

EU law and international cooperation in criminal matters: a tale of legal competence and political competency

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1 INTRODUCTION

This chapter aims to analyse the external dimension of EU criminal law through a discussion of the external profile of the Area of Freedom, Security and Justice (AFSJ), the domicile of the European Union's *acquis* in the field of criminal law. It is argued that in view of growing security challenges from outside the EU borders, the external dimension of the AFSJ is not only crucial to EU internal but also, and perhaps most importantly, global stability and security. To this end, the preservation of the AFSJ necessitates, *inter alia*, EU international cooperation with non-Member States in criminal matters. Beyond the EU classic range of instruments, such as bilateral agreements with third countries on extradition or priorities set in the context of Association Agreements, EU international cooperation in criminal law also includes less known individual mechanisms. In the AFSJ context such mechanisms include, *inter alia*, a strategic partnership with Russia outside the context of the European Neighbourhood Policy, individual arrangements with the United States covered by the New Transatlantic Agenda,¹ as well as external aid programmes and institution building contributing to good governance and the rule of law in the Western Balkans.

This chapter will commence with an analysis of EU criminal justice as an external policy. It will identify its restrictions based on the lack of criminal law competence in the foreign policy realm. In lieu of the lack of such competence, the chapter will then discuss the advancement of indirect EU international cooperation in criminal matters by identifying briefly the instruments available and their legal basis. It will then put forward some case studies, starting with a consideration of the EU's strategic partnership with Russia and the potential of a new EU-Russia legally binding agreement with criminal law implications and the issues of legislative competence

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¹ See Elaine Fahey, 'Transatlantic Cooperation in Criminal Law', Chapter 25.

surrounding it. The chapter will move on to consider EU policy on capabilities enhancement in the Western Balkans as part of the development of regional cooperation with a view to EU accession. Once legal competence is established in this context, the purpose then is to evaluate the political competency of the EU to influence public policy in the field of criminal justice. We will also attempt to identify actual and potential stumbling blocks in the transmission of EU rules and norms to neighbouring states. The time is ripe since the first forms of EU criminal law post-Lisbon Treaty have been enacted and a new constitutional dimension has attached to this field an external dimension which is worth observing.

<a>2 EU CRIMINAL JUSTICE AS AN EXTERNAL POLICY

The AFSJ was originally conceived almost 15 years ago as an internal project which was concerned with establishing an area without frontiers with an integrated management system. This system is unique in that not only does it constitute a means of rights enhancement by offering more ‘Freedom’ to EU citizens but it also contains elements of rights restriction in order for the EU to establish more ‘Security’ across its borders. As such, the AFSJ concerns both the movement of persons across the European ‘Area’ through developing a common policy on asylum, immigration and external border control as well as restrictions upon their liberties through criminal law. This chapter will focus on the latter, i.e., what we commonly refer to post-Lisbon as EU criminal law which carries with it new institutional dynamics and legal instruments that have only been fully effective since December 2014. As explained in previous chapters of this volume, the Lisbon Treaty’s criminal law *acquis* is based on mutual recognition in criminal matters and the possibility of law-making of a procedural nature. Accordingly, Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) provides for the enactment of minimum harmonization Directives in order to enable mutual recognition of judgments in criminal matters with a cross-border dimension.

Indeed, the areas of EU activity in the field of criminal law have proliferated from measures addressing corruption and money laundering to organized crime and

terrorism. These areas have received particular attention in various political pronouncements as crucial to establishing stability, security and accountability within the EU.² However, since transnational crime cannot be contained within Europe alone, most of these areas of EU activity carry a growing external dimension and demand international cooperation in order to be carried out more effectively. Yet, despite consensus between Member States that the EU must be able to become a global actor by developing resilience to respond to transnational crime,³ the external dimension to EU criminal law is not matched by an express conferment of competence in the Treaties for the EU to act externally on criminal law. Although the development of the external dimension of the AFSJ has been manifest since the Amsterdam Treaty, criminal law was for a long time tangled up in the former ‘third pillar’ and only recently became part of EU law proper.⁴

