 2011.
\textsuperscript{25} Sutherland, p 59.
Croall takes on another perspective of the perception of white-collar crime, which is based on the nature of the offences. The complexity of white-collar crime makes it difficult to capture the essence of the offences in legislation, creating many loopholes to be exploited. This theory demands that the legislators keep up with the white-collar offenders whose success comes from their ability to stay one step ahead of the law. For example the legislator needs to keep up with technical, industrial and financial innovations, which are constantly evolving. Croall also points out the diffusion of responsibility in organisations and corporations, which leads to difficulty in determining who is legally and criminally responsible for the offences. This also includes difficulties for law enforcement in discovering and prosecuting white-collar crime. The specialised personnel that are needed for both the legislator and law enforcement would come with a substantial cost to departments already struggling with budget constraints.\textsuperscript{26}

Another perspective is to consider the trust that exists between the rulers of the society and its citizens. The definition of the term trust can be widely interpreted, but in this context it refers to confidence in a relationship; that the other party will act respectably and fulfil the legitimate expectations that are put upon them. We trust the corporations that employ us; the banks were we deposit our money and take our loans to purchase our homes. Trust has become more problematic in contemporary society because it is harder for the ordinary citizen to know and to become informed about what happens within financial institutions but we are still dependent on this trust in everyday life. There is a paradox in this trust situation; if we would attempt to curtail the extension of trust in business relationships with the purpose of reducing the opportunity for white-collar crime we would automatically jeopardise legitimate business relationships and other interpersonal transactions.\textsuperscript{27}

In conclusion, due to the lack of social stigma associated with white-collar crimes, the perpetrators are only loosely defined as criminals and, as a result of this, prosecuted and punished accordingly. As an illustrative example of the pressing need for legislation to combat white-collar crime, Anglo-Irish Bank will be examined in chapter three.

\textsuperscript{26} Croall, p 15.
\textsuperscript{27} Friedrichs, p 8.
3 Anglo-Irish Bank: A Legal Crisis?

3.1 Introduction

There was a plethora of contributory factors that combined to create the financial crisis of 2007. These included the insufficient resources and power to intervene available to the financial regulator, the candidates chosen as financial regulator and the structure of the regulatory system. However while all of these significant, and many other peripheral, factors played their role a much more fundamental problem was that there was no political or corporate will to impose regulation. The entire banking system in Ireland was doomed to catastrophic failure precisely because it was allowed to flourish unfettered by the guiding hand of constructive regulation. Ireland’s banking collapse and subsequent economic crisis cannot be understood in its entirety without first understanding the Irish government and its representatives tacit endorsement of a lack of regulation. This chapter will exemplify a problem that has been on the agenda for many years without a practical legal priority. Anglo-Irish Bank will be examined and provide as an example for the background to The Proposed Directive on the fight against fraud to the Union’s financial interests and The Proposed Directive on bank recovery and resolution.

3.2 Background

The recession in Ireland had its genesis in reckless lending to construction investment, which inflated property prices and created an unsustainable property bubble. The resulting crash in property prices led to massive amounts of unserviceable debt and construction redundancies, which in turn lead to the requirement of a bailout plan as banks could not recoup the money they had lent. While all banks suffered great losses, the most extreme losses (relative to the size of loan books) were with the biggest offender, Anglo-Irish Bank, which was nationalised by the early 2009. Anglo-Irish Bank had earned its size through aggressive property-related lending. The Irish government took the view that it was simply too big to be permitted to fail and sought to improve the funding situation by guaranteeing the vast bulk of it’s liabilities, which was
followed later in 2008 by the provision of extra capital for the banking system. The government also established the National Assets Management Agency (NAMA) with the mandate to buy development-related loans from the banks. The problem that arose was that the initial guarantee of liabilities was far too broad for the government to uphold. The guarantee included securing senior bonds and some types of subordinated debt with the result of giving the taxpayers the bill to resolve the banking crisis. Ireland has been forced to lend money from the International Monetary Fund (IMF), The European Commission’s European Financial Stability Mechanism (EFSM) and bilateral loans from the United Kingdom, Sweden and Denmark. The budget for 2013 involved 3.5 billion euro in austerity cuts and taxes and is predicted to put the elderly, poor and sick in desperate situations.

3.2.1 The Investigation of Anglo-Irish Bank

On the 10th of May 2011, Mr. Justice Kelly appealed for the investigation against Anglo-Irish Bank to be completed, after the investigating report missed its deadline, which was the end of 2010.

The Director of and the Garda Bureau of Fraud Investigation has identified five issues, which are the subject of investigation. These are:

(i) The provision of financial assistance by Anglo to a number of persons in 2008 to enable the purchase of Anglo’s shares, i.e. giving of financial assistance by a company for the purchase of its own shares.

(ii) The provision of loans by Anglo to its former directors and the regular “warehousing” in Irish Nationwide Building Society of certain loans made available by Anglo to some former directors at the end of Anglo’s financial year thereby misleading the auditors.

(iii) A “back-to-back” deposit arrangement undertaken with Irish Life and Permanent Group for the benefit of Anglo at the end of Anglo’s financial year in September 2008;

(iv) The provision of a loan to a director of Anglo.

28 Philip R.Lane, The Irish crisis.

29 Summary of 2013 Budget Measures Policy Changes, December 5, 2012, Ireland
(v) The communication of possible false or misleading information in certain Anglo public statements in 2008.

At the time of the above appeal from the high court no prosecutions had been made and little or nothing had been done within the investigation despite that years had passed by since the investigation started. An extension was granted until the 28th July 2011. Mr. Justice Kelly concluded in his judgment that the collapse of Anglo-Irish Bank caused profound damage for both the state and it’s citizens and due to this fact one could reasonably expect that the relevant authorities would carry out a comprehensive investigation. Furthermore, Mr. Justice Kelly stated that the Anglo-Irish Bank case may be unique in its complexity and amount of material but certainly not in the investigation and its lack of speed.\(^\text{30}\)

### 3.2.2 Anglo-Irish Bank and the Quinn family

Anglo-Irish Bank was, to all appearances, one of the financial stars of the Celtic Tiger years but during 2008 its shares, suddenly and catastrophically, lost 99% of their value. The economic bubble based almost entirely on Ireland's inflated and unsustainable construction and property sectors, finally burst. In September 2008 after the collapse of the Lehmann Brothers, Anglo-Irish Bank was itself about to collapse. The Irish government decided on the recapitalisation of Anglo-Irish Bank and the cost of this has dominated the Irish economy since the 29 September 2008, and will do so for years to come. Anglo-Irish Bank is no longer involved in ordinary banking (it is now part of the Irish Bank Resolution Corporation or IRBC) but is seeking to recover such loans as it can to minimise the ultimate exposure of the taxpayers. At the current date there are a number of cases currently extant between the members of the Quinn family and their companies within the Quinn group and the formerly Anglo-Irish Bank across a number of jurisdictions. The Quinn children are the beneficial owners of the Quinn Group consisting of approximately 95 companies and which was under the stewardship of one of the defendants, Mr. Sean Quinn. Mr. Sean Quinn has developed a large international

property portfolio within the Quinn group for the benefit of his children.\textsuperscript{31} Forbes magazine’s 2008 rich list listed Mr. Sean Quinn as the 164th richest person in the world and the richest man in Ireland worth 6 billion euros.\textsuperscript{32}

