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The penalty of disqualification for terrorism within the European Union

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REPORT ON THE HARMONISATION OF THE PENALITY OF DISQUALIFICATION AT EU LEVEL IN THE AREA OF TERRORISM.

1.- The European Union's intervention in matters relating to criminal law and, in particular, harmonisation of law at EU level of certain aspects of it has not been a peaceful affair and has been intensely evolving over the course of the last few years.

It is precisely the fact that criminal law is an exclusive competence of the Member States, both in the establishment of criminal and penalties definitions, that it is based on the idea that it was a matter outside the integrative process and programme of the European Union and which, consequently, lacked in general terms of competence in criminal matters, is what has made the treatment of this issue go through different phases of a very different nature, in an evolution parallel to some extent to European integration itself.

2. On the basis of the foregoing and, in any case, the fact that any intervention by the EU institutions could not entail issuing rules directly, it is true that EU legislation and the criminal legislation of the Member States have been in contact, and harmonisation of both legal systems was necessary in many cases. It is therefore necessary to conduct an analysis of the process followed to the current position of the European Union on competence to harmonise or regulate institutions in the criminal field. It will give us a concrete perspective to address the issue of harmonising the legal consequences of certain offences, in particular those of terrorism.

I. INDIRECT HARMONISATION ON THE BASIS OF CASE-LAW.

3. At an initial stage (from the creation of the European Communities to the promulgation of the Treaty on European Union), the Court of Justice of the European Communities (CJEU) intervened, although indirectly and case-by-case, in the development and implementation of the Member States' criminal law, analysing the compatibility of each State's criminal legislation with EU freedoms and policies, as well as with EU secondary legislation. In its judgments, the CJEU interpreted the criminal law of Member States in accordance with EU law, even requiring the non-application of national law because of its dispute with EU legislation.

4. Thus, for example, one of the first such judgments may be mentioned, the Judgment of the Court of 11 July 1974 (Case 8/74 *Procureur du Roi v Benoît and Gustave*

Dassonville), which contains the following, in relation to the classification and application of the offence of smuggling in Belgium:

> *'(3)This question was raised within the context of criminal proceedings instituted in Belgium against traders who duly acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby infringing Belgian rules… (...)*
>
> *The requirement by a Member State of a certificate of authenticity, which is more difficult to obtain for importers of an authentic product which is legally in free circulation in another Member State, than to importers of the same product directly from the country of origin,* ***constitutes a measure having an effect equivalent to a quantitative restriction incompatible with the Treaty****'.*

5. In any case, the CJEU does not make any consideration beyond determining the compatibility or impact of EU law by national criminal law. In fact, in some judgments (cf. Judgment of the Court of 2 February 1977, *Amsterdam Bulb* BV v Produktschap voor Siergewassen, Case 50/76) the Court sets out **the obligation of Member States to obeserve EU legislation, with express reference to criminal law[1], but does not mention that the EU institutions could require that, let alone issue any guideline on the harmonisation of criminal law.**

6. More broadly on the powers of action of the EU institutions on national criminal law – in particular those of the CJEU itself – we find Judgment of the Court of 14 December 1995 (Case C-387/93, *Banchero),* which states as follows:

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1 *"3. In addition to the provisions which are identical to those contained in the community regulations the national rules contain provisions which: (...) – Provide penal sanctions in respect of infringments of the rules. (...) 5. By virtue of the obligations arising from the treaty the member states are under a duty not to obstruct the direct effect inherent in regulations and other rules of community law. 6. Strict compliance with this obligation is an indispensable condition of simultaneous and uniform application of community regulations throughout the community. 7. Therefore, the member states may neither adopt nor allow national organizations having legislative power to adopt any measure which would conceal the community nature and effects of any legal provision form the persons to it applies'.* That judgment was not officially translated into Spanish.

'(2) Those questions have arisen in the course of criminal proceedings brought by the Italian authorities against Mr Banchero for the unlawful possession of manufactured tobacco products of foreign origin. (...)

(14) It should be noted that, according to the Pretura di Genova, the provisions infringed by Mr Banchero also protect the national monopoly in manufactured tobacco products. The Pretura di Genova adds that, if the entire national monopoly were incompatible with the provisions of Community law to which it refers, and in particular with Articles 30 and 90 of the Treaty, this would have a bearing on the proceedings brought against Mr Banchero.