One could further argue that the AFSJ is by default not an area of intense external activity for the simple reason that it began its lifecycle as an internal policy put together for the benefit of the European citizenry. Based on evidence provided by the provisions of the Lisbon Treaty of, the AFSJ could still be perceived as such in the field of criminal law. Becoming an EU internal policy is a novelty for police and judicial cooperation in criminal matters which, save for a few highlights (such as *Pupino*⁵ and the environmental crimes cases⁶), enjoyed a rather ‘safe’ past as part of the inter-governmental ‘third pillar’ domain. In the current de-pillarized setting, however, what is now referred to as EU criminal law has unveiled judicial challenges which concern

² *The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C115/1–38; European Parliament, *Report on Organised Crime, Corruption and Money Laundering: Recommendations on Action and Initiatives to be Taken*, 2013/2107(INI), A7-0307/2013.

³ In the United Kingdom, practical cooperation on international crime is seen as the basis of being part of the EU. See *Review of the Balance of Competences between the United Kingdom and the European Union Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty* (July 2012), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/35431/eu-balance-of-competences-review.pdf.

⁴ See R.A. Wessel, L. Marin, and C. Matera, ‘The External Dimension of the EU’s Area of Freedom Security and Justice’ in C. Eckes and T. Konstadinides, *Crime Within the Area of Freedom, Security and Justice* (Cambridge University Press, 2011).

⁵ C-105/03 *Pupino* [2005] ECR I-5285.

⁶ C-176/03 *Commission v. Council* [2005] ECR I-7879; C-440/05 *Commission v. Council* [2007] ECR I-9097.

traditional (may we anachronistically say ‘Communitarian’) questions related to the internal division of competences between the EU and its Member States. This competence delimitation issue has been amplified due to both the intimate connection of criminal justice with national sovereignty, and the dual and often conflicting sources of fundamental rights and due process protection manifest in the EU and its Member States.⁷ So the argument goes that for as long as EU internal competence in the field of criminal law is fuzzy and unresolved, the EU’s external competence is deemed to remain fragmented and earthbound.

Thus, competence, or the lack of it, constitutes a major stumbling block for the EU’s development and external profile-building in criminal matters. This is the case despite the fact that the EU’s action on the international scene is augmented by the Lisbon Treaty in the form of express provisions regarding its legal personality (Article 47 of the Treaty on European Union (TEU)), the capacity to negotiate agreements with third countries or international organizations (Article 218 TFEU) and the possibility to pursue common policies and actions to safeguard EU values, fundamental interests, security, independence and integrity (Article 21(a) TEU). The conundrum of the lack of external criminal law competence is aggravated further by the fact that the Lisbon Treaty selectively confers an express external competence in respect of other AFSJ policy areas. Thus, while it provides for an external dimension to asylum and immigration policy in the form of partnership and cooperation with third countries for the purpose of managing inflows of persons applying for asylum or subsidiary or temporary protection (Articles 78(2)(g) and 79(3) TFEU) it contains no external provisions *vis-à-vis* criminal law.

As such, the EU may only employ its implied powers under Article 216(1) TFEU in order to conclude international agreements in the field of criminal law. This provision provides that:

<quotation>[t]he Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion

⁷ See Joined Cases C-411/10 and C-493/10 *NS and ME* [2011] ECR I-13905; *ME* [2011] ECR-0000; C-396/11 *Radu* (2013, nyr); Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and others* (2013, nyr), Opinion of Advocate General Cruz Villalón.

of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.</quotation>

Article 216(1) therefore establishes that EU competence may emerge not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted within the framework of those provisions by EU institutions.⁸ What is more, the Court of Justice of the European Union (CJEU) has accepted that whenever EU law creates, for EU institutions, powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.⁹ Hence, post-Lisbon, international agreements within the AFSJ are based either on the objectives or on a Decision adopted within the area of the AFSJ provisions of the Treaty. This is because, as explained, despite the external character of AFSJ policies (e.g., immigration, asylum, transnational crime), there is no express external competence for the EU to act in the field other than on common asylum and immigration policy. Implied powers under Article 216(1) TFEU may therefore come in handy for the Council in this 'Area', which is very much in the making and has only recently 'lifted off'.