The origin of the wider dispute between Anglo-Irish Bank and the Quinn family has its roots in the provision by the bank of approximately 2,8 billion euros to Quinn Finance, one of the private companies of the Quinn Group. The purpose with this facility was to allow Quinn Finance, or related companies within the Quinn group, to buy shares within the Anglo-Irish Bank, with the aim of artificially boosting the share price. As security for the relevant advances, share pledges and guarantee agreements were executed by the Quinn children and a number of companies within the Quinn Group in favour of Anglo-Irish Bank. These included companies in Ireland, Northern Ireland, Sweden, Cyprus and Russia. The basic allegations are that the provision of monies by Anglo-Irish Bank to Quinn Finance amounted either to impermissible market manipulation or assistance in the purchase of Anglo’s own shares, both of which activities being, at the level of principle, unlawful. The underlying action alleges conspiracy against the defendants, members of the Quinn family, consisting of the entering into and putting into effect a scheme or coordinated plan designed to strip assets from various companies or other legal entities, described as the International Property Group (IPG), over which Anglo-Irish Bank had security. In the present proceedings, Anglo-Irish Bank seeks to prevent the Quinn family, acting individually or in a conspiracy or in concert with one another, from inducing breaches of contract and intentionally causing loss to Anglo-Irish Bank by unlawful means, including taking actions, which, it is alleged, will result in transferring assets.\textsuperscript{33} The Quinn family does not deny that that they have attempted to remove their assets - lawfully as they see it - from the capacity of Anglo-Irish Bank. On 26 June 2012, Judge Ms. Dunne concluded that there is still a dispute in respect of the sum claimed by Anglo-Irish Bank in the

\textsuperscript{31} Anglo Irish Bank Corporation PLC v Quinn Investments Sweden AB & Ors, Judge Hardiman J date of 10/24/2012.

\textsuperscript{32} The world’s billionaires, #164 Sean Quinn and family, 3 May, 2008, Forbes.

\textsuperscript{33} Anglo Irish Bank Corporation PLC v Quinn Investments Sweden AB & Ors, Judge Clarke J date of 09/13/2011 and Judge Fennelly J date of 10/24/2012.
proceedings to recover 2.8 billion euros. However, what has never been disputed is the sum of 455 million due to Anglo-Irish Bank. Ms. Judge Dunne further concluded that;

“Instead of trying to repay the admitted debt due, the Quinn family and in particular the respondents have taken every step possible to make it as difficult as can be to recover any amount due. They have engaged in a complex, complicated and, no doubt, costly, series of steps designed to put the assets of the IPG beyond the reach of Anglo, in a blatant, dishonest and deceitful manner. They have consciously misled courts here and elsewhere. They have sought to deprive Anglo of the assets which would go some way to discharging an admitted indebtedness. The behaviour of the respondents outlined in evidence before me is as far as removed from the concept of honour and respectability as it is possible to be.”

Mr. Sean Quinn, his son Sean Quinn Jr. and a nephew, Peter Darragh Quinn were given three months penalty in jail for contempt of court by seeking to remove the value of the property portfolio with the view to deprive Anglo-Irish Bank of its security.34

3.2.3 The current legal position in Ireland

The Irish penal reform trust concludes that there is a lack of prosecution for white-collar crimes and that studies show that a person’s economic background may have a significant impact on whether or not they will receive a custodial sentence. Other reasons may be an over-policing of disadvantaged areas, which results in greater crime detection and therefore imprisonment than in more privileged areas.35 The department of justice, equality and law reform released a consultation paper and stated that community policing focuses on removal of fear from the community, and asked themselves: who does the citizen fear? Is it the murderers and thieves they read about in

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34 Anglo Irish Bank Corporation PLC v Quinn Investments Sweden AB & Ors, Judge Ms. Dunne date of 26 june 2012.
the paper or the leaders of our banks, politicians and judges that we are raised to trust? Corporate crimes are traditionally committed by privileged members of society who are not seen as a security or control threat if they are sentenced to imprisonment. They are therefore sent to open detention facilities rather than overcrowded, drug-infested prisons and may therefore not fear the punishment as they would if being sent to prison or similar facilities with a general population and cross section of offenders. The department of justice, equality and law reform published another consultation paper, which stated that where the crimes committed are economic so should the punishment be. However, that compares badly with the nature of the punishment of street crimes such as theft, property damage etc. that are also of an economic nature. Furthermore, the potential rewards for white-collar crimes outweigh the potential penalties and in order to be effective the penalty fine for white collar/corporate crime should be proportionate to the wealth and income of the accused. It must further be insured that the monies used in payment of a penalty fine handed down in a judgement have not been accrued as part of the prosecuted crime as this would defeat the purpose entirely. One example of how legally underprepared Ireland was for the eventualities of this economic crisis and the devastating results this had is that there are no provisions in Irish law which make reckless trading a criminal offence. This oversight has resulted in the Irish citizens now paying more taxes so the government can bail out the banks and bondholders. As these people speculated on the free market capitalist system the burden of this debt should not be placed on the Irish taxpayer, particularly those who can least afford to pay this erroneous debt.

In conclusion, before the crisis, the Irish governments priorities were more aligned with the interests of the bankers and the property developers than they were on the consideration and implementation of good governance legislation. The absence of

37 Irish penal reform trust report, p 16.
38 Department of justice and equality, White paper on crime consultation process, discussion document No. 3, p 40.
39 Irish penal reform trust report, p 19
40 Department of justice and equality, White paper on crime consultation process, discussion document No. 3.
appropriate and deterrent legislation on national level is recognised as one of the fundamental factors that allowed the economic crisis to reach a level that generated massive forms of loss and harm. One arguable solution for this would be legislation designed to reconcile the legal differences present in Member States laws at EU level. A EU wide consistency of approach in this area of legislation would further prevent corporations from participating in “shopping” for a jurisdiction better suited to their agenda. Chapter four will continue on the above issues by analysing the competence against the goals of the EU and the question of competence distribution.
4 The Competence of EU Criminal Law

4.1 Introduction

The Lisbon Treaty has meant that the EU now has an explicit legal basis for the adoption of criminal law directives, thereby ensuring the effective implementation of EU policies that have been subjected to harmonisation measures.\textsuperscript{41} In other words, the Lisbon Treaty recognises penal competence on supranational level. Hereby, the Lisbon Treaty challenges the still dominating Member States, where criminal law is still seen as the core of state sovereignty. This chapter aims to discuss the legal grounds on which criminal law can be created in order to combat white-collar crime at EU level.

4.2 The scope of criminal law

Criminal law is one among many ways to legislate. For this reason, to understand the criminal law competence of the EU, a definition of criminal law is needed.

The borders of the criminal law system are often set by formal criteria, which will define criminal law in a strict sense. The Swedish criminal law system has constructed these boarders by referring to the sanctions attached to a certain behaviour that can lead to imprisonment or criminal law fines, which constitutes the act as a criminal offence.\textsuperscript{42} According to Asp, administrative sanctions are not considered to belong to the criminal law system in a strict sense. However, administrative sanctions are to some extent and in some cases treated as if they are part of criminal law. For example, the classification of criminal law by the ECHR depends on whether there has been a "criminal charge" pursuant to article 6 ECHR. In this context, the definition of the ECHR includes both criminal law (in a strict sense) and administrative sanctions. However, administrative sanctions has been further interpreted by the ECtHR, in the Engel case, as being applicable under the definition of criminal law when it has a

\textsuperscript{41} See article 83 TFEU.