In those proceedings, the question referred for a preliminary ruling was raised as inadmissible and the CJEU expressly ruled on its cognitive faculties over national criminal legislation, with plenty use of EU case-law in that regard:

"(58) While, in principle, ***criminal legislation and rules of criminal procedure are matters which remain within the Member States' area of competence, the Court has consistently held that Community law sets certain limits in relation to the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons.*** *Administrative measures or penalties must not go beyond what is strictly necessary, and the control procedures must not be framed in such a way as to restrict the freedom required by the Treaty and must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom (judgment in Case 203/80 Casati [1981] ECR 2595, paragraph 27; see also the judgments in Case 157/79 Regina v Pieck [1980] ECR 2171, paragraph 19, and in Case 299/86 Drexl [1988] ECR 1213, paragraph 18)'*

In this case, the CJEU interprets the national criminal legislation in light of the rules of the Treaties:

"Article 30 of the Treaty does not therefore preclude national legislation, such as that in force in Italy, from penalizing as a smuggling offence the unlawful possession by a consumer of manufactured tobacco products from other Member States on which excise duty in accord with Community law has not been paid, where the retail sale of those products is

like the retail sale of identical domestic products, reserved to distributors authorized by the State'.

7. A greater intensity of the involvement of the EU institutions in national criminal law and the precedent of direct intervention over them as part of the EU harmonising process is noted in those judgments under which the EU jurisdictional body states that **EU legislation precludes the application of national criminal law.** At this point, the Judgment of the Court of 1989 (Case 186/87, Ian William Cowan) is very significant, in which the Court upholds its competence to act on national criminal law, although stressing that its enactment is a competence of the Member States:

> *'(19) Although in principle criminal legislation and the rules of criminal procedure, among which the national provision in issue is to be found, are matters for which the Member States are responsible, the Court has consistently held (see inter alia the judgment of 11 November 1981 in Case 203/80 Casati [1981] ECR 2595) that* ***Community law sets certain limits to their power.*** *Those legislative provisions cannot, in fact, discriminate against persons to which Community law confers the right to equal treatment, or restrict the fundamental freedoms guaranteed by Community law'.*

On that basis, it makes an intervention in the national criminal law at issue for a preliminary ruling, imposing its incompatibility with EU law:

> *'(20) In the light of all the foregoing the answer to the question submitted must be that the prohibition of discrimination laid down in particular in Article 7 of the EEC Treaty* ***must be interpreted as meaning that in respect of persons whose freedom to travel to a Member State, in particular as recipients of services, is guaranteed by Community l****aw that State may not make the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal agreement with that Member State" .*

8. In the case of the Judgment of 11 November 2004, *Niselli* (C-457/02), the Court prioritises the content of a Directive over an national criminal reform in Italy which determined that the conduct at issue in criminal proceedings had ceased to constitute an offence under national law; consequently the EU rule counteracts any retroactivity of the new rule:

> *'(22) As regards the disposal of the criminal proceedings after the entry into force of Decree-Law No 138/02, the Tribunale penale di Terni (Criminal Court, Terni) is asking, in essence, whether the 'authentic interpretation' of 'waste' given in Article 14 of Decree-Law No 138/02 could be contrary to Directive 75/442. According to that interpretation, the facts with which Mr Niselli is charged no longer constitute an offence, because the scrap metal seized was intended to be reused and could not therefore be described as waste. However, if that interpretation is incompatible with Directive 75/442, the criminal proceedings must continue on the basis of the offence charged".*

9. The contents of the Judgment of the Court of 19 January 1999 (Case C-348/96, *Donatella Calfa*) is very clear in terms of the competence raised by the Court. In fact, it is the national body itself which proposes to the EU Court the compatibility of national criminal law– in particular concerning the penalties to be imposed – with EU legislation:

> *"(14) The national Court is asking essentially whether Articles 8(1) and (2), 8a(1), 48, 52 and 59 of the Treaty and Directive 64/221* ***preclude legislation*** *which, with certain exceptions, in particular where there are family reasons, requires a Member State's Courts to order the expulsion for life from its territory of nationals of other Member States found guilty on that territory of the offences of obtaining and being in possession of drugs for their own personal use".*

And the CJEU justifies its action on national criminal law:

> *"(17) Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that* ***Community law sets certain limits to their power, and such legislation*** *may not restrict the fundamental freedoms*

guaranteed by Community law (Cowan, paragraph 19)".

The final intervention on national criminal law:

> *"Articles 48, 52 and 59 of the EC Treaty and Article 3 of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health* ***preclude national legislation*** *which, with certain exceptions, in particular where there are family reasons, requires a Member State's Courts to order expulsion for life from its territory of nationals of other Member States found guilty on that territory of the offences of obtaining and being in possession of drugs for their own personal use".*

II. PRECEDENTS OF DIRECT HARMONISATION.

10. In a couple of very relevant case-law precedents, the CJEU went beyond simply examining concrete harmonisation in a given case, in order to state the need for Member States to take into account the legal interests of a nature common to all Member States or EU in regulating and applying their criminal legislation, granting them protection similar to the legal interests of each Member State.