<a>3 INSTRUMENTS OF EU INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Despite the above competence hurdles, international cooperation in criminal matters is manifested rather indirectly, with criminal law appearing as a side issue in international agreements signed between the EU and third countries. Such cooperation has occurred

⁸ 22/70 *Council v. Commission (European Road Transport Agreement or ERTA)* [1971] ECR 263, para. 16. See for detail on EU external implied powers: T. Konstadinides, 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) *European Law Review* 511.

⁹ *Opinion 1/76 (Inland Waterways)* [1977] ECR 741, para. 3; *Opinion 2/91 (ILO Convention)* [1993] ECR I-1061, para. 7.

in four distinct ways:

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(i) through the EU classic range of instruments, i.e., bilateral agreements with third countries such as those concluded in the past on the basis of ex Articles 24 and Article 38 TEU.¹⁰ Such agreements are now concluded under the implied power vested in Article 216(1) TFEU;

(ii) through priorities set in the context of EU enlargement, including Association Agreements which provide reciprocal rights and obligations as well as a prospect of full EU membership. These Agreements are based on Article 217 TFEU which provides that ‘the Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure’;¹¹

(iii) through individual international cooperation mechanisms such as the so-called Partnership and Cooperation Agreements (PCAs) predominantly occupied with establishing a free trade area. These were originally concluded as mixed (cross-pillar) agreements between the EU, the Member States and the newly independent states that emerged after the fall of the Soviet Union.¹² They are now concluded on the basis of Article 212 TFEU which provides that ‘the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries’;¹³

(iv) through Stabilization and Association Agreements (SAAs) between the EU and

¹⁰ See e.g., Agreement between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) [2007] OJ L204/18; Agreement on Extradition between the European Union and the United States of America [2003] OJ L181/27.

¹¹ See e.g., the EU-Ukraine Treaty.

¹² Borrowing from Hillion, De Baere calls these agreements ‘proto cross-pillar’ because at the time PCAs were concluded, the EU did not have legal personality to enter into treaties (they were concluded on behalf of the EC). Yet again PCAs provided a model for bridging cross-pillar objectives such as promoting trade and combating crime. Post-Lisbon, cross-pillar mixed agreements declined because all international agreements are now signed by the EU. Still, however, a certain fuzziness is maintained in lieu of the retention of CFSP in the TEU and thus its firm separation from the rest of the TFEU policy areas. See G. De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), p. 297.

¹³ See for an extensive study of PCAs: C. Hillion, *The Evolving System of EU External Relations as Evidenced in the EU Partnerships with Russia and Ukraine* (Ph.D thesis, Leiden, 2005).

Western Balkan countries which emerged from Yugoslavia's ruins. These are instruments granting these countries tariff-free access to EU markets and technical and financial assistance in exchange for commitment to political, economic, trade or administrative reforms. As with Association Agreements, Article 217 TFEU serves as the legal basis for SAAs.

These 'Agreements' can be considered as international treaties for the purpose of the Vienna Convention on the Law of the Treaties.¹⁴ Their legal effect is immensely significant not least because, *inter alia*, they intensify the EU's external profile on cooperation in criminal matters. What is important, however, is whether the commitments that the partner states have voluntarily undertaken under the above agreements are respected domestically and whether the EU has the competence and the means to enforce them against them. This is all the more important in the field of criminal law where, apart from the classic bilateral or Association Agreements, specific cooperation on freedom, security and justice is also based on a non-legally binding setting through, *inter alia*, the establishment of the so-called Common Spaces on Freedom Security and Justice (FSJ) in the context of EU strategic partnerships. The aim is to create a replica of the AFSJ between the EU and third countries based on loose obligations. We will focus below on the criminal law aspects of the EU strategic partnership with Russia, EU's biggest neighbour,¹⁵ and regional cooperation with the Western Balkans, known as the least integrated and the most unstable region in Europe. We will identify the challenges underlying the current institutional setting in those relations which, although fundamentally different, are directed to similar goals.

3.1 EU-Russia Strategic Partnership

Political and operational cooperation between the EU and Russia takes place outside the European Neighbourhood Policy in a number of areas such as drug and human

¹⁴ R.A. Wessel argues that the same holds true for the other international instruments used by the EU, including Memoranda of Understanding, Joint Declarations, Joint Statements, Joint Positions. See R.A. Wessel, 'Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements' in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited: the EU and its Member States in the World* (Oxford, Hart Publishing, 2010).