\textsuperscript{42} Asp, p 56 et seq and see chapter 1 section 1 of the Swedish Criminal Code.
punitive character. The Engel case has been adopted by the ECJ and used in the interpretation of whether a sanction is defined as criminal law by the following criteria:

(i) “The legal classification of the offence under national law.
(ii) The very nature of the offence.
(iii) The nature and degree of severity of the penalty that the person concerned is liable to incur”

One can argue that the severity of a criminal sanction is rooted in the social and ethical values of a society. Advocate General Jacobs gave criminal law the following definition to reflect its purpose in his opinion of 3 June 1992:

“Typically, the purpose of a criminal sanction exceeds that of simple deterrence, and will normally involve such matters as the stigma of social disapproval or the attribution of moral blame. Thus, the amount of the penalty, in the criminal case, will often reflect the extent of society’s disapproval of the conduct in question, rather than any more pragmatic consideration”.

The nature of criminal sanctions emphasises and underlines the social and ethical judgment of blame and unworthiness on the penalised act. This is then reflected in the severity of the sanction. The definition of criminal law and the distinction between administrative sanctions and criminal sanctions will be further discussed under chapter six regarding its possibilities to be defined as a deterrent.

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43 See Engel and others v. Netherlands, Application No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8.6.1976, paragraph 82-83, Asp, p 59 and Satzger, p 49 et seq.
44 C-489/10 Bonda [2012] E.C.R. I-000, paragraph 37-43, cf C-617/10 Åkerberg Fransson, Judgement of the Court 26 February 2013, paragraph 35 and Asp, p 58 et seq.
45 Satzger, p 63
4.3 Legislative competence of the EU in criminal law

4.3.1 Article 83 TFEU

The main legal basis for EU criminal law today can be found in Article 83 TFEU, which provides a general competence provision for the approximating of substantive criminal law by means of directives. Under this article, directives with minimum rules on EU criminal law can be made. Article 83 TFEU consists of a list of the crimes that can be adopted and is therefore exhaustive. 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 and organised crime. These are the crimes that the EU has found to be of particular interest due to the seriousness of the crime and their cross-boarder dimensions. Furthermore, on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria in article 83 TFEU, i.e. a crime that mirrors the listed areas in article 83(1). One could argue that the areas that are listed in article 83(1) will therefore always meet the prerequisites for criminal law due to the very nature of these offences. There is a possible caveat contained within the article that states that the council may adopt decisions on the basis of developments in crime. On reflection however, this extension could be considered as being too vaguely worded to be used in the creation of criminal law. According to Asp, the most reasonable interpretation is that both the generic requirements and the list requirements must be fulfilled in order to give the EU the competence to take a certain instrument. Asp argues that the criteria of cross-boarder dimension and the particular serious requirements must be fulfilled cumulatively. Asp further argues that these criteria may be interpreted by degrees. This will most likely muster future argumentation regarding the applicability of crimes under these criteria. It can also be argued that an instrument aimed at harmonising the general rules on offences such as theft, fraud or forgery would naturally fulfil these requirements.

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48 Satzger, p 75.
49 Asp, p 84 et seq.
addition, article 83(1) TFEU embraces criminal law competence derived from two entirely different perspectives.

In this context, article 83(2) TFEU states:

“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”.

This clause enforces the EU to create criminal law with the precondition of the fulfillment of legal criteria. It is on this legal ground that the EU can decide on whether criminal law is needed to protect certain areas of interest and to provide specific legal guidance. This section can by its wording be interpreted as limitless and could therefore be incompatible with the above mentioned principal of conferral. The limitation stems from the given definition of “essential”. According to Satzger, criminal law is here used as an “enforcement mechanism” to provide the tools to make EU policy, directives etc. This ensures that they can be efficiently implemented and that these goals can naturally be seen as “essential”. To further examine and this, Asp finds that by using the criterion of “essential” instead of “necessary” (which is found in similar contexts), the criterion is more demanding than the general requirements. In this context, the EU legislator cannot be given a wide margin of appreciation. Therefore, the harmonisation of criminal law must be the only measure that is approved to reach the aim pursued in article 83 TFEU. It can be argued that this section has developed because the former legal implementation process was not efficient enough to protect EU interests. The criterion that has to be met by the Member States to uphold the “minimum rules” is upheld by the principle of loyalty, which will be examined in the next section.

One limitation to the EU’s competence in creating criminal law is article 83(3) TFEU. This establishes an “emergency brake” which prevents any excessive use of the competences. The “emergency brake” enables individual Member States to suspend the

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50 Satzger, p 76.
51 Asp, p 130.
ordinary legislative procedure to any draft directive if they fear that its enactment would affect “fundamental aspects” of their criminal justice system. The proposed directive is then referred to the European Council, where, if unanimity is reached within a timespan of four months, the draft will be referred back to the Council and the suspension will be lifted. The most apparent examples of “fundamental aspects” are general principles such as; legality, proportionality etc. and it is most likely that if one Member State has an objection, more will follow. Satzger finds this “safe line” to be a political compromise and a substitute for the majority principal. However, nine remaining Member States can still move ahead with the draft directive, by establishing enhanced cooperation between them.

In conclusion, in order for the EU to have the competence to adopt a certain instrument, the article presupposes that the generic requirements are fulfilled and that the proposed offence being considered is within the range of listed offences in article 83(1) TFEU.

4.3.2 Definition of offences and sanctions

The competence under article 83(1) TFEU includes the harmonisation of sanctions. Regarding the Member states level of minimum rules on EU criminal law, the principle of loyalty in interaction with general principles such as the principles of proportionality and subsidiarity, constitutes the corollary of the relationship between national criminal law and EU law. The Member States are here obligated to ensure compliance with EU law and to ensure protection of its legal interests.

The Commission has through its communications from 2011 on “ensuring the effective implementation of EU policies through criminal law” listed the measures that are applicable on “minimum rules” under criminal law in article 83 TFEU, the following has been selected in context:

52 Asp, p 139.
53 Satzger, p 74-80.
54 See article 83(3) TFEU, article 20 et seq TFU and article 326 et seq TFEU.
“The definition of the offences, i.e. the description of conduct considered to be criminal”...such as instigating, aiding and abetting. In some cases attempt to commit the offence is also covered.”

“All EU criminal law instruments include in the definition intentional conduct, but in some cases also seriously negligent conduct...define what should be considered as “aggravating” or “mitigating” circumstances.”

“Covers offences committed by natural persons as well as by legal persons such as companies or associations. However, in existing legislation, Member States have always been left with the choice concerning the type of liability of legal persons for the commission of criminal offences, as the concept of criminal liability of legal persons does not exist in all national legal orders.”