11. The first of these consists of the relevant Judgment of the Court of 21 September 1989 (Case 68/88, Commission of the European Communities v Hellenic Republic, known as the "Greek corn case"), which contained the following:

> *'(22) According to the Commission, the* ***Member States are required by virtue of Article 5 of the EEC Treaty to penalize any persons who infringe Community law in the same way as they penalize those who infringe national law*** *The Hellenic Republic failed to fulfil those obligations by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the commission and concealment of it.*
>
> *The Court declares that "(4) By failing to institute criminal or disciplinary proceedings against the persons who took part in and helped conceal the transactions which made it possible to evade the abovementioned*

7 agricultural levies the Hellenic Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty".

In the same vein, Order of the Court of 13 July 1990 (Case C-2/88 Imm. J. J. Zwartveld et al) established that Member States must protect EU legislation using any necessary means, including criminal prosecution:

> *"In the European Economic Community, which is a community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation. That principle* ***not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings,*** *but also imposes on Member States and the Community institutions mutual duties of sincere cooperation. In the case of the Community institutions, this duty of sincere cooperation is of particular importance vis-à-vis the judicial authorities of the Member States who are responsible for ensuring that Community law is applied and respected in the national legal system."*

13. On the other hand, the need for criminal protection of legal interests of a EU nature was also expressed in a regulatory instrument, in a direct precedent to the policy of direct harmonisation which has been in place in recent years. Thus, Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy laid down in its Article 31(1):

> *'Article 31. 1. Member States* ***shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law****, against the natural or legal persons responsible where common fisheries policy have not been respected, in particular following a monitoring or inspection carried out pursuant to this Regulation'.*

III. DIRECT HARMONISATION.

14. After the aforementioned precedents, the current phase was reached wherein, without a doubt, the EU institutions have consolidated the process o

harmonisation of criminal law. Thus, the Treaty on European Union (TEU), in Articles 29 and 31.1(e), provided for the need to harmonise criminal law at EU level.

> *'**Article 29.** Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.*
>
> *That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through: (...)*
>
> *- **approximation, where necessary, of rules on criminal matters in the Member States**, in accordance with the provisions of Article 31(e).*
>
> ***Article 31.** 1. Common action on judicial cooperation in criminal matters shall include: (...) (e) **progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.***

15. Under these articles, the harmonisation process becomes formal and general, going on to be developed, first of all, through regulatory provisions of the Council of the European Union – *'framework decisions*' – whereby a set of rules are laid down with elements integrating criminal legislation in the field of organised crime, terrorism or drug trafficking. The EU institutions do not merely analyse on a case-by-case basis whether EU law is affected by national criminal law; they regulate general aspects relating to the classification of criminal conduct and their punishment within the European Union .

In that area, however, harmonisation was still limited, firstly because it seemed to be confined to the specific fields indicated in the TEU –

even though, in spite of that, the Council experienced an intense harmonising activity-[2], - ; further because the regulation impact was limited given that the harmonisation instruments were rooted in the 'third pillar', whereby (i) Member States directly intervened in the approval of the 'decisions' [3]and (ii) the implementation of its content could not be required 3 to Member States through coercion mechanisms.

17. A key step in strengthening the EU's full powers in criminal harmonisation is the European Commission's drive to try to include in the scope of the 'first pillar' the harmonisation of criminal law for the protection of the environment, on the understanding that it was a power that could be developed on the basis of the content of the TEU itself (on the basis of Articles 174 to 176 TEU). In particular, the European Commission approved the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM [2001] 139 of 13 March 2001, DOC 18 E of 26 June 2001), which concurred with the initiative of the Council of the European Union in this regard with the adoption of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. In the face of that event, the Commission brought an action for annulment with the Framework Decision before the CJEU, which settled it in the Judgment of the Court (Grand Chamber) of 2005 (Case C-176/03).

18. The Commission's argument – which is very relevant for the purposes of this Report – is contained in the Judgment itself:

2 This is the case, among others, of Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.6.2000), as amended by Council Framework Decision 2001/888/JHA of 6 December 2001; Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001); Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001); Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002); Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002).