¹⁵ Apart from Russia, the EU's Strategic Partners include the United States, Canada, Brazil, India, China, South Africa and Mexico.

trafficking, organized crime, cybercrime and counter-terrorism. These are duly recognized by the EU in Article 83 TFEU to constitute serious crimes with a cross-border dimension. In the context of the EU internal policy-making, these are crimes in respect of which the EU is competent to establish minimum rules for its Member States concerning the definition of criminal offences and appropriate sanctions. In the external context, however, there is no such power of approximation. EU-Russia relationships are based on mutual cooperation manifested in instruments such as the Cooperation Agreement between Europol and Russia on data exchange launched in 2010. The key instrument fostering EU-Russia relationships is the Partnership and Cooperation Agreement in Justice Liberty and Security (1997). While this is the main legally binding framework for cooperation, the main instrument to set out the EU-Russia justice, liberty and security agenda is the non-legally binding Roadmap for the Common Space on FSJ (2005), although there is certain political momentum to turn this into a legally binding bilateral framework agreement.¹⁶ This is because PCAs are generally vehicles of political and economic transition (including visas and mobility) and, therefore, lack justiciable provisions concerning police and judicial cooperation in criminal matters.¹⁷

Notwithstanding the PCA asymmetry, EU-Russia cooperation has overall been adequate in the field of organized crime. Apart from the Europol-Russia relationship transition from strategic cooperation into a fully-fledged operational cooperation, there are new incentives to enhance training of law enforcement agencies in Russia as well as establishing memoranda of understanding to facilitate information exchange and drug-related crime prevention. To this end, the two sides have signed a Memorandum of Understanding between the European Monitoring Centre for Drugs and the Russian Federal Drug Control Service¹⁸ and, more recently, they decided on a bilateral

¹⁶ Although EU competence to do so is disputable, perhaps Art. 8 TEU would be a good start to establish an agreement containing reciprocal rights between the parties. See P. Van Elsuwege, *Towards a Modernisation of EU-Russia Legal Relations?*, CEURUS EU-Russia Papers No. 5 (June 2012), p. 10, available at <http://ceurus.ut.ee/wp-content/uploads/2011/06/EU-Russia-Paper-51.pdf>.

¹⁷ By contrast, Art. 23 of the PCA, which provides that the parties shall ensure within their territory the non-discrimination on grounds of nationality of workers with regard to their conditions of employment, is directly effective and, therefore, justiciable before the courts of EU Member States. See *C-265/03 Igor Simutenkov* [2005] ECR I-2579.

¹⁸ Available at www.emcdda.europa.eu/attachements.cfm/att_40975_EN_MoU%20FINAL%20CI%20en.pdf.

agreement on Drug Precursors (2013).¹⁹ Significant effort has also been made in the area of counter-terrorism, where both the EU and Russia appear willing to produce a future memorandum of understanding on the fight against terrorism and drugs cooperation.²⁰ The strategy focuses predominantly on combating terrorist financing by both reducing the availability of funds and providing for the freezing of terrorist assets. These developments have been embraced by the Russian Ministry of Justice which has hosted periodic meetings on FSJ (17 so far) with EU representatives and EU-Russia Summits (31 so far). The purpose of those is to encourage further cooperation and exchange of experience on the fight against drug trafficking, corruption and terrorism, as well as consolidating mutual legal assistance on criminal cases.²¹

The above progress aside, the EU-Russia partnership is based on somewhat loose obligations. For instance, judicial cooperation in criminal matters takes place through one-off bilateral contacts between Russia's General Prosecutor's Office and the competent authorities of EU Member States or Eurojust. There are no common minimum standards for safeguards in criminal procedure. In this regard, the external dimension of the EU's AFSJ has been supplemented by the relationship that Russia has developed with the Council of Europe. For instance, since Russia ratified the European Convention on Human Rights (ECHR) in 1998, not only is the ECHR firmly a part of Russia's legal system but also the decisions of the European Court of Human Rights (ECtHR) are treated as binding precedents by domestic courts. This is important in transplanting European standards of procedural rights to Russia which are equivalent to

¹⁹ See relevant Press Release, 4 June 2013, available at http://europa.eu/rapid/press-release_IP-13-499_en.htm.