The meaning of “aggravating” and “mitigating” can be exemplified through The Proposed Directive on the fight against fraud to the Union’s financial interests. The proposed directive’s article 8 prescribes that Member States should punish fraud involving advantages or damages of a certain amount with a minimum term of imprisonment. According to Asp, the rule formally requires a certain minimum penalty, however it is not clear how to strictly separate between such requirements and rules on aggravating or mitigating circumstances. Conclusively Asp states that one can argue that as the article indicates a threshold of a “substantial amount” to have been defrauded to warrant the handing down of a minimum sentence then this must also be the prerequisite for what is to be considered “aggravating”.

Regarding sanctions, without invoking the criminal law competence provided for in article 83 TFEU, the EU may through a directive require that the infringements of the rules of the directive will be met by penalties that are “effective, proportionate and dissuasive”. This competence also follows from the decision of the European Court of

56 Asp, p 99 et seq.
57 COM (2011) 573 final, p 9 and Asp, p 86.
Justice in the so-called “Greek Maize Case” regarding fraud. The “effective” criteria have been interpreted to the extent that the sanctions must aim and be suitable for the goals set up to achieve protection according to EU provisions and interests. The “proportionate” criterion demands that the sanctions be adequate to the goals pursued and its effects must not exceed what is necessary to achieve the aim. The criterion of “dissuasive” requires that the sanctions must have both specific and general deterrent effect. Upon reflection of the “Greek Maize Case” and supranational criminal law one can see that even if the EU has the competence to implement supranational criminal law in order to protect its interests, the Member States obligations to uphold the goals set by the Union remain of great importance. This is for the time being, at least, an important consideration when the EU does not use its competence regarding fraud, which will be further evaluated through article 325 TFEU below.

4.3.3 Crimes against the financial interest of the union

Article 325 TFEU makes reference to one specific crime: “fraud and any other illegal activities affecting the financial interests of the Union”. In the article the Treaty creates a special obligation, on top of sincere co-operation in Article 4(3) TEU, to counter fraud. The article further envisages the adoption of all “necessary measures” (compared with “essential” in article 83 TFEU). The requirement for an action to prove necessary is for the action to obtain one of the objectives that can be found in the treaties and where the treaties have not provided the necessary powers. Article 325(3) TFEU gives the European parliament and the Council the mandate to adopt the “necessary measures” in the prevention of, and the fight against, fraud. As described above, competence under article 83(2) TFEU is limited to minimum rules regarding the definition of offences and sanctions. According to Asp, this includes that measures such as harmonisation of the general part of criminal law are not covered by its competence. Therefore, in theory, article 325 TFEU could be put into practice for taking criminal law

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60 The vocabulary has a clear criminal law connotation; Asp p 143.
61 Satzger, p 54 et seq.
measures in such an area.\textsuperscript{62} This was proposed to be valid when The Commission accordingly chose the article 325 TFEU for The Proposed Directive on the fight against fraud to the Union’s financial interests stating the range of competence as:\textsuperscript{63}

“\textit{The EU’s competence to enact "the necessary measures in the fields of prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies" which "act as a deterrent" is set out in Article 325 of the Treaty on the Functioning of the European Union. Contrary to the pre-Lisbon Treaty version of the provision, Article 325(4) of the Treaty on the Functioning of the European Union now does not exclude measures impacting on "the application of national criminal law". Against this backdrop, recent legal writing concurs that criminal law measures are covered by Article 325.}”\textsuperscript{64}

By determining The Proposed Directive on the fight against fraud to the Union’s financial interests legal base in article 325 TFEU, it gives the area of law a supranational character. By not limiting the directive by article 83 TFEU it prevents the result of a “\textit{géométrie variable}” i.e. different applications in Member States due to the “\textit{opt out}” protocols, which do not apply in article 325 TFEU.\textsuperscript{65}

According to Klip, with article 325 concentrating on financial interests, this area escaped the “\textit{emergency brake}” that can be used in article 83(3) TFEU by the Member States when legislating criminal law.\textsuperscript{66} However, Satzger who views it differently gives a different approach. He suggests that when directives emerge from article 325(4) TFEU, article 83(3) TFEU should by analogy be applied to that criminal law competence. Satzger believes that it is not possible that the Member States left an “\textit{unintended lacuna}” when reforming the Treaties. However, it is stated that the

\textsuperscript{62} Asp, p 137.
\textsuperscript{63} See article 263 TFEU The European Court of Justice reviews the legality of legislative acts.
\textsuperscript{64} SWD (2012) 195 final, p 26.
\textsuperscript{65} Asp, p 148 and SWD (2012) 195 final p 26; Denmark, Ireland and the United Kingdom would have had the choice to opt out if the directive was based on article 83 TFEU.
\textsuperscript{66} Klip, p 238.
“emergency brake” does not apply to supranational criminal law that has been created by regulations. Only directives are impinged by the Member States Margin of appreciation as pursuant to article 83(3) TFEU.67 The conclusion is that it is unclear by doctrine if the “emergency brake” is applicable on article 325 TFEU and an approval on which legal view the article should have is called for.

In conclusion, in spite of the extended competence and the prioritising of economic crime through the entry of the Lisbon Treaty there is no explicit definition or legal basis for the fight against white-collar crime. The specific areas of crime and the shared competence in article 4(j) TFEU limit the EU’s competence. Although, white-collar crime is not listed in article 83(1) TFEU, such misconduct could be applicable under the legal auspices of organised crime and fraud. In other words, white-collar crime of this form could be applicable by both article 83 and article 325 TFEU.68

4.3.4 The Stockholm programme

The most recent addition to the Justice and Home Affairs agenda is the Stockholm programme. The programme introduces and develops the steps towards criminal law at EU level. It sets out the European Union’s priorities for the areas of Freedom, security and justice through the prism of criminal law as a European policy area. This area of priorities is further developed in chapter V in the TFEU with the starting point of article 67 TFEU.69 Among the Stockholm programme’s priorities is the recommended development of a focused and purposeful internal security strategy in order to improve the protection of citizens and the fight against crime. One section given particular attention is economic crime. By this means the Union must reduce the opportunities available to organised crime that have evolved from the globalised economy, especially crime that has emerged from the current economic crisis. Furthermore, criminal sanctions must be sufficient to detect fraudulent market abuse.70 This legislation is given the outspoken meaning of being a response to citizen’s problems. Concordantly, the legislation should also reflect on the shared values that are the basis of the EU.

67 Satzger, p 82.
69 The Stockholm programme, p 4 et seq.
order to maintain the tightrope balance of the Unions financial interests and the interests of the citizen, efficient and effective criminal law at a EU level has been stated to be “necessary”. Of further interest is Article 13 TFEU. The article demands that the EU shall have an institutional framework which aims to promote its values, advance its objectives, serve the interests of its citizens and of its Member States and ensure the consistency, effectiveness and continuity of its policies and actions. Supplementary to article 13 TFEU in this case is article 7 TFEU, which states that the EU shall provide consistency between its activities. However, according to Herlin-Karnell there may be an inherent contradiction here. Herlin-Karnell points out the promise of establishing a consistent and effective, as well as a continuing, EU policy and focusing on EU citizens and respecting Member States preferences and EU law values. This, Herlin-Karnell states, poses difficulties when applied in EU legal practice as “consistent” and “efficient” cannot and should not be considered interchangeable in what is today, an unevaluated area when put into the context of EU criminal law. To make these factors and aims work together when potentially imposing on a states sovereignty is still a job not fully accomplished or evaluated.