3 According to Article 34(2)(b) TEU: "**2.** *The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods.* ***They shall not entail direct effect'.***

'Although it does not claim that the Community legislature has a general competence in criminal matters, the Commission ***submits that the legislature is competent, under Article 175 EC, to require the Member States to prescribe criminal penalties for infringements of Community environmental protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective.*** *According to the Commission,the* ***harmonisation of national criminal laws****, in particular of the constituent elements of environmental offences to which criminal penalties attach,* ***is designed to be an aid to the Community policy in question.'***

19. The Court proceeded to annul the Framework Decision and to give free rein to the legislative development of criminal harmonisation, despite the absence of general jurisdiction in the matter (*'... in principle, the Community has no jurisdiction in matters of criminal law or criminal procedural law (see, to that effect, Judgment of the Court of 11 November 1981. Case 203/80, Page 02595, paragraph 27, and Judgment of the Court of 16 June 1998, Lemmens, Case C-226/97, Page I-3711, paragraph 19)*' – paragraph 47 of the Judgment –), justifying it as follows:

'(48) However, ***the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.***

(49) It should also be added that in this instance, although Articles 1 to 7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they ***leave to the Member States the choice of the criminal penalties to apply****, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive".*

The ECJ considers that 'the entire framework decision, being indivisible, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community', that is the principle of supremacy of the EU instruments, noting that the Council itself was the one that pointed to the

need to provide criminal protection to the environment as a legal interest to be protected at European Union level:

> *'(50) The Council does not dispute that the acts listed in Article 2 of the framework decision include infringements of a considerable number of Community measures, which were listed in the annex to the proposed directive. Moreover, it is apparent from the first three recitals to the framework decision that the Council took the view that criminal penalties were essential for combating serious offences against the environment."*

21. Subsequently, another Judgment was delivered by the CJEC on 23 October 2007 (Case C-440/05) establishing direct regulatory competence in those areas which, without being primary or direct objectives, could affect them indirectly (in this case it was the criminal-law framework for the enforcement of the law against ship-source pollution, which the judgment linked both to environmental protection and the common transport policy); this considerably expands, albeit somewhat in an open, general and insecure manner, the EU scope of action for criminal harmonisation by legislative means.

Currently, the Treaty on the Functioning of the European Union [4] regulates direct harmonisation in a clear manner, giving very broad competence to the EU institutions to carry out direct criminal harmonisation by legislative means.

Article 83 (ex Article 31 TEU) contains the following:

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

[4] At this point it is relevant to cite the contents of Articles 61(3) and 69 B and C of the Treaty of Lisbon.

crime. On the basis of developments in crime, the ***Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph.*** *It shall act unanimously, prior approval of the European Parliament.*

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and ***sanctions in the area concerned.*** *Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76."*

23. The contents of Article 84 TFEU are very relevant. It lays down the following:

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

24. This provision determines a conferral of competences that has virtually no limits, since it would not be conditioned to any specific area, rather than obviously the legal interests cited in the Treaties – to which, moreover, almost all of the issues which may be the subject of public policies can be redirected – nor to being subject to prior harmonisation, but only seems to be conditioned by matters of particular EU seriousness and relevance.

25. On the basis of the foregoing, it can be said that the EU institutions currently have specific competence to act in the criminal field and, although that competence does not consist of directly regulating criminal rules, the harmonisation power or competence, while indirect, is very intense and broad, to the point where it may affect any area of action in EU policies.

IV. DIRECT HARMONISATION OF CRIMINAL SANCTIONS.

26. On the basis of the above, and in order to reach the appropriate conclusions on the harmonisation of disqualification sanctions, it is necessary to review the cases in which the European Union has carried out a direct legislative intervention to harmonise criminal sanctions in certain areas.

Before listing the sanctions required in each of the criminal areas harmonised by Article 83 TFEU – in addition to the environment –
it should be noted that the ***justification for harmonising*** minimum sanctions is similar to all of them. In that regard, the directives state that it is understood that the objective of each directive, given its particular seriousness and/or international nature, cannot be sufficiently achieved by the Member States and, therefore, harmonisation in application of the principle of subsidiarity in Article 5 TEU is justified, always in compliance with the principle of proportionality.

1. Sexual exploitation of children: precedent of penalties for permanent disqualification.

27. This area has been harmonised by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

28. In this case, the sanctions for **natural persons** are linked in the articles to the specific criminal offences. They are divided according to each of the three aspects regulated by this Directive, offences concerning sexual abuse (Article 3), sexual exploitation (Article 4) and child pornography (Article 5).

29. Besides these sanctions against natural persons, penalties for **legal persons** are regulated in Article 13 as follows:

> ***1.*** *Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 12(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as: (a) exclusion from entitlement to public benefits or aid;* ***(b) temporary or permanent disqualification from the practice of commercial activities;***

(c) placing under judicial supervision; (d) judicial winding-up; or (e) temporary or permanent closure of establishments which have been used for committing the offence.