²⁰ See R. Hernández i Sagrera and O. Potemkina, *Russia and the Common Space on Freedom, Security and Justice*, CEPS Paper in Liberty and Security No. 54 (February 2013), available at www.ceps.be/ceps/dld/7768/pdf. See also European Council, *Joint EU-Russia Statement on Combatting Terrorism*, 5816/14 (Brussels, 28 January 2014), available at www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/140835.pdf.

²¹ See EU-Russia Permanent Partnership Council on Freedom, Security and Justice, 13 January 2014, available at http://eeas.europa.eu/delegations/russia/press_corner/all_news/news/2014/20140113_en.htm; EU-Russia Summit, Yekaterinburg, 3–4 June 2013, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137354.pdf.

those protected by the EU.²² We must recall here that Article 6(3) TEU refers to the ECHR as part of the general principles of EU law which also have external application.

With reference to substantive criminal law, Russia has ratified the Council of Europe Convention on Corruption (2007), the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2000), the European Convention on the Transfer of Proceedings in Criminal Matters (2008) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism (2009).²³ The objectives behind these Conventions to some extent reflect the intentions found in ‘internal EU secondary legislation on EU mutual assistance in criminal matters between the EU and its Member States. The Council of Europe Conventions, however, do not impose similar obligations or liability in case of faulty implementation or breach. As such, their non-binding targets cannot compensate for the lack of legally binding regulations between the EU and Russia. What is more, Russia’s adherence to the Council of Europe’s Conventions is not always matched with a comparable human rights threshold to the ECHR standards of protection. Areas of incompatibility vary from substandard protection of privacy and control over the protection of personal information, to distrust in the functioning of the judicial system *vis-à-vis* the right to a fair trial protected under Article 6 ECHR.²⁴

Notwithstanding the EU Neighbourhood Barometer’s results which shows that 57 per cent of Russians believe that the EU and Russia share sufficient common values to be able to cooperate,²⁵ severe ECHR breaches by Russian law enforcement authorities are likely to cause turbulence in EU-Russia relations. Such breaches are detrimental to democracy and the rule of law (enshrined in EU law in Article 2 TEU)

²² It has been argued, however, that there might be strains in EU-Russia relations as a result of the link between respect for human rights and the rule of law and cooperation in the AFSJ; see Hernández i Sagrera and Potemkina, *Russia and the Common Space on Freedom, Security and Justice*, above n. 20.

²³ Council of Europe Treaty Office, ‘Treaties signed and ratified or having been the subject of an accession’, available at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=Rus&MA=999&SI=2&CM=3&CL=EN> G.

²⁴ According to Paul Mahoney, UK judge at the ECtHR, Art. 6 ECHR provides procedural protection once ‘a “criminal charge” is brought against an individual; and it remains in place until the charge is “determined”, that is until the sentence has been fixed or an appeal decided’. P. Mahoney, ‘Right to a Fair Trial in Criminal Matters Under Article 6 ECHR’ (2004) 4(2) *Judicial Studies Institute Journal* 107, 109.

²⁵ Available at www.enpi-info.eu/files/interview/FactsheetENPI_wave2-RU-EN1.pdf.

and provoke reactions and criminal behaviour (such as the 2013 Volgograd twin terrorist attacks) which threaten the protection of critical infrastructure in Russia, a major EU priority area. The purpose of the Strategic Partnership with the EU is, therefore, undermined for as long as Russia's systemic human rights violations are still at issue. Since it does not seem politically expedient for the EU to suspend or freeze its Partnership and Cooperation Agreement with Russia until the above breaches are remedied,²⁶ the ECtHR appears to be the only 'European' Court that could enforce a culture of compliance in Russia *vis-à-vis* the protection of the rights of suspected or accused persons, criminal defendants and convicted criminals.