On this same issue Asp concludes that, even though the creation of an Area of Freedom, Security and Justice have clear aims and are stated to be a central objective to the EU it has not demonstrated that there are yet any concrete conclusions as regards cooperation in the area of substantive criminal law.

4.3.5 The principles of conferral, subsidiarity and proportionality

According to the principal of conferral, primary law incorporates the competences for achieving certain specified goals. The competence for the EU to enact supranational criminal law in order to achieve a certain goal must be determined by the interpretation of the provisions and primary law in general. Even though the interpretation is based on

71 COM (2009) 262 final. This method can arguably be efficient but restrictive on the Member States sovereignty. Such impositions on sovereignty are often challenged by the Member States. The means of those imbedded comments will be discussed further below under the section dealing with member state response.

72 Herlin-Karnell, p 86.

73 Asp, p 72.
EU principles, the specific characteristics of criminal law must be kept in mind. The significance of the principal is that the EU does not enjoy unlimited power to act. In other words, the EU cannot act outside its competence, which is conferred by a legal basis in the Treaties, and any punishment requires prior codification. The legal basis for Union acts is found in the Treaties but also in other Union acts which are designed for implementation. Furthermore, it is essential that the legislative procedure state its legal basis. When a measure has multiple legal bases, which are indissolubly linked with each other and without one being secondary and indirect in respect of the others, the measure must be based, as an exception to the main rule of one legal basis, on the various relevant Treaty provisions. Two other guiding principles for the EU’s range of competence are the subsidiarity and proportionality principles, which will be further discussed below.

The principle of subsidiarity signifies that, in areas that do not fall within its exclusive competence, the Union:

“Shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

The principle regulates the competence of the EU. When the EU has competence, it can only use said competence if it passes the criteria set out in the principle of subsidiarity called the “definitions test” by the wording of “only if” and “better”. In other words, the principle oversees the conferral of powers. Furthermore, the article states that the EU can only act when the Member States cannot achieve the “action” and the EU can better achieve the intended aim because of its effects and scale. There can, however, be some ambiguity in the interpretation of these criteria and this can be problematic. It can

74 Satzger, p 54.
75 See article 5(1-2) TEU.
77 See article 5(3) TFEU.
78 Van Nuffel, Lenaerts, p 131-140.
easily be argued that supranational law is needed for its effect and scale and often also demanded to ensure effectiveness of EU law.\textsuperscript{79}

The principle of proportionality states that:

\begin{quote}
“The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”\textsuperscript{80}
\end{quote}

A balance is here demanded between the “actions” - in this case is criminal law, and not to go beyond what is necessary to achieve the given goal, which in this context would be the level of “deterrent”.

The principles of conferral, subsidiarity and proportionality are of great importance in providing an objective test to evaluate if fundamental aspects of the criminal justice system have been affected instead of only having article 83(3) TFEU’s “emergency brake” to refer to.\textsuperscript{81} Since the EU’s interest is foremost the citizen (see Stockholm programme), the European legislator may only demand that an act be criminalised if it is “necessary” to protect a fundamental interest and if all other measures have been proven insufficiently. Only if these criteria have been fulfilled can criminal law be regarded as “necessary” and in accordance with the above principles. It is of importance that by the principle of good governance, the European legislative bodies must justify their use of criminal sanctions as the last resort of social control.\textsuperscript{82}

For a further practical example, the Commission’s argument for The Proposed Directive on the fight against fraud to the Union’s financial interests, regarding the need of EU action, was defined by the definition of the protected aim:

\begin{quote}
“Are by nature, and from the start, placed at EU level, they are more
\end{quote}

\begin{itemize}
\item \textsuperscript{79} Herlin-Karnell, p 113.
\item \textsuperscript{80} See article 5(4) TFEU.
\item \textsuperscript{81} Klip, p 36 et seq and Protocol (No 2) on the application of the principles of subsidiarity and proportionality which gives the Member States the opportunity to voice concern regarding the principles and the legislative procedure at EU level, the principles reflects on EU criminal law as an “ultima ratio”.
\item \textsuperscript{82} The manifesto on European criminal policy in 2011, The European criminal Policy Initiative, see section 4.3.1 and 4.3.3 for a thoroughly examination of the criterion “necessary”.
\end{itemize}
comparable in form and substance to rules on the EU institutions...such as in terms of being physical ...and in accordance with specific EU rules”83

In conclusion, the difference between the application of administrative sanctions and criminalisation is that the first gives the Member States the competence to choose the appropriate sanctions, in accordance with the requirements of “effective, proportionate and dissuasive”, while the second requires purposeful criminal law sanctions.

The competence of the EU in creating criminal law is complex and depends on many variables. A further evaluation of article 83 TFEU, article 114 TFEU and article 325 TFEU will be made through the proposed directives in chapter 5.

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5 EU Directives

5.1 Introduction

Economic crime has become a highly prioritised area of focus for the EU in recent years due to the economic crisis currently afflicting many of its Members States and also because there is a need to protect the lives and safety of EU citizens by tackling organised crime in accordance with the Stockholm programme. In this chapter, two proposed directives will be evaluated with a view to their possible application in the creation of legislation for white-collar crime. This should not only provide an opportunity to reflect on and clarify the EU’s competence in creating EU criminal law but also show how the EU has chosen to prevent a repetition of the current economic crisis.

5.2 The Proposed Directive on the fight against fraud to the Union's financial interests

5.2.1 The proposed directive’s scope

The definition of the directive can be found in articles 3 and 4, which state that fraud affecting and/or relating the Union’s financial interests is to be criminalised by the Member States. The liability range is set to include both legal persons and natural persons. Article 6 states that the liability for legal persons comprises that Member States are obligated to take “necessary measures” to make sure that legal persons can be held liable. As for penalties for natural persons, Member States are obligated to ensure that the criminal offences are punishable by “effective, proportionate and dissuasive” criminal penalties, including fines and imprisonment.84 Furthermore, an imprisonment threshold is included pursuant to article 6 with the requirement of being “effective, proportionate and dissuasive”.85 The European Court of Justice has confirmed a direct link between the collection of the Value Added Tax revenue (in compliance with the applicable Union law) and the availability to the Union budget of the corresponding Value Added Tax resources. In this context, any “lacuna” in collection of the first

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84 See section 4.2.3 for definition.
potentially causes a reduction in the second. Value Added Tax fraud therefore has to be considered as affecting the EU’s financial interests and is therefore covered by this proposed directive.⁸⁶ As the “EU financial interests” are not defined in the Treaty per se, the Commission has accordingly stated that existing legislative practice cover both the general budget of the EU and the special budgets managed by the EU, namely:

- “Revenues (e.g. agricultural levies, sugar contributions, customs duties);
- Expenditures (e.g. subsidies, aid, direct payment);
- Assets (movables, immovables, EIB bonds).