2. *Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 12(2) is punishable by sanctions or measures which are effective, proportionate and dissuasive.*

30. In addition to the disqualification contained in respect of legal persons, the provision of Article 10 which refers to the **disqualification arising from convictions** is very relevant, which states:

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

31. In this regard, in order to better learn of the Legislator's position on disqualification, recital 40 of the Directive states that:

> ***'Where the danger posed by the offenders and the possible risks of repetition of the offences make it appropriate, convicted offenders should be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children.'***

32. The provisions set forth in this area are a very relevant precedent for the provision of permanent disqualification as a harmonised criminal sanction at EU level for a certain type of offence; it should be noted that the purpose of harmonisation is the protection against the danger presented by perpetrators of criminal offences and the risk of reoffending.

2. Human trafficking.

33. This area has been harmonised by Directive (EU) 2011/36 of the European Parliament and of the Council of 05 April 2011 on preventing and combating

trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

34. Penalties for **natural persons** are regulated in Article 4, which states:

1. *Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least five years of imprisonment.*

2. *Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least five years of imprisonment: Member States shall take the necessary measures to ensure that an offence referred to in Article 2 is punishable by a maximum penalty of at least 10 years of imprisonment where that offence: (a) was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims; (b) was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (1); (c) deliberately or by gross negligence endangered the life of the victim; or (d) was committed by use of serious violence or has caused particularly serious harm to the victim.*

3. *Member States shall take the necessary measures to ensure that the fact that an offence referred to in Article 2 was committed by public officials in the performance of their duties is regarded as an aggravating circumstance.*

4. *Member States shall take the necessary measures to ensure that an offence referred to in Article 3 is punishable by effective, proportionate and dissuasive penalties, which may entail surrender.*

35. As regards **legal persons**, sanctions are provided for in Article 6:

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1 1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as: (a) exclusion from entitlement to public benefits or aid; ***(b) temporary or permanent disqualification from the practice of commercial activities;***

(c) placing under judicial supervision; (d) judicial winding-up; or (e) temporary or permanent closure of establishments which have been used for committing the offence.

Temporary or permanent disqualification from the practice of commercial activities – which will focus on the area of activity in which the crime has been committed – is therefore provided for as a harmonised criminal penalty. This is a provision which, as shown below, is found in a high percentage of the sectors subject to harmonisation. It may constitute a relevant precedent for extending the penalty of disqualification to natural or legal persons in the area of terrorism and areas of a similar nature.

3. **Illicit arms trafficking.**

36. This area has been harmonised by Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, although specific sanctions concerning these criminal activities remain non-harmonised.

4. **Money laundering.**

37. This area has been harmonised by Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. The sanctions applicable in this area to **natural persons** are regulated in Article 5, which provides:

1. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable* ***by effective, proportionate and dissuasive criminal penalties.***

2. *Member States shall take the necessary measures to ensure that the offences referred to in Article 3(1) and (5) are punishable by a maximum term of imprisonment of at least four years.*

3. *Member States shall also take the necessary measures to ensure that natural persons who have committed the offences referred to in Articles 3 and 4 are, where necessary, subject to additional sanctions or measures.*

As regards **legal persons**, the content relating to criminal sanctions is included in Article 8:

> *Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:* ***(a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions; (c) temporary or permanent disqualification from the practice of commercial activities;*** *(d) placing under judicial supervision; (e) a judicial winding-up order;* ***(f) temporary or permanent closure of establishments which have been used for committing the offence.***

Once again, the sanction of temporary or permanent disqualification from the practice of commercial activities as a harmonised criminal sanction for crimes committed in this area appears.

5. Currency counterfeiting and means of payment fraud.

38. This area has been harmonised by several pieces of legislation. On the one hand, Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA**.** As regards the sanctions applicable to **natural persons**, Article 5 refers to:

> ***1.*** *Member States shall take the necessary measures to ensure that the conduct referred to in Articles 3 and 4 is punishable* ***by effective, proportionate and dissuasive criminal sanctions.***
>
> *2. Member States shall take the necessary measures to ensure that the offences referred to in point (d) of Article 3(1), the offences referred to in Article 3(2), and the offences referred to in Article 3(3) in relation to conduct referred to in point (d) of Article 3(1) shall be punishable by a maximum sanction which provides for imprisonment.*
>
> *3. Member States shall take the necessary measures to ensure that the offences referred to in point (a) of Article 3(1) and in Article 3(3) in relation to conduct referred to in*

point (a) of Article 3(1)18 shall be punishable by a maximum term of imprisonment of at least eight years.