In the past five years only, the ECtHR has ruled against Russia on numerous occasions concerning the rights of the defence in criminal proceedings in relation to ineffective legal assistance during appeal proceedings,²⁷ violation of the *ne bis in idem* principle,²⁸ and excessive use and duration of pre-trial detention and custody,²⁹ to name but a few ECHR breaches.³⁰ For some of these cases, the Strasbourg Court has utilized the pilot judgment procedure to deal with repetitive applications arising from the same recurrent issue at the domestic level.³¹ The role of the ECtHR is, therefore, significant in compelling the Russian authorities to address human rights breaches also condemned by the EU and to help enhance the EU-Russia partnership through the penetration of a European dimension into Russia's domestic discourse.³²

3.2 Regional Cooperation with Western Balkan States

The EU-Western Balkans relationship has been developed in the framework of the EU enlargement policy. If there was a motto to describe the European integration of

²⁶ Note that according to the European Commission, 'the EU is the most important investor in Russia. It is estimated that up to 75% of Foreign Direct Investment stocks in Russia come from EU Member States'. See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/>.

²⁷ *Sakhnovskiy v. Russia*, Application No. 21272/03, ECtHR, Judgment of 2 November 2010.

²⁸ *Zolotukhin v. Russia*, Application No. 14939/03, ECtHR, Judgment of 10 February 2009.

²⁹ *Petukhova v. Russia*, Application No. 28796/07, ECtHR, Judgment of 2 May 2013.

³⁰ See for further cases against Russia a Press Country Profile which notes 122 ECHR violations in 2012 alone; see www.echr.coe.int/Documents/CP_Russia_ENG.pdf.

³¹ *Ananyev and others v. Russia*, Application No.42525/07, ECtHR, Judgment of 10 January 2012.

³² It should be noted that Europeanization is a contested notion as a systematic process of policy change. S. Bulmer and C.M. Radaelli, 'The Europeanization of National Policy?' in S. Bulmer and C. Lequesne, *The Member States of the European Union* (Oxford University Press, 2004).

Western Balkan states post-2003, it would be ‘stabilization with a view to accession negotiations’.³³ Apart from visa facilitation and readmission initiatives, the EU’s approach to the region includes tackling corruption and intertwined sectors of organized crime activities, namely, trafficking in drugs, human beings and weapons. This is endemic in light of the region’s non-retentive borders, poor regional cooperation and ill-functioning institutions. The chosen EU method of addressing these problems is, first, through the rebuilding and transformation of law enforcement institutions and court systems; and secondly, through capabilities enhancement. To this end, the EU has established since 2001 individual Stabilisation and Association Agreements (SAAs) with Croatia and the Former Yugoslav Republic of Macedonia (FYROM) (2001); Albania (2006); Montenegro (2007); Bosnia-Herzegovina and Serbia (2008). SAAs share a similar model of external leverage with the EU-Russia PCA, discussed above, i.e., offering, *inter alia*, a relaxed visa regime through facilitation and readmission schemes.

As bilateral agreements, SAAs are different to PCAs, discussed in the context of the EU-Russia relationship. Not only are they legally binding but they are also based upon a strong conditionality approach which suggests approximation to EU rules. They also promote strong neighbourly relations and regional cooperation (for example, through addressing common threats in connection with organized crime activities and integrated border management). Furthermore, the EU has established Roadmaps on corruption and cross-border police cooperation, as well as financial and human resources support for institutional and capacity building (e.g., through creating appropriate units in ministries or the police and setting up counter-money laundering offices). Notwithstanding these rule of law sector-strengthening efforts, crime and corruption is seen as deeply entrenched in the politics of Western Balkan states, sometimes with strong links to organized crime groups. This means that although police authorities are able to arrest suspects based on evidence, the judicial system has, more

³³ See EU-Western Balkans Summit, Thessaloniki, 21 June 2003. Press Release available at http://europa.eu/rapid/press-release_PRES-03-163_en.htm. See also L. Vesnic-Alujevic, *European Integration of Western Balkans: From Reconciliation to European Future* (Centre for European Studies, 2012), available at http://thinkingeurope.eu/sites/default/files/publication-files/european_integration_of_western_balkans.pdf.

often than not, abstained from prosecuting.³⁴ Even when prosecution takes place, the level of sentencing in organized crime cases remains relatively low.³⁵ Hence, public order and judicial reform as well as improving the reliability of statistics on the fight against crime are key to the EU's benchmarking efforts to exert external influence in FSJ.