These interests can be affected either by reducing or losing assets or revenue accruing from resources, or by an unjustified item of expenditure.”⁸⁷

Currently, there is no deterrent legislation, in terms of precise definitions and clear minimum sanctions, in place to protect the EU’s financial interests. One cause of this is the diversion between the Member states and their different forms of legislation and definitions for offences. Such diversions have been found, among others, to have a negative impact on the effectiveness of the EU’s policies. Common offences for the Member States can be argued to be uniform in interpretation. With the establishment of an EU wide objective aim and definition for the offences, the ability of Member States to enforce all necessary prosecution requirements and reach a deterrent effect would be greatly enhanced. The uniformity of such a stated objective and definition across the board would bolster each Member States legal position and remove any opportunity for “jurisdiction shopping”.⁸⁸

5.2.2 Legal basis

The proposal is founded on article 325(4) TFEU which, as stated above, provides for the legislative procedure to adopt the “necessary measures” with a view to affording effective and equivalent protection. Further, the article provides for the legal base to

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legislate “fraud and any other illegal activities affecting the EU’s financial interests” in the case of preventing and fighting these crimes. As examined above, it is a controversial issue as to whether article 325 TFEU can bear the competence to adopt criminal laws on fraud or whether it would need to have recourse to article 83(2) TFEU.\textsuperscript{89} However, as it is the current chosen legal basis, the article contains the competence that any criminal legislation created in accordance with the article must act as a “deterrent.” This criterion is only to be found in article 325 TFEU and nowhere else in the Treaty, which strongly indicates the importance and legal power of the article. The proposal states that the purpose of article 325 TFEU lies in the single interest i.e. Union public money, wherever it may be collected or spent. For this reason the proposal declares itself as a priority policy emerged from these grounds.\textsuperscript{90}

Under its own initiative, and as a continuation of the controversial legal basis, the Legal Affairs Committee has decided to take up under rule 37(3) of Parliament’s Rules of Procedure, the question of whether it would be appropriate to change the legal basis for the proposed directive by changing the current legal ground in article 325 TFEU to article 83(2) TFEU. According to the Committee the question of whether Article 325(4) or Article 83(2) TFEU is the appropriate legal basis for the proposal is if one of the articles can be interpreted as being \textit{lex specialis} in this area of law. The Committee argues that article 83(2) TFEU covers the elements of measurements of the proposal and that the Lisbon Treaty has, through the article, permitted that the adoption of minimum rules on criminal substantive law is the appropriate legal ground when protecting EU financial interests. This, according to the Committee, supports the idea that article 83(2) TFEU is a \textit{lex specialis} in regard to the conferral of competence for substantive criminal law and calls for a further debate on the question.\textsuperscript{91}

\textsuperscript{89} Herlin-Karnell, White-collar crime and European financial crises: getting tough on EU market abuse, p 486. See section 4.3.3 for the discussion on the controversy.
\textsuperscript{90} SWD (2012) 195 final, p 11et seq.
\textsuperscript{91} Committe on Legal Affairs, Opinion on the legal basis for the proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law. 29.11.2012.
5.3 The Proposed Directive on bank recovery and resolution

5.3.1 The proposed directive’s scope

At the time of The Proposal of the Directive on the EU’s financial interests, another directive was also proposed, The Directive on bank recovery and resolution. Despite superficial similarities, the two proposed directives have, in actuality, two different perspectives on how to prevent economic losses for the European taxpayers.

The Commission’s Proposed Directive on bank recovery and resolution has its roots in the financial crisis of 2007. High profile banks such as Lehman Brothers, Anglo-Irish Bank and Kaupthing (Iceland) were accredited the status of being “too big to fail” and the Member States financial support to save these banks was unprecedented. In other words, public funds, financed by taxpayer’s money were used to prevent what may have caused an even greater disruption to the markets than we can see today. The view that is taken under this directive is that it is undesirable that public funds are used for “bailing out” banks at the expense of other public objectives. For this reason, the proposed directive sets out to achieve the objectives of:

“enhancing financial stability, reducing moral hazard, protecting depositors and critical banking services, saving public money and protecting the internal market for financial institutions”.

The scope of the proposed directive is divided into three areas: preparation, recovery and resolution. This will in turn apply to all credit institutions and certain investment firms. These three key concepts set out to increase powers of supervision for banking supervisors so that they may collect information from within the financial sector. This information can then be used in the creation of real transparency and therefore potentially prevent the financial situation from becoming too complex and put in resolving actions. The different areas of the proposed directive aims to address

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92 Crisis-related losses by European banks, 2007 and 2010: €1 trillion or 8% of EU GDP (IMF).
Approved state aid measures including guarantees between October 2008 and October 2011: €4.5 trillion or 37% of EU GDP; COM (2011) 848 final.

93 MEMO/12/416; Bank recovery and resolution proposal: Frequently asked questions.

forthcoming problems quickly and close to source to prevent the need for bank resolution to ever happen again.\textsuperscript{95}

\section*{5.3.2 Legal basis}

The legal basis in this case is article 114 TFEU, which confers to the adopted directives the power, in regards to the internal market, to harmonise national laws with administrative sanctions. Article 114 TFEU has traditionally been used as a legal basis for the fight against EU financial crimes with the aim of increasing investor confidence.\textsuperscript{96} This legal basis, however, both establishes and limits the range of penalties by requiring that they are “effective, proportionate and dissuasive”.\textsuperscript{97}

Large financial institutions have in modern times become inextricably woven into greater society. They have shown that, should they fail, they can drag down whole countries with them into severe debt and recession. The authorities therefore have a responsibility to ensure that there are effective tools to prevent economic entities from requiring the use of public funds. While these financial institutions have worked over cross-boarders, the authorities power to intervene has remained national. The aim of the proposed directive is to ensure that the banks (regardless of their jurisdiction) are resolvable in case of failure.\textsuperscript{98}

\section*{5.4 Member State’s response on criminal law based on article 325 TFEU}

Article 12 TEU states that the national parliaments shall contribute to a good functioning of the Union. This Includes:

\textsuperscript{97} See section 4.3.2 for definition.
(i) “That the national parliaments will be informed with draft legislation acts in accordance with the Protocol on the role of national Parliaments in the European Union.

(ii) Ensuring that the principle of subsidiarity is followed accordingly with the procedures provided for in the protocol on the application of the principles of subsidiarity and proportionality.

(iii) Taking part in the evaluating mechanism for implementation of the Unions policies within the framework of the area of freedom, security and justice.”

The national parliaments have the opportunity to give a motivated opinion outlining their rational as to why they consider a draft for legislation to be in breach with the principle of subsidiarity. 99 However, the development of more sophisticated crime and a complex financial market (arguably emerging from the creation of the EU) necessitated the Lisbon Treaty, which has taken the exclusive legislation power from the Member States on the area of criminal law. It is no longer the Member States that set the daily criteria as the Lisbon Treaty has given the EU the power of creating criminal legislation and the power to demand from the Member States that they create criminal legislation to protect not just themselves but the EU and its Member States. 100

The Swedish Justice Committee has challenged The Proposed Directive on the fight against fraud to the Union's financial interests but not yet The Proposed Directive on bank recovery and resolution. 101 The Swedish government, though, sides with the Commission’s view that it is reasonable to take more effective and preventative action at EU level in order to combat fraud affecting the financial interests of the Union and that such measurements may involve a degree of approximation of the fundamental elements of criminal acts. However, the Swedish government notes that there is reason to monitor the directive so as to ensure that it will develop according to the proportionality principle. 102 The Committee puts pressure on the ultima ratio principle