4. *Member States shall take the necessary measures to ensure that the offences referred to in points (b) and (c) of Article 3(1) and in Article 3(3) in relation to conduct referred to in points (b) and (c) of Article 3(1) shall be punishable by a maximum term of imprisonment of at least five years.*

5. *In relation to the offence referred to in point (b) of Article 3(1), Member States may provide for effective, proportionate and dissuasive criminal sanctions other than that referred to in paragraph 4 of this Article, including fines and imprisonment, if the counterfeit currency was received without knowledge but passed on with the knowledge that it is counterfeit.*

39. On the other hand, sanctions against **legal persons** are contained in Article 7 – including the penalty of temporary or permanent disqualification – which reads as follows:

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as (a) exclusion from entitlement to public benefits or aid; ***(b) temporary or permanent disqualification from the practice of commercial activities;*** *(c) placing under judicial supervision; (d) judicial winding-up;* ***(e) temporary or permanent closure of establishments which have been used for committing the offence.***

40. Furthermore, Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA. With regard to the counterfeiting of non-cash means of payment, Article 9 of this Directive provides concerning penalties applicable to **natural persons**:

1. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 8 are punishable by effective, proportionate and dissuasive criminal penalties.*

2. *Member States shall take the necessary measures to ensure that the offences referred to in Article 3, in points (a) and (b) of Article 4 and in points(a) and (b) of Article 5 are punishable by a maximum term of imprisonment of at least two years.*

3. *Member States shall take the necessary measures to ensure that the offences referred to in points (c) and (d) of Article 4 and in points (c) and (d) of Article 5 are punishable by a maximum term of imprisonment of at least one year.*

4. *Member States shall take the necessary measures to ensure that the offence referred to in Article 6 is punishable by a maximum term of imprisonment of at least three years.*

5. *Member States shall take the necessary measures to ensure that the offence referred to in Article 7 is punishable by a maximum term of imprisonment of at least two years.*

6. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 6 are punishable by a maximum term of imprisonment of at least five years if they are committed within the framework of a criminal organisation, as defined in Framework Decision 2008/841/JHA, irrespective of the penalty provided for in that Decision.*

41. On the other hand, sanctions against **legal persons** are regulated in Article 11 – the penalty of temporary or permanent disqualification is therein repeated –:

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 10(1) or (2) is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and which may include other sanctions, such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary exclusion from access to public funding, including tender procedures, grants and concessions; ***(c) temporary or permanent disqualification from the practice of commercial activities;*** *(d) placing under judicial supervision; (e) judicial winding-up;* ***(f) temporary or permanent closure*** *of establishments which have been used for committing the offence.*

6. Corruption.

42. In this case, several directives have also been issued. Firstly, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse. As regards **natural persons**, the penalties provided for are contained in Article 7:

1. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 6 are punishable by effective, proportionate and dissuasive criminal penalties.*

2. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 5 are punishable by a maximum term of imprisonment of at least four years.*

3. *Member States shall take the necessary measures to ensure that the offence referred to in Article 4 is punishable by a maximum term of imprisonment of at least two years.*

43- In addition, as regards **legal persons**, Article 9 provides that:

> *Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 8 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as: (a) exclusion from entitlement to public benefits or aid;* ***(b) temporary or permanent disqualification from the practice of commercial activities;*** *(c) placing under judicial supervision; (d) judicial winding-up; (e) temporary or permanent closure of establishments which have been used for committing the offence.*

44.- Moreover, Directive (EU) 2017/1371 of the European Parliament and of the Council of 2017 on the fight against fraud to the Union's financial interests by means of criminal law harmonises penalties in this area. Specifically, the punishment concerning **natural persons** is contained in Article 7, which states:

1. *As regards natural persons, Member States shall ensure that the criminal offences referred to in Articles 3, 4 and 5 are punishable by effective, proportionate and dissuasive criminal sanctions.*

2. *Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 are punishable by a maximum penalty which provides for imprisonment.*

3. *Member States shall take the necessary measures to ensure that the criminal offences referred to in Articles 3 and 4 are punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage. The damage or advantage resulting from the criminal offences referred to in points (a), (b) and (c) of Article 3(2) and in Article 4 shall be presumed to be considerable where the damage or advantage involves more than EUR 100 000. The damage or advantage resulting from the criminal offences referred to in point (d) of Article 3(2) and subject to Article 2(2) shall always be presumed to be considerable. Member States may also provide for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law.*

4. *Where a criminal offence referred to in point (a), (b) or (c) of Article 3(2) or in Article 4 involves damage of less than EUR 10 000 or an advantage of less than EUR 10 000, Member States may provide for sanctions other than criminal sanctions.*

5. *Paragraph 1 shall be without prejudice to the exercise of disciplinary powers by the competent authorities against public officials.*

45. Here the minimum sanctions for **legal persons** are found in Article 9, which provides that:

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent exclusion from public tender procedures; ***(c) temporary or permanent disqualification from the practice of commercial activities;*** *(d) placing under judicial supervision; (e) judicial winding-up; (f) temporary or permanent closure of establishments which have been used for committing the criminal offence.*