But can the swift transition of potential EU candidates to a free market economy, which is paramount to the progressive EU-Western Balkans partnership, occur without fulfilment of the states' criminal justice commitments in the framework of the SAAs? Obviously, fulfilment of the set criteria depends on the specific features of each state. However, experience from recent EU enlargements demonstrates that the high threshold of conditionality does not imply a high level of integration with reference to adjustments in criminal law. This is especially the case with Croatia where, at the time of its accession to the EU, not only corruption and hate crime remained prevalent but the country did not have the administrative capacity in place necessary for the proper implementation of the EU criminal *acquis*. In particular, the application of Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW) has met with certain difficulties in Croatia in relation to officials who participated in the Yugoslav wars.³⁶ Although we will avoid making generalizations, especially due to the somewhat patchy implementation of the EAW in the existing Member States, there is evidence that crime, corruption and tax evasion cost Croatia billions of Euros.³⁷

The story of Croatia, which was considered advanced enough to undergo a process of Stabilisation and Association, shows that EU enlargement conditionality has

³⁴ European Union's IPA Programme for Western Balkans, *Main Report* (February 2012), pp. 26–35, available at http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/2013_final_main_report_lot_3.pdf; see also H. Gramckow 'The Challenge of Making Courts More Efficient: Recent Experiences of the Western Balkans States' in *Law in Transition* (2011), pp. 61–3, available at www.ebrd.com/downloads/research/law/lit11ei.pdf.

³⁵ The Commission's monitoring report on Croatia's accession preparations mentions that overall the level of sentencing for organized crime is low. Commission Communication, *Monitoring Report on Croatia's Accessions Preparations*, COM(2013)171 final (Brussels, 26 March 2013), p. 7.

³⁶ 'Croatia defies EU on arrest warrant', *EurActiv*, 26 August 2013, available at www.euractiv.com/justice/croatia-defies-eu-arrest-warrant-news-529939.

³⁷ 'EU should stop funding Croatia's corrupt networks', *EU Observer*, 17 January 2013, available at <http://euobserver.com/opinion/118760>.

not succeeded in raising criminal law standards in the country. The recurrent issue, also prominent in the accession of Bulgaria and Romania, which are facing similar problems of unruliness, is that EU enlargement places more emphasis on transplanting the EU's concrete model of market economy than its abstract commitment to the rule of law. As such, addressing short-term security and justice priorities appears to constitute enough evidence for the EU to give a candidate state the green light *vis-à-vis* the fulfilment of its European perspective. Of course, this approach is not sustainable in the medium-to-long term and has negative repercussions in achieving the external criminal objectives of the AFSJ.

<a>4 CONCLUSION: COMPETENCE OR COMPETENCY?

The aim of the EU to keep Russia close and integrate the Western Balkans region, and to make this a priority, is an ambitious project in EU external relations. As far as international cooperation in criminal matters is concerned, the level of partnership or integration that can be achieved between the parties is conditional upon EU competence to conclude agreements with third parties that create binding legal obligations and EU pre-accession strategy. Indeed, some progress has been made in EU bilateral relations and both the EU and its partner states seem to have embraced a European perspective in dealing with transnational crime. However, any future plans to provide a solid legal basis for EU AFSJ partnerships seems to be constrained by the Treaty's lack of express external competence in criminal law and the somewhat loose commitments generated by the EU's pre-accession strategy. The sometimes equivocal EU-Russia relations and the lack of credibility of EU conditionality manifested in the EU-Western Balkans SAAs provides a good testing ground for the future of EU international cooperation in criminal law.