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99 See article 6 in Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
100 Gröning, p 98 and see article 325(2) TFEU.
101 The Swedish Justice Committee is a Parliamentary Committee concerned with the matters of the Swedish judicial system.
102 Justitieutskottets utlåtande 2012/12:JuU8, p 7.
and argues for the legal ground of article 83(2) TFEU to be used in the first place when creating EU criminal law. As the article only demands that the Member States create minimum rules according to directives when creating criminal law, total harmonisation with national law is eliminated. The Swedish government follows the Committee’s line in this regard and states that the directive is too detailed regarding the sanctions set out by the proposed directive and that this may result in difficulties when implementing the directive into national law and fitting every legal system. According to the Swedish government, the aims of the directive should be able to be reached through less restrictive conditions and that the Member States criteria of creating “effective, proportionate and dissuasive” legislation should be enough to reach the goals of the Union. Therefore, the proposed directive is not, according to the Swedish government, in compliance with the subsidiarity principle. The Swedish government proposes that fraud and corruption should be fought through a change in routines and changes within the organisation of the EU instead of harmonising all Member States legislation when it comes to fraud.103

Even though the Swedish Justice Committee’s response is not in accordance with the proposed directive’s given competence, this does not decide its fate.104 An evaluation of the two proposed directives through their legal bases and their possible application in creating “deterrent” legislation will follow in chapter 6.

103 Justitieutskottets utlåtande 2012/12:JuU8, p 8 et seq.
104 For example see section 4.3.1 and the “emergency brake”.
6 Deterrent Legislation

6.1 Introduction

The EU level legislation that has emerged from the ashes of the economic crisis provides a background perspective on the EU’s willingness to legislate an unregulated legal area in order to prevent this from happening again. Just as it is stated in the directives, the economic crisis stemmed from an unregulated market without transparency or supervision. The fallout from the current economic crisis is all encompassing and pervasive, affecting all aspects of society. However, the white-collar crime that was one of the main causal factors of the crisis has generally, not been highlighted (let alone prosecuted) in the after stages. Instead, it has been explained away as simply the behaviour of aggressive financial institutions. The core question is whether these two directives can provide the basis for deterrent legislation against white-collar crime (even though white-collar crime is not explicitly mentioned within them). The definition of “deterrent” that is found in article 325 TFEU will be discussed, as it is the only article within the Treaty that explicitly mentions this term. Following from this, previous conclusions on the definition of criminal law will be added to the discussion.\textsuperscript{105}

6.2 The scope of “deterrent”

In article 325 TFEU, the Treaty has defined the measures taken for the protection of EU financial interests as those: “which shall act as a deterrent”. Traditionally, the Court of Justice has used the term “dissuasive” as opposed to “deterrent”.\textsuperscript{106} This is not just the use of a synonym but rather demonstrates an escalating development in the Court of Justices view of how severe the measures taken should be and obligates the EU and its Member States to create legislation in accordance with the definition of “deterrent” against any illegal conduct affecting EU financial interests. The Commission develops this further, through the “task” of “deterrence”, which is for public policies aimed influencing conduct in a way that will result in “voluntary refraining from the

\textsuperscript{105} SWE (2012) 195 final and see section 4.2 regarding the classification of criminal law.

\textsuperscript{106} See section 4.2.3 for the definition on “dissuasive”.

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commission of illegal acts”. Historically, there has been doubt cast on the deterrent potential of the threat of punishment alone. However, the Commission states that modern science does indicate that the:

“fear of being caught”, “certainty of sentencing” and/or ”be shamed” by thorough criminal investigations, proceedings, trial, conviction and/or a criminal record, as well as the risk of being “disrupted in the course of their illegal business, can have an effect on potential perpetrator’s decision as to whether to cross the Rubicon into intentional illegality, particularly regarding individuals enjoying a relatively good reputation or social status.”

This specific range of the definition of “deterrent” is arguably particularly useful in the fight against white-collar crime, an area of criminality that has been both gravely under prioritised in its detection and prosecution, and underestimated in its ramifications. The definitions application with respect to white-collar crime is particularly enhanced in that it specifically identifies the same societal group widely acknowledged to be responsible for the majority of white-collar crime, namely “persons of high or respectable social status”.

The legislation, which has the purpose of being a “deterrent”, requires the three following criteria:

“(i) Legal provisions containing appropriate legal definitions of illegal conduct and associated sanction levels,
(ii) At least vague notions of the existence of such provisions on the part of the person to be deterrent
(iii) An expected practice of actual enforcement of these provisions by the authorities.”

As to unintentional illegal acts, the Commission has included that legislation providing for sanctions in case of negligence that may have a "warning sign effect", would

108 See section 2.2.
increase awareness of risks of illegality in decisive moments of a given activity. Thus reducing the likelihood of the undesired illegal outcome materialising.\textsuperscript{110}

### 6.3 Practical definition

The Commission has proposed and evaluated several policy options regarding their possible application as being "deterrent".\textsuperscript{111} One of these policy options was suggested and recommended as fulfilling the criteria. According to the Commission, in terms of efficiency, the option offered the more balanced relationship between intrusiveness and effectiveness and is therefore the recommended policy option. It is as follows.\textsuperscript{112}

\[ \text{"A legislation measure requiring clarification, appropriate expansion of the scope and strengthening of the sanction levels of national criminal provisions for the protection of EU financial interests."} \textsuperscript{113} \]

It is suggested that this should involve the following measures so as to reflect the problem of a lack of deterrence, lack of enforcement and lack of actual recovery of lost amounts.

(a) Creating a broader scope of offences, including legal persons, decision-makers and all public servants and situations (also abroad by means of a jurisdiction clause). As a given example, decision-makers within organisations managing EU money could cause the legal persons liability for their role or lack of preventive action within criminal proceedings. This would guarantee sufficient liability of legal persons regardless of whether this is done administratively or under criminal law, but also encourage Member States to make legal persons liable in criminal proceedings.

(b) The above requirements would necessitate a precise definition of the offences in the Member States. This would overcome the differences in law between the Member

\textsuperscript{110} Op. cit, p 25.

\textsuperscript{111} SWE (2012) 195 final, p 29 et seq.

\textsuperscript{112} Op. cit, p 40.

\textsuperscript{113} Op. cit, p 33.
States and therefore remove the opportunity for “jurisdiction shopping,” whilst also enable them to become a bigger force in fighting these sorts of crime through enforcement and recovery in cross-border cases.

(c) Appropriate sanction types and levels that would set minimum standards such as imprisonment, but also in line with the best practices in Member States, which are identified through the basis of expert and practitioner. This would have deterrent effects for potential perpetrators in a way administrative sanctions would not. According to the Commission, only penalties higher than 4 months can “trigger surrender”. It is regarded that the level of 6 months is the lowest realistic penalty to “exert a deterring effect in the sense of stigmatising and disrupting effect”. The reason for this is, taking into account early releases from prison after a part of the sentenced time is served, any lower figure might allow perpetrators to serve their sentence in the normal course of their annual working/holiday cycle.