7. Computer crime

46. This area has been harmonised by Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. Sanctions on **natural persons** are set out in Article 9:

1. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 8 are punishable by effective, proportionate and dissuasive criminal penalties.*

2. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 7 are punishable by a maximum term of imprisonment of at least two years, at least for cases which are not minor.*

3. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 4 and 5, when committed intentionally, are punishable by a maximum term of imprisonment of at least three years where a significant number of information systems have been affected through the use of a tool, referred to in Article 7, designed or adapted primarily for that purpose.*

4. *Member States shall take the necessary measures to ensure that offences referred to in Articles 4 and 5 are punishable by a maximum term of imprisonment of at least five years where:(a) they are committed within the framework of a criminal organisation, as defined in Framework Decision 2008/841/JHA, irrespective of the penalty provided for therein (b) they cause serious damage; or (c) they are committed against a critical infrastructure information system.*

5. *Member States shall take the necessary measures to ensure that when the offences referred to in Articles 4 and 5 are committed by misusing the personal data of another person, with the aim of gaining the trust of a third party, thereby causing prejudice to the rightful identity owner, this may, in accordance with national law, be regarded as aggravating circumstances, unless those circumstances are already covered by another offence, punishable under national law.*

47. In addition, sanctions against **legal persons** are contained in Article 11:

1. *Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 10(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and which may include other sanctions, such as: (a) exclusion from entitlement to public benefits or aid; (**b) temporary or permanent disqualification from the practice of commercial activities**; (c) placing under judicial supervision; (d) judicial winding-up; (e) temporary or permanent closure of establishments which have been used for committing the offence.*

2. *Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 10(2) is punishable by sanctions or measures which are effective, proportionate and dissuasive.*

8. Environment.

48. This was one of the first areas to be harmonised via directive, through Directive 2008/99/EC of the European Parliament and of the Council of 2008 on the protection of the environment through criminal law. With regard to sanctions, the Directive, perhaps due to the time when it was enacted, is much less specific than the rest, since for **natural persons** Article 5 establishes:

> *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are* ***punishable by effective, proportionate and dissuasive criminal penalties.***

49. Whilst for **legal persons**, Article 7 provides that:

> *Member States shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties.*

V. HARMONISATION OF PENALTIES IN THE AREA OF TERRORISM.

50. This area has been harmonised by Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on preventing and combating

terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA was issued in the area of terrorism.

51. As regards the recitals in the Directive, it is important to include the following:

> *'(18) Penalties and sanctions should be provided for natural and legal persons being liable for such offences,* ***which reflect the seriousness of such offences.***
>
> *(34) Since the objectives of this Directive cannot be sufficiently achieved by the Member States but can rather,* ***by reason of the need for Union-wide harmonised rules****, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the* ***principle of proportionality,*** *as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.*
>
> *(39) The implementation of criminal law measures adopted under this Directive* ***should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness, racism or discrimination.***

52.- In this case, the penalties for **natural persons** are found in Article 15 and are as follows:

1. *Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 12 and 14 are punishable* ***by effective, proportionate and dissuasive criminal penalties, which may entail surrender or extradition.***

2. *Member States shall take the necessary measures to ensure that the terrorist offences referred to in Article 3 and offences referred to in Article 14, insofar as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 3, except where the sentences imposable are already the maximum possible sentences under national law.*

3. *Member States shall take the necessary measures to ensure that offences listed in Article 4 are punishable by custodial sentences, with* ***a maximum sentence of not less than 15 years for the offence referred to in point (a) of Article 4, and for the offences listed in point (b) of Article 4 a maximum sentence of not less than 8 years.*** *Where the terrorist offence referred to in point (j) of Article 3(1) is committed by a* ***person directing a terrorist group as referred to in point (a) of Article 4, the maximum sentence shall not be less than 8 years.***

4. *Member States shall take the necessary measures to ensure that when a criminal offence referred to in Article 6 or 7 is directed towards a child, this may, in accordance with national law, be taken into account when sentencing.*

53. Furthermore, sanctions for **legal persons** are found in Article 18:

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 17 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as: ***(a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities;*** *(c) placing under judicial supervision; (d) a judicial winding-up order; (e) temporary or permanent closure of establishments which have been used for committing the offence.*

VI. ON THE PENALTY OF DISQUALIFICATION ON THE BASIS OF TERRORISM AT EU LEVEL.

54. This section should be formulated as way of conclusion of everything contained in this report, connecting it with the possibility of harmonising temporary or permanent disqualification from the exercise of public office as a criminal penalty for persons who commit terrorism offences.