With reference to Russia, although negotiations on a new agreement to replace the current PCA started in 2008, the establishment of a sound and legally binding bilateral framework between the EU and Russia to cover criminal aspects raises questions *vis-à-vis* the principle of conferral of powers. In particular, the ambition to deepen EU-Russia relations on criminal law has exposed a legal competence gap that

cannot be filled unless the current Treaties are revised or Russia is willing to tighten up its ties to the EU by entering into a SAA. However, as seen in the context of the Western Balkan states, SAAs are ‘pre-association’ agreements subjecting states to policy-related conditionality in return for a remote accession possibility. The recent EU-Russia tensions over Ukraine demonstrate that the SAA model is unappealing to Russia, which appears to be a rival suitor to the EU. Current evidence demonstrates that not only does Russia wish to maintain its sphere of influence but it also aspires to retain its customs union (the Eurasian Economic Community) by steering neighbouring states away from the EU.³⁸ As such, it is more likely that any new EU-Russia Agreement would be in line with the parties’ geostrategic interests and only go as far as to cover trade, investment and energy.³⁹

On the other side of the spectrum, modernization and adjustment to the advanced European models is highly challenging for the Western Balkan states. Although the EU is competent through SAAs to enter into legally binding obligations that in theory provide for adjustments in criminal law, in practice, it seems somewhat cumbersome for the EU to force progress and secure harmonized standards in the region. This is even more so given the EU’s ill-designed approach to Western Balkan states’ accession negotiations characterized by a lack of concrete benchmarks and a far-off accession perspective. The latter has added to the transition economies’ lethargic approach and to an overall ‘enlargement fatigue’.⁴⁰ As it is expected, doubts over the prospects of EU membership have generated little political motivation in the associated states to move quickly and invest money and effort to build functional and sustainable constitutional and institutional reforms.

What is more, EU international cooperation in criminal matters is hindered by

³⁸ J. Forbrig, ‘Why Ukraine’s future lies with the EU, not Russia’, Opinion on CNN, 4 December 2013, available at <http://edition.cnn.com/2013/12/03/opinion/ukraine-protests-russia-forbrig/>.

³⁹ Such a new agreement could still be concluded, like the PCAs, under Art. 212 TFEU but could be extended in other fields by bringing in another more specific legal basis (e.g., environment, energy). In this case the EU would have to explore the possibility of including its Member States by signing a mixed agreement with Russia. Alternatively, a new agreement on trade and investment could be concluded under Art. 207 TFEU. See Van Elsuwege, *Towards a Modernisation of EU-Russia Legal Relations?*, above n. 16, at 12.

⁴⁰ See M. Braniff, *Integrating the Balkans: Conflict Resolution and the Impact of EU Expansion* (London/New York, IB Tauris, 2011), p. 94.

the fact that the AFSJ is an area of shared competence. This means that unless totally pre-empted, Member States can still act unilaterally in the AFSJ and therefore conclude agreements on their own with third states. For instance, after its EU accession, Poland signed a local border traffic agreement with Russia in 2012. Estonia also signed a bilateral agreement with Russia for cooperation against the illicit traffic and use of narcotic drugs in 2009. Given the lack of external criminal competence, such bilateralism compensates for the lack of EU unified external action in criminal matters. At the same time, bilateralism discourages any uniform response from the EU. The proliferation of bilateral relationships between EU Member States and EU partner states implies that the conclusion and ratification of new agreements on behalf of the EU has become a secondary priority.

Last but not least, there are fundamental constitutional impediments to deepening the relations between the EU and its partners. Under Article 218 TFEU, the conclusion of an international agreement with Russia requires unanimity in the Council and the consent of the European Parliament. Such consensus would be difficult to secure in view of the fact that Russia is not fully compliant with the EU values listed in Article 2 TEU. This provision states that the rule of law constitutes a 'value' and adds that it is 'common' to Member States. What is more, Article 21(1) TEU places the rule of law in the context of EU foreign policy and attributes to it an exportable quality. The logic behind this provision is that since the rule of law has inspired the creation of the EU as a democratic system of governance, then it can be legitimately exported to third parties, such as the Western Balkan states. This is a unique function of the rule of law which distinguishes it from the intrinsic notion operating within the bounds of the Member States constitutional orders. In this respect, not only does Article 21(1) TEU boost the extra-territorial claim of the EU as a value promoter alongside the Council of Europe, but it also makes adherence to the EU rule of law a necessity in the conduct of EU international cooperation with third countries.

For as long as the above legal and political frictions stand between the EU and its partners, the EU may have or acquire the legal competence, but would still be lacking the political competency, to consistently achieve or exceed its external goals.