(d) Introduction of a standard prescription period regarding criminal investigations. By recommendation, 5 years once investigations have begun.114

The Commission has stated that the range of criminal law is set by the impact on fundamental rights. The proposed measures, within the policy option, have been evaluated and found by the Commission to meet these objectives of general interests recognised by the Union.115 As recognised in the de Larosière report:

"Supervision cannot be effective with weak, highly variant sanctioning regimes. It is essential that within the EU and elsewhere, all supervisors are able to deploy sanctioning regimes that are sufficiently convergent, strict, resulting in deterrence".116

114 SWD (2012) 195 final, p 33 et seq.
115 Op. cit, p 36 et seq and see article 52 paragraph 1 of the Charter.
However, one objection can be found in the Manifesto on European Criminal Policy 2011, regarding the principle of guilt (mens rea). The Manifesto argues that even if it is found that the criminalised acts in question are in accordance with the principle, it is not clear whether legal entities can be held liable. Their argument is that there is a decisive difference between guilt of an individual and guilt of a legal entity and this must be elaborated upon at the national level.117

In conclusion, The Proposed Directive on the fight against fraud to the Union’s financial interests, even thought disputed, has by the recommended policy option been given the interpretation by the Commission of containing the competence to create “deterrent” legislation. Regarding The Proposed Directive on bank recovery and resolution, its legal basis does not give the competence for the above “deterrent” measures to be taken. However, even if an administrative sanction may not be a sufficiently strong response, it is argued that an administrative sanction can be decided and executed without delay. Lengthy procedures and resources can thus be avoided. Therefore, this type of sanction is considered in areas where the offence is not “particularly severe or occurs in large numbers”. One given example by the Commission on Ensuring the effective implementation of EU policies through criminal law, was the area of “complex economic assessments”. The basis for this is that, in many cases, administrative sanctions has the competence to provide for a broader range of possible sanctions, from “fines and suspension of licenses to exclusion from entitlement to public benefits, which can be tailored to the specific situation”. Therefore, the paper concludes that administrative sanctions may be sufficient and perhaps even more effective than criminal sanctions.118 This could be argued to be in line with the case law of ECHR and Asp’s argument, namely that administrative sanctions “are to some extent and in some cases treated as if they are part of criminal law” and that through the interpretation of the case law, administrative sanctions can have a “punitive character”.119 In conclusion, one can argue that administrative

119 See section 4.2 referencing; Engel and others v. Netherlands, Application No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8.6.1976, paragraph 82-83 and Asp, p 59.
sanctions have a controlling function and, possibly sometimes and in specific cases, a better deterring effect without the necessity of having the complete competence of criminal law.
7 Conclusion

The purpose of this thesis has been to evaluate the feasibility of creating deterrent laws at EU level through the utilisation of the Lisbon Treaty in the fight against white-collar crime. The specific focus has been on the constitutional dimensions of the EU’s competence but also indirectly on the effectiveness of the EU in opening up legislative competences in order to accomplish criminal law in this area. The intention has been to focus on European criminal law and to discuss if it has evolved in parallel with the ever developing economic crisis, with the hypothesis that the apathy towards the creation of effective deterrent regulation for white-collar crime played a substantial role in the genesis of the crisis.

The case of Anglo-Irish Bank demonstrated that a built-in structure of opportunity encourages white-collar crime and makes it less vulnerable to legal controls and sanctions. However, the financial crisis strengthened the case for action at EU level, which resulted in The Proposed Directive on the fight against fraud to the Union’s financial interests and The Proposed Directive on bank recovery and resolution.

The Proposed Directive on the fight against fraud of the Union’s financial interests states that fraud affecting and/or relating to the Union’s financial interests is to be criminalised by the Member States and that the liability range is set to include both legal persons and natural persons. An extended definition from The European Court of Justice includes Value Added Tax, with the argument that any loss in tax revenues will cause a reduction in EU funds. This harm is directly harmful to the interests of the EU. It can be argued that as white-collar crime has been a major causal factor in the current financial crisis, resulting in massive bailouts and the closure of countless businesses across Europe, it has directly affected the EU’s tax revenues and thus has been directly harmful to the interests of the EU.

By choosing the directive’s legal base as article 325 TFEU instead of article 83 TFEU, the Commission denied Denmark, Ireland and the United Kingdom any opportunity to opt out, excluded the limitations of “minimum rules” and possibly denied them the opportunity of enacting the “emergency brake”, resulting in article 325 TFEU having a supranational character. With the proposed directive the Commission further recommended that the minimum threshold for penalties of imprisonment be set at 6
months with the intention of creating a sufficient level of stigmatisation and disruption to an offender’s schedule so as to be a “deterrent”. This given competence and range can arguably overcome the limitations that have lead to relevant legal loopholes that have been taken advantage of.

The Proposed Directive on bank recovery and resolution’s scope is divided into three areas: preparation, recovery and resolution. The proposed directive has been the EU’s outspoken solution in preventing another economic crisis. However, it lacks the “deterrence” of criminal law and is applicable only to credit institutions and certain investment firms. This limits the proposed directive’s effectiveness against white-collar crime across the range of possible offences. However, without invoking the criminal law competence provided for in article 83 TFEU, the rules of the directive are required to be met by penalties that are “effective, proportionate and dissuasive”.

There is arguably an overlap between administrative sanctions and criminal law in what can be defined as being “deterrent” which has led to a discussion as to which one could be most effective in tackling white-collar crime. While administrative sanctions are regarded as having the competence to provide for a broader range of sanctions it is recommended that they are used in areas where the offence is not “particularly severe or occurs in large numbers”. For the relevant instrument to be a tool in fighting serious crime it needs to follow and develop in parallel with the more innovative and technical crimes that white-collar crime includes. It is established that the directive’s aims are to protect the EU’s internal market, prevent an economic crisis from occurring again and/or protect the funds of EU. What is not mentioned, however, in either proposed directive is the impact white-collar crime had on the financial crisis or on the EU’s financial interests in a more general context. This concern is not addressed at all and it is curious, to say the least, that the focus of blame in both directives has been attributed squarely to the lack of legislation with no inclusion of the private corporations/persons who acted in the shadows of the law during this time. While both directives have the same genesis, they have different legal bases. We can see that where one directive is enhanced in its efficacy the other is deficient, and vice versa. Concordantly, the amalgamation of the two directives would be ideal for the purposes of both preventing and fighting white-collar crime. However, because of the societal position that white-collar crime occupies and as it clearly fulfils the criteria of
“particularly severe or occurs in large numbers” which excludes administrative sanctions, it is therefore necessary to apply criminal law when protecting the EU’s internal market, preventing an economic crisis from occurring again and/or protecting the funds of EU as white-collar crime has demonstrably negatively impacted upon all three.

In conclusion, article 325 TFEU should be the preferred legal basis for the creation of deterrent criminal law in the fight against white-collar crime. The Proposed Directive on the fight against fraud to the Union’s financial interests, based on article 325 TFEU, has the scope to include a wide range of offences and holds both natural and legal persons liable through deterrent legislation, raising the profile of what is at present a remarkably under estimated form of crime given its prevalence and impact on society. At present, the legal basis for the proposed directive is controversial. However, there can be no equivocation when it comes to recognising the extremely disadvantageous effect of white-collar crime on the facets of society not participating in it and the financial advantage to those who do. And so the directive’s impact on white-collar crime is dependent on the choice between the legal bases of article 325 TFEU and article 83 TFEU, essentially deciding if:

*Qui sentit commodum debet sentire et onus.*

– He who obtained an advantage ought bear the disadvantage as well.
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