55. In general terms, it can be claimed that there is no problem in harmonising EU law in the sense of including in EU legislation the obligation of Member States to take the necessary measures to ensure that the offences of terrorism will be punished with a penalty of disqualification from the exercise of public office.

56. To that end, it is sufficient to assess the content of Directive 2017/541 of 15 March 2017 and the harmonisation regarding criminal sanctions which have already been listed by the EU legislature. . It does not appear necessary to explain that if imprisonment can be harmonised – also in the terms *de facto* established by Directive 2017/541 – or the penalty of temporary or permanent ban from commercial activities by legal persons – the penalty of disqualification from holding public office by natural persons can be included in the same manner. Without prejudice to this formal argument based on the configuration and contents of the Directive harmonising criminal legislation in this area, from a material point of view there are also grounds which constitute a solid basis for such conclusion:

1) There is no doubt about the EU's competence to harmonise issues relating to terrorism offences, including development of criminal types and sanctions; indeed, the existence of Directive 2017/541 is a fact. Such action is justified by Article 83(1) TFEU, second subparagraph, which expressly mentions 'terrorism' as a criminal area in which to establish minimum standards concerning the definition of criminal sanctions.

2) The penalty of disqualification is already harmonised for other areas (offences of sexual exploitation against natural and legal persons and virtually all harmonisation Directives for legal persons), so there is a precedent for harmonisation of criminal sanctions with the establishment of the disqualification penalty.

3) In this case, the criminal area is serious; therefore, disqualification is consistent with that seriousness and would be proportionate to the commission of such offence.

4) Recital 8 to Directive 2017/541 specifies as the purpose of terrorist acts – further by laying that purpose as a requirement for the consideration of terrorist act – the following: *'seriously intimidate a population, to unduly compel a government or an international organisation to perform or abstain from performing any act, or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation'*. On the basis of that concept, the penalty of disqualification from public office is proportional to the nature,

protected legal interest and circumstances of these offences (recital 39 to Directive 2017/541), since the purpose of the penalty would be precisely to try to prevent the convicted person from being able to integrate into the '*political, constitutional, economic or social structures'* it sought to destabilise or destroy with the actions for which he was convicted.

5) Similarly, recital 39 to Directive 2017/541 lays down as criteria for the application of harmonised law – also valid for the establishment of sanctions– that "*the legitimate aims pursued and to their necessity in a democratic society' should be taken into account.* Following on from the above, it seems not only necessary but essential to establish an incompatibility between committing a terrorist offence and holding office in a democratic society, the coexistence core of which is precisely what the convicted person intends to affect or destroy. Hence, it can be justified that the penalty of disqualification on grounds of terrorism is of necessary existence in a democratic society.

57. Once the harmonisation of the penalty of disqualification is justified, it is not difficult to project the same grounds for the purpose of establishing the type of such disqualification from the point of view of the duration of the punishment. At this point, we must underline that the Community legislature, whenever it has resorted to disqualification to harmonise criminal sanctions for a given area, has done so by quantifying the punishment as '*provisional*' or '*permanent'; ' final'*; that is, as the start and in general, the possibility for the legal system of the Member States to provide for such sanctions on a definitive basis has been envisaged. On a different matter, it is the Community legislature itself who understands that, under certain circumstances, *permanent* or *final* bans or disqualifications comply with the general principles of proportionality, effectiveness and dissuasive nature to be taken into account when providing for criminal punishment of criminal conduct.

58. The effectiveness and dissuasive nature of the penalty are principles that could inspire permanent or long-term disqualification, on the basis that the purpose of the penalty is to prevent the convicted person from trying to use public office to reach the goals they previously sought through terrorist action. In this case, a parallel could be drawn between this situation and the only precedent in EU harmonisation, that of professional disqualification or for risky activities laid down in the field of sexual exploitation. In such case, as previously highlighted, the danger and risk of

recidivism are the purposes justifying the possible adoption of such a permanent penalty (it appears that Directive 2011/92/EU allows the body eventually applying the criminal rules for discretion), i.e. it is a preventive measure to prevent the convicted person from putting at risk or attacking the same legal interests in the future. In the case of terrorism, the purpose of which is to intimidate the population, put pressure on public authorities or attack the fundamental political, constitutional, economic or social structures of a country, keeping the terrorist away from those institutions against which they already acted would prevent new threatening behaviours against such interests.

59. On the other hand, determining a penalty of disqualification greater than imprisonment, or even of a permanent nature, would respect the principle of proportionality if justified via points 4 and 5 of paragraph 56 of this Report, in particular with regard to the connection between the exercise of public office and the purposes intended with the terrorist act, setting some kind of additional or conditioning precondition concerning the reintegration or regret of the convicted person.

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